

RISK MANAGEMENT TIPS

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PLEASE NOTE: I have compiled this article after having attended several Risk Management (RM) courses in Australia, talking to Legal Risk Managers in other jurisdictions and reading extensively on RM topics.

All of these have influenced the content to a large extent, but I have also drawn on my own experiences in practice and particularly on my 13 years of dealing with professional indemnity claims against attorneys.

What follows is by no means definitive. I have tried to distil some key ideas and to provide some interesting case studies or “war stories”, which I hope readers will find helpful. (These are preceded by a yellow and black icon, to help readers locate them easily.)

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1. INTRODUCTION

In the past, in an ordinary year, we were notified of around 300 claims and potential claims. In both the 2008/2009 and 2009/2010 years of account we received well over 500 notifications. This upward trend seems to be continuing in the 2010/2011 year, which is cause for concern.

For convenience sake we initially categorise claims in terms of the area of law in which they arose, such as conveyancing. There are certainly problems and errors that occur, which are specific to a particular area of law, but we have found that claims across the different areas have many common underlying causes.

In this article I hope to “drill down” to a certain extent, point out some common problem areas and make what I hope will be constructive suggestions for managing the risks.

In the course of our work with the AIIF claims, we meet many well-respected, experienced, professional, intelligent, competent and honest practitioners, who are obliged to concede that they have acted negligently. Claims against attorneys definitely do not only happen to others in the profession who may be inexperienced or incompetent.

A surprisingly small proportion of claims arise out of an attorney’s lack of knowledge of the law and most claims are avoidable if the essential risk management principles and tools are applied.

If I were, off the top of my head, to choose three major causes of claims, I would say they were;

- i) Failure to obtain proper instructions from client and manage client’s expectations;
- ii) Inadequate supervision of staff coupled with a lack of checks and balances to pick up problems; and
- iii) Failure to consider the attorney’s ethical and other duties to the court, client and third parties.

The aim of this series of articles is to:

- i) Provide suggestions as to how to reduce the chances of “claims prone situations” arising;
- ii) Suggest improvements in the way such situations are handled when they do arise; and
- iii) Highlight the importance of ensuring that there is evidence and a paper trail to effectively defend unfounded claims.

RISK MANAGEMENT IS BASED MOSTLY ON COMMONSENSE!

2. ENGAGEMENT MANAGEMENT

This RM tool is the single most important one in a practitioner’s armoury against claims. If you read nothing else in this article, please read this section!

In their book entitled *Managing Client Expectations and Professional Risk*, published by Streeton Consulting (Pty) Ltd in 1994, Ronwyn and Peter North cite what they regard as the **five essential ingredients** that govern the nature and structure of the attorney/client relationship as being:

- Setting up the engagement;
- Managing client expectations;
- Varying the terms of the engagement;
- Writing to the client; and
- Closing the engagement

After having undertaken an extensive research and claims profiling exercise for the Risk Management Project initiated by LawCover in the early 1990's, the Norths concluded that attorneys who were involved in PI claims often failed to satisfy one or more of these five essentials.

2.1 Setting up the engagement

Before I get into the detail of engagement management and in particular engagement letters, I believe that it is important to take one small step back, and consider the following questions:

*“Do I really want this **client**?” and “do I really want this **matter**?”*

On the website of New South Wales' professional indemnity insurer, LawCover, there is an article delightfully entitled *I hear you knocking – Is this a problem client?* (see <http://www.lawcover.com.au/filelibrary/files/Publications/Lsjarticles/LSJMarch09.pdf>) This article looks at *inter alia* the screening of clients, the dangers of accepting a client who is transferring a matter from another attorney and the question of conflicts of interest. It ends by suggesting a number of questions that you need to ask before accepting a client or an instruction, such as:

- Do I/we have the necessary expertise, time and resources to handle the matter?
- Are there time constraints associated with the matter that are capable of being met?
- Am I being pressurised into accepting the matter by an existing valuable client, close friend or family member?
- Does the client have realistic expectations as to the outcome that can be achieved?

To these questions, I would most certainly add a further one and that is:

- *Is this client transferring the matter to me from another attorney?*

2.1.1 Letters of engagement/written mandates

2.1.1.1 Introduction

An **engagement letter** defines the legal relationship (or **engagement**) between a professional firm (e.g., law, investment banking, or accountancy firm) and its client(s). This letter is essentially a contract spelling out the terms and conditions of the engagement. Principally, it addresses the scope of the engagement and the terms of compensation for the firm.

In many international jurisdictions like Australia, Scotland and Canada, it has become compulsory for attorneys to enter into detailed written letters of engagement with their clients.

This is not the case in South Africa, but more and more firms are becoming alive to the benefits of recording their mandates and ancillary agreements with clients in a formal and detailed document.

Bruce Ritchie, Director of Professional Practice at the Law Society of Scotland, said about the **introduction of compulsory letters of engagement**: "Many solicitors already provide such information in writing and we have had rules about conveyancing work for some time, but making it a requirement for all ensures uniformly high standards throughout the legal profession and clients will know where they stand from the start.

"It simply makes good business sense. It is very important that all the information given to a client is clear and that any terms which are unfamiliar to the client are explained if necessary. Clients should also be advised on the potential consequences of late or non-payment for work carried out by their solicitor, i.e. that the solicitor may stop working on the client's behalf until payment has been made. This protects both parties and we hope will prevent the problems which can occur when solicitors have to withdraw at a late stage.

"It is important for some clients to be aware of what level of service they can expect for their fee - for example the client might want emails rather than phone calls at work - and this is something they could agree with their solicitor in writing at the beginning. The introduction of these practice rules will remove the potential for confusion or misunderstanding and should help reduce the number of complaints against solicitors."

We strongly urge all firms, whether large or small, to introduce the uniform use of tailor-made letters of engagement into their everyday practice.

2.1.1.2 Essentials/checklist for engagement letters

- *Identity of the client* - the engagement letter should be backed by the required FICA process in the case of new clients. Make sure you know and record whether the client is acting in his/her personal or a representative capacity. (NB. If client is representing an entity, make sure you know and record the nature of the entity, its full name and other essential details and very importantly, whether client has been properly mandated to instruct you on the entity's behalf).
- Any *additional parties* to be included in the representation.
- *Primary responsible attorney* - any other attorneys/assistants to be associated with the matter.
- *Details of the mandate/scope of work* to be done - specific areas to be included in order to avoid any misunderstanding about responsibilities and deliverables. Any unusual or specific instructions should be recorded.
- *Specific areas not to be included.*
- *What the client can expect from the firm* including time-frames if important to client.
- *What the firm expects from the client/client responsibilities* (eg documents, data etc).
- *Deposit required.*
- Holding and *investing of client's money* (if applicable).
- *Fee structure-* basis on which fees and disbursements will be charged, frequency of billing and payment terms (many claims arise out of fee disputes – to be discussed more fully in the future).
- *Termination of mandate* by client.
- *Circumstances allowing for termination by firm.*
- *Initial interview form and instructions* (information to be verified by client).
- *Instruction to sign and return* (this **must** be done).
- *Goodwill provision* – thanks for business and offer to discuss anything not understood.
- It may be a good idea to have client agree to a *domicilium citandi et executandi* (To cater for the situation where client cannot be contacted at the address originally provided).

(Some practices use a general engagement letter setting out their terms of business without specifying the actual services to be performed and then a specific engagement letter repeating those terms and also specifying the scope of work and the responsible persons etc.)

Update Engagement Letters to reflect changes in the scope or timing etc. Written addenda should be prepared and be signed by client.



Case Study 1: Attorney A, from a large well-established practice received a call from a prospective new client, B, who said he was in the process of selling his luxury German car to Mr C for Rx. He advised that the parties had agreed that the purchase price should be paid into an attorney's trust account.

Attorney A took telephonic instructions from B, and thereafter, sent a letter to B, *inter alia* setting out his firm's requirements in terms of FICA.

Before attorney A had received a response to the letter, the amount of Rx was paid into the firm's trust account (ostensibly by C) and B had telephoned to confirm that a cash payment had been made and the vehicle had been delivered to C. He requested that Attorney A expedite payment to him, after deduction of the necessary fee.

When confirming payment with the bank, attorney A failed to ascertain whether payment was made in cash or by cheque. He arranged for payment of the balance, after deduction of the fee, into B's account.

Well that seemed to have been a quick and easy fee earned, with very little work involved! Sadly, **Attorney A was the victim of a classic scam!**

A few days later he discovered that payment had been made by cheque, which had been returned by the bank because of a lack of funds in the account.

Needless to say, neither B nor C could be traced and the account into which the money had been paid had been closed.

Lesson learned:

With the benefit of hindsight, there are numerous mistakes that Attorney A made and lessons to be learned, in this seemingly straightforward matter. **But one of the initial fundamental mistakes was his failure to properly carry out the engagement process.** It is essential to know who you are dealing with before you take on a new client.



Case Study 2: Attorney D was consulted by Mr E, who advised him that he had been severely injured in a motor vehicle collision, whilst he was a passenger in the vehicle of his good friend, Mr F.

From Mr E's description of the collision, it was clear that Mr F, the driver of the vehicle in which he was a passenger, was solely to blame for the collision.

Attorney D says that he advised Mr E that he would only have a limited claim against the Road Accident Fund, and that he would have to claim against Mr F for the portion of his claim not recoverable from the RAF.

Attorney D further insists that Mr E was horrified at the idea of claiming from his friend, Mr F and that his instructions were only to pursue the limited claim against the RAF.

After a period of four years had elapsed, Attorney D received a summons from a new firm of attorneys acting on behalf of Mr E, in which it was alleged that he had allowed the common law claim against Mr F to become prescribed. Attorney D had no evidence to support his version and confirm Mr E's instructions not to pursue a claim against Mr F. He also had no file note or confirmation letter.

Lesson learned:

In a situation where a client makes an important decision or gives any unusual instruction, the attorney needs to ensure that;

- The consequences are fully explained to the client, in language that s/he understands and
- The discussion is minuted and confirmed in writing.

This is again an instance where the attorney could have protected himself by properly carrying out the engagement process and recording the instructions in an engagement letter.

2.1.1.3 Sample Engagement Letters

I have included two examples of engagement letters, which merely suggest some approaches that can be taken when drafting these letters. It would be a good idea for your practice to adopt its own preferred style and approach and to design a unique, standard letter that all its practitioners can use and adapt to individual circumstances.

Example No. 1.

[Date]

[New Client]

RE: *Employment of* _____ ***by*** _____

Dear _____:

Thank you for selecting _____ to represent you with respect to _____ . This letter will confirm our recent discussion regarding the scope and terms of this engagement.

Our firm has agreed to represent you in this lawsuit. I personally will supervise the case. However, it is anticipated that other lawyers and legal assistants in the firm also will work on the case.

[Give some detail of the anticipated services, and discuss any limitation on the scope of the representation.] All of our services in this matter will end, unless otherwise agreed upon in writing, when there is a final agreement, settlement, decision or judgment by the court.

Not included within the scope of our representation are appeals from any judgments or orders of the court.

Appeals are subject to separate discussion and negotiation between our firm and you. Also not included in the scope of this agreement are services you may request of us in connection with any other matter, action or proceeding.

You have agreed to pay for our services based on the time we spend working on the case. My current hourly rate is R_____ per hour. The rates of our associates currently range between R_____ and R_____ per hour. Legal assistants, who will be utilized where appropriate to avoid unnecessary attorney fees, currently are charged at R_____. These rates are subject to change once a year, usually in December. Generally you will be billed for all time spent on your matter, including telephone calls.

We will forward billing statements monthly. They will contain a description of services, including the date, the person rendering the service, the amount of time involved, and a description of the task accomplished. Monthly statements also will itemize money we have advanced on your behalf (disbursements) such as service and filing fees, expert witness fees, charges for investigation, travel and accommodation, telephone calls, photocopies and telefaxes.

As discussed, our current estimate for this engagement is R_____. **[Detail items the estimate covers and does not cover.]** This estimate is imprecise as my knowledge of the facts at this time is limited. We will advise you if fees will be significantly higher than this estimate. At such time, you may decide to restrict the scope of our efforts or we may make other adjustments. This estimate does not include disbursements.

You have paid us the sum of R_____ as a deposit against fees and disbursements, which we have deposited to our trust account. After your receipt of monthly statements, we will pay the amount of the statement from the trust account. If any portion of the deposit is unexpended at the conclusion of the case, it will be refunded to you. If the deposit is expended, you have agreed to pay subsequent monthly statements on receipt. An interest charge of one and one-half percent per month is charged on statement balances not paid within 30 days of billing. You will appreciate we can make no guarantee of a successful conclusion in any case. However, the attorneys of this firm will use their best efforts on your behalf.

[Include any special disclosures that may be appropriate, such as potential conflicts of interest, client confidentiality issues, etc.]

If this letter fairly states our agreement, will you please so indicate by signing and returning the enclosed copy. If you have any questions or concerns, please call me to discuss them. We greatly appreciate the opportunity to represent you on this case and look forward to working with you.

Yours sincerely

Example No. 2.

Dear Mr.....

Thank you for instructing us to act in this matter. Please read this letter carefully, as it constitutes the basis of the agreement between us. If there is anything you do not understand or do not agree with, please contact me immediately.

Your instructions

You are starting up a small business called “Brightwood” which will manufacture wooden educational toys. You have instructed me to draw up employment contracts for your staff, and to include the following special provisions:

.....

My advice

I have advised you that the following Laws are applicable to your employment relationship and that their provisions will need to be taken into account in drawing up the employment contracts:

.....

Matters outside the scope of your instructions

Please note that I have not and will not be providing you with any advice on tax or patent matters. I recommend that you seek advice from a tax attorney or your accountant and from patent attorneys.

Our charges

I confirm having advised you that we require an upfront deposit of R....., before I can start work on this matter.

I attach a separate document giving you information about our charges. Please take note that, if at any time our account is unpaid for longer than 30 days, we reserve the right to refuse to carry out any further work on your behalf until payment has been made.

Please sign and return a copy of this letter and the document of charges, to confirm your instructions. As soon as I have received these, and have confirmation that your deposit has been paid, I will begin work on the contracts.

Yours sincerely

2.1.2 Deciding not to accept a mandate

If for any reason, you decide not to take on the client or the matter, for example if there is a conflict of interests, it is sound practice to send the “client” a **non-engagement letter**. Such a letter will ensure that both parties are agreed that no mandate has been accepted by you and will provide proof in the event that any claim arises against you, out of an alleged mandate to act.

2.1.2.1 Non-engagement checklist

- *Disclaimer on investigation of merits of the matter*
- *Areas of possible conflict* (if applicable)
- *Advice to seek other representation/opinion*
- *Warning on prescription etc*

2.2 Managing client's expectations

Managing your client's expectations starts at your initial instruction in a matter. The *letter of engagement* (See 2.1.1 above) is a great tool for delineating your client's expectations once you have assiduously established what it is s/he wants and expects from you and the legal system.

It is also beneficial to the practitioner, who may be inclined to wander off course in the handling of a matter, often forgetting to let client know of any change of direction or tactic!

Many clients have unrealistic expectations and it is dangerous not to let them know upfront what can and cannot be achieved. If you fail to manage client's expectations right from the start, you create the perfect breeding ground for a professional indemnity claim. So *rule number one* - **from the outset establish exactly what your client expects to achieve in the matter and let her/him know what might realistically be achieved.**

So now your client says "Well I'll go to another attorney who can get me what I want."
Better to let the client go and save potential losses and stress further down the line.

It goes without saying that it is a big mistake to impress your clients by raising their expectations as to what you might be able to achieve. Some personal injury (and other) practitioners issue summons claiming ludicrously high damages, which they must know they will not succeed in getting for their clients. Down the line they may face a disgruntled client at best, but more likely they will suffer the indignity and inconvenience of a claim alleging under-settlement of the matter.

There are many unacceptable excuses that attorneys use to avoid properly managing client's expectations, such as: "My clients want to leave things to me as the professional. They don't want to be involved in the minutiae of the matter" or "I am the professional. Clients don't understand the uncertainty of litigation" or "Clients won't be willing to instruct me if they don't believe that I know it all."

These excuses are not helpful.

(On the other hand there is the client that wants to direct every aspect of the litigation, especially if s/he is one of those who believe they have a good understanding of the legal process and a fool-proof case.

S/he is the client who insists on all sorts of interlocutory actions being brought or letters written. S/he's the one who sends e-mails to you every day with new ideas on how the matter should be run and follows up to make sure the instructions are being carried out. Is this starting to sound familiar? With a client like this you are doomed at some stage to slip up, being literally worn down by the avalanche of instructions and the bullying. The red light should be flashing. There is no way that there can be shared expectations in a relationship like this. It's time to either put your foot down or divorce your client. No fees are worth the stress and the potential of a PI claim.)

Once you have established and agreed on realistic expectations and discussed the way forward with client, the danger of a gap between client's and your expectations still exists as the matter progresses and the relationship must be managed throughout its duration.

2.3 Varying the terms of engagement/mandate

It may emerge that, despite your best endeavours, your client has not given you the full picture, been somewhat economical with the truth or simply got the facts wrong. New evidence might emerge that changes the complexion of the matter to the extent that new strategies need to be employed or expectations need to be adjusted. Whatever the cause, matters are often quite fluid and this needs to be managed carefully, if you and client are to remain "on the same page."

Yes, you've got it! *Rule number two* – **discuss the matter with client anew, identifying the new issues that have raised their heads**. Get client's buy-in on any proposed changes of strategy. Very importantly make sure that you discuss any impact that changes in strategy/mandate will have on time-periods and COSTS.

You guessed it again. *Rule number three* – **record the changes in writing and amend the terms of engagement in an amended letter of engagement**. (Don't forget to obtain your client's signature to the amendments.)

2.4 Effective communication with client

Many professional indemnity claims against practitioners result from problems with communication between the practitioner and her/ his client.

It goes without saying that communication is one of the most important tools at your disposal. No number of qualifications, no amount of research, no years of practical experience can help if the practitioner is unable to effectively communicate with all role players (such as clients, witnesses, opposing attorneys, correspondent attorneys, counsel, magistrates or judges.)

Miscommunication can occur at any stage during the fulfilment of the mandate, for example, when:

- Taking initial instructions;
- Advising client on alternative courses of action and or the implications thereof;
- Taking instructions during the course of the mandate;
- Advising client during the course of the mandate;
- Discussing settlement of a matter;
- Closing the mandate;
- Seeking advice from a colleague, expert or counsel;
- Communicating with the representative of the other party.

It is important to carefully consider how the other person will understand your communications and how you should consider hers/his. There are many obvious and some more subtle barriers to effective communication with client.

Some factors to consider are the medium used, age, language, culture, literacy, knowledge/education, experience, emotional/mental state, time constraints, expectations, sexism, ethical obligations etc.

In verbal communication:

Is what you have really said (or intended to say) what the other party has actually heard?

Some guidelines:

- The person you are conversing with should be put at their ease, to facilitate the discussion;
- Use plain language wherever possible. (Avoid jargon and legalese. These are sometimes used more out of insecurity than necessity);
- Repeat what you have said in different words to make sure that you are understood;
- Ask questions. Elicit a response from your listener to ensure that s/he has in fact understood the meaning and implications of what you have said;
- Develop listening skills. Talk less and listen more. Make sure that you have understood what the other person has said/intended to say. Repeat what you think you have heard, to make sure that you have got it right;
- Use probing questions to ensure that you get all relevant information.

Follow up verbal discussions with written confirmations of the content, wherever possible and practical. This gives the other person the opportunity to correct any miscommunication. It also provides a reminder of, and proof of the content of a discussion months later, when memories may have faded.

In written communication:

Somehow, when confronted with the task of reducing matters to writing, many of us in the legal fraternity (from candidate attorneys to judges) are unable to do so in plain language. So much legal writing is smothered in legalese. We use clichés and choose the largest, most pedantic words. Our sentences are sometimes several lines long – and as a result, often difficult to follow.

Documents like these can result in misunderstandings. There is far less chance that a carefully worded document in plain language will be misunderstood.

In discussing the use of plain language by attorneys, one of my colleagues had the following to say: *“I am afraid that, if I don’t use this impressive legal terminology and I make my writing too simple, my client or colleague will not respect me and will think that I am not well educated.”*

It is actually more challenging to write in plain language than to ramble on and hide behind stock legal phrases. It always fills me with admiration when I come across an easy-to-read document that clearly and succinctly conveys ideas and information simply. There is an art in explaining a complex concept in simple language.

Much has been written on this topic and I am certainly not qualified to go into it in any detail. Here are a few basic ideas:

- Plan and structure your document so that there is a logical flow of ideas;
- Make it as easy as possible to read and understand;
- Keep sentences short. (Aim to use no more than 20 words);
- Choose the active rather than passive voice;
- Make the document easily readable;
- Use precise words or terminology for clarity;
- Layout is important. White space can be used effectively;
- Emphasize key issues with devices like headings, bullets and highlighting;
- Express yourself simply, concisely and clearly;
- Remove all unnecessary words from your text;
- Change complicated, pretentious, legalese to simple English;
- Avoid unnecessary repetition.

One of the main difficulties practitioners face when defending professional indemnity claims, is providing **proof of communications with client**. Time and again we deal with the situation where the attorney has neither made a file note at the time of the discussion, nor confirmed what was discussed/agreed in writing to client.

For example, we have frequently seen claims where the attorney has paid out on client’s telephonic instructions and client denies giving the instruction. Sometimes this is because the instructor was in fact an impostor impersonating the client.

**All important communications, information and advice must be in writing.
Any verbal communications must be confirmed in writing.**



Case Study 3: In a conveyancing matter, shortly after registration, the conveyancer received a call from the “client’s wife” who said her husband was driving and could not speak on the cell phone. She said that her husband had asked that the refund of the bond instalment be paid into another bank account instead of the one into which he had initially instructed the attorney to pay. She gave the details and the conveyancer was not unduly concerned, because;

- the surname and initials of the account holder were the same as the previous ones;
- she had briefly spoke to the “husband” while he was driving;
- the “wife” had also contacted the bank’s cancellations department regarding the change of banking details and told the attorney that she could speak to the designated person;
- the conveyancer had then telephoned the designated person at the bank, who had confirmed that she had spoken to the “wife”.

The designated person at the bank had, however, requested that the conveyancer send the new banking details through to the bank to be changed on the system, in order for the refund to be paid into the new bank account. (The bank wisely wanted written confirmation first!)

Thereafter, the bank duly paid the refund into the new bank account. A while later the conveyancer received a telephone call from the client asking where his money was. *Needless to say, payment had been made into an account that did not belong to the client.*

Lesson learned:

- Always insist on written instructions from your client where s/he consents to the release of funds into a bank account other than the one previously nominated by her/him.
- Do not accept telephonic instructions regarding payment of money, always insist on a written instruction signed by the client, together with her/his contact details.
- On receipt of the instruction, confirm with client the instructions contained in the authority in order to safeguard against fraudsters who give instructions on behalf of unsuspecting clients.
- Be especially critical of e-mail instructions that are sent from a different e-mail address from the client’s usual one. Always confirm this instruction with a telephone call to the client verifying the validity of the instruction.

All staff must be made aware of the prevalence of fraud and scams being perpetrated on unsuspecting attorneys and their staff. They must be made aware of the necessity to check all information carefully before paying out funds and to obtain ALL important instructions in writing from client. To be extra cautious in this climate, a quick call should be made to client to verify the content of important written instructions.

2.5 Closing the engagement

It is a good practice to round off a matter by sending client a short report with the final statement of account. Any outstanding matters or those to be followed up should be brought to the attention of the client.

Below is an extract from a letter which I believe to be a good example of a final letter:

"I confirm that we have now received payment of the capital and costs and accordingly regard the matter as finalised.

I confirm that included in the total capital award of R100 000-00 is the sum of R20 000-00 in respect of past medical and hospital expenses.

A statement of account is attached, reflecting the financial transactions processed on your account and a balance of R65 000-00 due to you. The sum of R65 000-00 has been deposited into your account No123 held at H bank in your name.

I confirm that the RAF has provided you with an undertaking in terms of s 17(4) (a) which formed part of your settlement and is enclosed herewith. As discussed, you will liaise directly with the RAF in respect of any future medical claims covered by the undertaking.

We are now filing our papers and thank you for your valued instruction."

It may be that the engagement is closed, for one reason or another, *before the matter is finalised*. Perhaps a conflict of interests may have emerged, the client is refusing to take the practitioner's advice or is simply not responding to letters and telephone calls.

It is prudent to ensure that the closing of the engagement is **timeously** brought to the attention of the client. It is simply not enough to send a few letters threatening to close the engagement or ending the engagement, particularly if prescription is looming or important deadlines are imminent.

In this regard, see *Mazibuko v Singer*, 1979(2) SA 258(W), where the attorney wrote to client three times and got no response. He therefore withdrew and did not lodge the client's MVA claim. The court held that the attorney was negligent and that he should have gone to Soweto to find client or completed and signed/attested the claim form himself.

If your client does not respond to important correspondence, rather send registered letters and if these are not collected, do all you can to locate him/her including going to the potential expense of employing a tracing agent. This is preferable to ending up with a claim against you.

3. MANAGING THE MATTER

3.1 Analysing the facts and the law

It seems like stating the obvious, but before one can even begin to consider the legal issues and what strategies to adopt, you need the essential FACTS at your disposal. Until then, you are also not in a position to give your client unqualified advice.

3.1.1 Facts from client

It is essential that you obtain all relevant information from your client. This is not as easy as it might seem, for a number of reasons:

Your client may, *inter alia*;

- be economical with the truth and deliberately hide facts
- not think certain information is relevant to the matter
- not be aware of certain facts
- not have a clear recollection of facts and events
- be reporting what someone else has told him/her
- bend the facts to suit his/her version
- not understand your questioning.

You may, *inter alia*;

- fail to ask the right questions
- inadvertently put words into your client's mouth
- be in a hurry to terminate the consultation
- have delegated this "chore" to a junior member of staff
- have misunderstood your client
- have failed to take clear/comprehensive notes at consultation.



Case Study 4: Mr Y wished to buy a property in instalments from Mrs X for a purchase price of R220 000. He had already paid instalments totalling R120 000, when he instructed the conveyancer to draft an agreement of sale and attend to the registration of transfer.

At the time the property was still registered in the names of Mrs X and her deceased husband, Mr X. She provided the conveyancer with the title deeds reflecting this, and also their marriage certificate and Letters of Executorship in terms of which she was appointed to administer her late husband's estate. **She omitted to tell him that she had in the meantime remarried in community of property to Mr Z.**

The conveyancer drafted the sale agreement between Ms X and Mr Y, without reference to the deceased estate or Mr Z. Ms X subsequently refused to proceed with the sale on the basis that the agreement was void for non-compliance with the Alienation of Land Act 68 of 1981 and s15 (2) of the Matrimonial Property Act 88 of 1984.

Lesson Learned:

The above case study discussed provides an illustration of the result of a practitioner's failure to obtain an essential piece of information i.e. that the seller had remarried in community of property. Because he did not have this essential fact at his disposal, he did not include the spouse as a party to the agreement of sale, as was required by law.



Case Study 5: Many years ago, as a candidate attorney, I took instructions from a man who was charged with assault GBH. He told me a long story. He had been picking up litter in the park in the course of his employment. He described in detail how he used his spiked stick to pick up the litter without having to bend down. He told me how he had heard a crashing noise in the public lavatories and gone in to investigate. He had seen that one of the doors had been smashed and when he looked around, a young man had lunged at him from the side, with a piece of the door in hand. What could he have done but defend himself with his spiked stick?

By this time I was feeling very sorry for my client, and was sure that he was going to be able to offer the court a good and credible explanation for the assault.

I then asked him if he by any chance knew his assailant. It turned out this fellow actually had a name. More than that, he had been surreptitiously dating my (conservative) client's daughter. Worse still, he had got her pregnant!

3.1.2 Facts from the documents

It is the attorney's duty to carefully consider documents relevant to his mandate. Too often we encounter claims where this just does not happen and an essential aspect of the matter is overlooked. This may merely be a pure oversight, resulting from time pressure or fatigue. It could also be the result of the delegation of the matter or aspects thereof to an employee.

This happens more often than one would expect. A large number of conveyancing claims result from the conveyancer's (or his secretary's) failure to take note of the contents of title deeds, agreements of sale, instructions from banks and the like, for example:



Case Study 5: In one such claim, *the conveyancer failed to properly supervise his secretary or check the documents before signature. She had omitted the Homeowners' Rules (that appeared in the Deeds of Sale) from the Title Deeds.*



Let's look again at the conveyancing Case Study 4 (above). The conveyancer failed to take note of the fact that the title deed reflected the names of both spouses as the joint owners of the property. He failed to cite the executor of the deceased spouse's estate as a party in the sale agreement.



Case Study 6: In another of our matters, X bank instructed the conveyancer to register a second bond over a property and paid the money to the mortgagor on date of lodging (as opposed to date of registration). The documents were rejected on lodging, when it was discovered that there had been an earlier attachment of the property and the bond could not be registered. The conveyancer (and his secretary) had failed to properly check the deeds office search, which would have revealed the attachment before lodging was attempted.



Case Study 7: In yet another matter, there was a clause in an agreement of sale, in which the mineral rights were reserved in favour of the seller of the immovable property. The agreement was sent to the purchaser for signature and the latter amended the clause so that only one third of the mineral rights would be retained by the seller.

The conveyancer did not notice the change and proceeded to register the property without the reservation of the full mineral rights.

3.1.3 Facts that emerge from further investigation

There will of course always be additional facts that emerge as a matter progresses, such as those from documents obtained at discovery, or those obtained from other sources such as medical records.

All new facts need to be considered very carefully as they could seriously affect a client's case or strategy. Your client should be kept apprised of all new facts and developments. If necessary, discuss with him/her how it will affect the strategy and possible outcome of the matter. (It may even result in your having to amend the Letter of Engagement.)

3.1.4 The law/legal issues

It is only once you are sure of your facts that you can confidently analyse them, identify the legal issues and apply the law to the facts in order to give your client an unqualified opinion on the matter and suggest strategies.

There are relatively few claims arising from a practitioner's lack of knowledge of the law. I will therefore not dwell on this area, save to warn that sometimes practitioners become so bogged down in the facts of a matter that they can no longer see the wood for the trees. It is always a good idea to ask a colleague to look at the matter with fresh eyes. It is surprising how a colleague can quickly identify an issue that should have been staring you in the face!

4 DECIDING ON AND PLANNING AN APPROPRIATE STRATEGY

4.1 Considering client's objectives and expectations

I cannot emphasise enough, the importance of establishing what a client's expectations are and managing them effectively.

Once you have obtained the facts and applied the law to those facts, you will need to consider the possible ways forward in the light of your client's expectations and objectives.

The possible strategies should be discussed with client and his/her 'buy in' should be obtained on the most appropriate one. The pro's and con's and probable costs must be properly canvassed. Your letter of engagement should reflect your agreed course of action (and should be amended as changes to your mandate occur.)

At this point, it may be apposite to emphasise that practitioners need to be careful not to give the client advice of a **non-legal** nature. Very often the role of attorney can become blurred with that of confidante or financial/business advisor. This is a very risky situation, which can ultimately lead to a claim.

4.2 Advising client on strategy

In advising client and deciding on a strategy, *inter alia* the following need to be carefully considered:

- Whether there may be more than one plaintiff and/or defendant.
- The possibility of a defendant/defendants becoming insolvent or absconding in the time it takes for a matter to come to trial.
- All possible causes of action that might arise from the facts.
- Timing.
- Resources.
- Strengths and weaknesses of client's case. (Be as objective as possible.)
- All external factors that might have an impact on the matter, such as availability of witnesses, possible court backlogs.

Once you and your client have decided on an appropriate strategy, an important consideration is whether or not you have/your firm has the appropriate legal knowledge, experience, resources and time to take the matter on. Some questions you might consider are the following:

- Could I delegate part or the whole of this matter to another staff member?
- Would my client object to this?
- How closely would I need to supervise?
- What if the matter requires action to be taken in another jurisdiction?

- Do we have a branch office there/Do we have a reliable correspondent? Does client understand what this will entail?

5 DEALING WITH A MATTER TRANSFERRED FROM ANOTHER ATTORNEY

Believe me! This is always risky, *even if the matter is transferred between attorneys in the same firm*. It can be a professional indemnity claim waiting to happen.

The facts need to be checked, as do the legal issues. No assumptions should be made. The difficulty very often lies in trying to reconstruct the developments in the matter up to the time it is transferred.

If the client has cancelled the mandate of the previous attorney, because of dissatisfaction with the progress of the matter, there is a good chance that the file may well be chaotic and the previous attorney uncooperative.

We have had several claims where the attorney took over a matter with disastrous consequences. In two such matters:



Case Study 8: The transferred file showed that the previous attorney (A) had lodged the claim and drafted and issued the summons against the RAF. There was no proof of service on file. The client told the new attorney (B) that A had advised him that the summons had been served. B did not double check with the RAF. The summons had in fact not been served and by the time B discovered this, the five-year period for the service of summons had lapsed.



Case Study 9. In a similar matter, the claim became prescribed because the second attorney incorrectly assumed that the first attorney had lodged the claim with the RAF. Although there was a letter on file, addressed to the RAF and purporting to lodge the claim, for some reason it was never delivered. By the time the necessary enquiries were made, it was too late.

In the two cases discussed above, the practitioners were unaware that the clients' claims were close to prescription. However, we have dealt with numerous claims in which the practitioner agreed to take over a matter, being fully aware that prescription was imminent. This is risk management suicide! Of course the claimants ended up successfully claiming against the attorneys.

TAKE NOTE!

- Avoid accepting transferred files wherever possible.
- Avoid accepting matters where prescription is imminent and/or there is insufficient time to take the necessary action.
- Make no assumptions about the matter.
- Check all facts and legal issues (the prescription date on the file cover may well be incorrect).
- Peruse the file very carefully and make the necessary enquiries (from client, the previous attorney and any other parties involved) before accepting the mandate.
- Conduct proper engagement management .
- Manage your client's expectations.
- Manage the matter.

6 IMPLEMENTING AND MANAGING THE STRATEGY

Now that you know your client and his/her expectations and have aligned your strategy accordingly, you are ready to implement the appropriate strategy.

In the broader sense, are procedures and structures in place in your practice, to facilitate the smooth implementation of your strategy? Are you confident that other staff members will be able to continue running your matter if there is an emergency? What if you suddenly fall ill?

Your practice should have its own standardised procedures and minimum operating standards (MOS) that will allow for a seamless transition where a matter is handled by another person. If there is such standardisation, then the margin for errors and misunderstandings is substantially decreased.

If your file is well managed, in accordance with your MOS, it becomes a much simpler matter for a colleague to pick up on what has been done and what must still be done to keep the matter on track, in line with your strategy.

6.1 Working plans

Your **MOS** should make provision for a **working plan** for every matter.

Prepare a written plan for each matter. This should set out the procedures that need to be followed and the planned outcomes.

In drawing up your working plan, you might consider, *inter alia* :

- What needs to be done to achieve the desired and agreed outcomes.
- Timing issues such as imposed time limits (eg prescription, court rules) and problems that could affect timing.
- What occurrences/unknown or unexpected elements could alter the outcomes.
- Contingency plans.

There is always the chance of unforeseen circumstances affecting your strategy. Your instructions/mandate and strategy may have to be adapted from time to time, which will also necessitate changes being made to your working plan.

If the working plan is communicated to client in appropriate layman's terms, s/he is less likely to feel alienated and will usually feel more involved in and in control of the matter. There is a better chance that the client will take some shared responsibility that will assist in the smooth running of the matter.

Practitioners very often explain to us that a matter has become prescribed or gone awry, because they have had difficulty in getting the necessary instructions, assistance and /or documents from their clients. If the client sees the bigger picture and understands the time limitations better, this problem can often be avoided. Client is more likely to co-operate and timeously provide you with whatever you request to ensure progress in the matter.

You may also find that one of the benefits of this approach is that client tends to telephone or e-mail less often with enquiries about progress.

As each step is "ticked off" both you and client (or anyone taking over the matter) can see how it is progressing and what further steps need to be taken.

6.2 Checks and Balances

Drafting of documents is an area in which there are often errors that lead to claims being made against practitioners. Surprisingly, problems often do not result from the attorney's lack of legal knowledge and expertise, but rather from errors that have crept in and not been picked up in time.



Case Study 10: In one such matter the attorney (A) finalised the drafting of a complicated lease agreement and sent it to his client (the lessor) for signature. Luckily, the client noticed that A had put in a rental amount of Rx per month, instead of the substantially larger amount of Ry. The client drew A's attention to this error and the latter undertook to amend it. The client then signed the lease and sent it back to A, who unfortunately forgot to change the rental amount and sent it on to the lessee's attorney (B). B's client snatched at the bargain and signed the lease for the lesser amount. Thereafter, the lessee denied that the rental should have been a higher amount and the lessor had to apply for rectification of the agreement.

Practitioners need to introduce and adhere to stringent **MOS** in the drafting and checking of documents. The following points should be considered:

- Where a lengthy document or contract is being drafted and constantly amended, each new draft needs to be thoroughly checked anew, numbered and retained for record purposes.
- It might also be helpful for record purposes to write client's instructions on the draft to be amended.
- Some practitioners find it helpful to have a skeleton of the important dates, figures, and key words for each paragraph, to check the final draft against.
- Also it can prove useful to monitor the word count and track changes.
- It is a good idea to get a "fresh set of eyes" to check a document that you may have become too familiar with.
- No matter how much pressure is placed on you, do not take the risk of failing to give enough time to proof reading.

Once the properly checked final document is ready for submission or signature, the practitioner's vigilance must continue. S/he must ensure that it is properly signed and dated by the correct parties, without any amendments.



Case Study 11: In one of our matters, the attorney sent documents to a purchaser, who made certain amendments to it before signature. The attorney failed to notice the changes, as did his client.

Every practice needs to ensure that the full responsibility for any given file does not fall onto the shoulders of only one person.

You might, for example, have a **centralised diary system** for your practice. You may perhaps have a system whereby both the secretary and the attorney keep a diary of the matters that need to come out of diary.

Whatever your system, it needs to work effectively for you and your staff.

Likewise, it is an excellent idea to have a system of **file reviews or audits** to pick up any possible problem at an early stage. This will increase your chances of timeously discovering:

- inadvertent errors made in the handling of matters;
- bad practice habits and non-adherence to your **MOS**;
- dishonesty and
- matters that have not come out on the diarised dates or have been filed away without a new date.

Such an audit might well have prevented the following problems from occurring:



Case Study 12: The attorney had particularly difficult particulars of claim to draft in a Magistrates' Court matter. She kept putting it off, but eventually applied herself and worked late one night finalising the draft that her temporary secretary had typed up for her. It was a huge relief to strike this document off her pre- holiday "to do" list. She then went on holiday and by the time she laid hands on the file again, the inevitable had happened and the claim had become prescribed without the summons having been served on the defendant.

We have come across numerous instances over the past year or two, where conveyancers have not diligently reviewed files and have left their conveyancing secretaries to run matters - with consequently disastrous consequences.



Case Study 13: In one such firm, the secretary applied for bridging finance on several transactions, where neither of the parties had in fact requested such finance. She forged the signatures of the parties on the applications and that of the conveyancer on the undertakings. She then instructed the bridging financier to deposit the loan into her creditors' and her boyfriend's accounts.

6.3 Delegation.

In the handling of a matter, it is very often necessary and practical to delegate either responsibility for the entire matter or certain portions of it to a junior colleague or one with expertise in a particular area of law. Your MOS should cater for this situation, and the following should be noted:

- Your client should be made aware of the delegation and of the delegate's contact details.
- Delegate in writing, setting out precisely what is being delegated and setting timelines.
- The delegation needs to be placed in context. The background, strategy and Working Plan must be provided to the delegate.
- The task delegated must be matched to the delegate's capabilities and capacity.
- Remember that you remain accountable to client in spite of the delegation.
- If necessary, the delegate should be trained and supervised in his/her performance of the task.
- Ensure that you keep the delegate updated on any new developments in the matter that may have an impact on his/her task.
- Set up contact times and take enough time to discuss the matter and answer any questions that may arise.
- Encourage the delegate to share ideas and information with you. Very often two heads are better than one.

6.4 File Notes and file order

A “Usable Trail” should be regarded as essential in any **MOS**.

To be effective, file notes should ideally:

- Be as contemporaneous as possible and not be reconstructed at a later date.
- Be dated, and signed and preferably record the time spent on the conversation .
- Be legible, clear, concise and to the point.
- Include all significant issues that were covered in the discussion.

It goes without saying that files should be well ordered, chronological and complete. The file should be a comprehensive record of all work done and activities in the matter. Drafts should preferably be kept in separate sub-folders to avoid confusion.

If for any reason it becomes necessary for someone else to handle your matter (whether on a temporary or permanent basis) it is essential that the file is well-ordered and that there are adequate file notes. All telephonic and face to face discussions must be recorded in writing and better still, immediately confirmed in a letter or e-mail.

If an attorney goes on leave, for example, it is a very precarious practice to simply chat about the matter to your “locum”, who is unlikely to remember everything. Without written records and instructions, the “locum” may well make incorrect assumptions about the matter or fail to carry out an important step.



Case Study 14: A company owned a property. One of the directors bought the property from the company and the firm of attorneys was instructed by the seller to collect payment of the purchase price and attend to the transfer of the property. There were several delays in the matter, and in the interim, both the conveyancer and paralegal attending to the matter left the practice. The file was handed over to another paralegal, who was advised by the departing conveyancer that the purchase price had been paid by the purchaser directly to the seller.

There was no record of this payment on file. There were no file notes to this effect either. When all transfer and other conveyancing costs had been paid, the property was transferred into the name of the purchaser. Only once the seller enquired after the proceeds of the sale, did it become apparent that the purchase price had in fact not been paid.

- **Not only is it difficult for a friendly colleague to know what is happening in the file in the absence of proper written notes, but it is fertile ground for an unfriendly colleague and past client or third party to make allegations of negligence that cannot be disputed because of a lack of any supporting documentation.**
- **Of course, another benefit of keeping comprehensive file notes is that they ensure that comprehensive attorney and client accounts and party and party bills of cost can be supported.**
- **It is surely negligent not to be in a position to collect full party and party costs awarded to your client because of a lack of file notes or missing documents.**

Many of the above ideas are strongly influenced by the course notes provided to me by LawCover Insurance (Pty) Limited in Sydney, Australia, when I recently attended a series of risk management workshops there. I acknowledge, with thanks, their kind permission to use their notes to assist me in drafting this section of the article.

Ann Bertelsmann (Risk Manager)

7 SUPERVISION

7.1 The importance of supervision

In the previous section, I touched on the topic of **delegation** in the context of implementing strategy and managing matters.

In running a successful practice and carrying out a client's mandate, it is often essential to delegate responsibility to others, for fulfillment of parts or the whole of the mandate.

Delegation certainly does not remove a practitioner's responsibility to client. The buck still stops with you! When there is delegation, it is essential that controls are in place to ensure quality service to client. Where appropriate, there must be effective **supervision** of delegates.

Supervision need not be synonymous with disempowerment, micro-management or nit-picking. In fact *effective* supervision is none of these negative things.

In my view, it should empower while providing broad guidelines, appropriate training, review and constructive feedback.

The building blocks are the softer skills like inspiration, respect, openness, two-way communication and leading by example.

Effectively supervised staff =

- satisfied clients
- confident, motivated staff
- successful teamwork
- an efficient, successful practice

The consequences of failure to supervise staff.

Failure to properly supervise staff is unprofessional conduct!

- The LSNP Rule 89.16 states that it is unprofessional or dishonourable or unworthy conduct to fail to adequately supervise staff.
- The KZNLS Rule 14 (vii) states that it is misconduct to carry on practice “at an office which is not under the direct and personal supervision of – (aa) the member, or (bb) a partner of the member, or (cc) a practitioner who is employed by the member.”
- The FSLs has a similar rule (17(13) requiring that the practice be continuously under the direct and personal supervision of a practising attorney.

I mentioned at the beginning of this article, that one of the **major causes of claims** was inadequate supervision of staff coupled with a lack of checks and balances to pick up problems. Principals in a practice are, of course, vicariously liable for the wrongs and mistakes of their employees.* An unacceptable proportion of claims against practitioners arises out of the fact that there was little or no effective supervision of staff.

**TAKE NOTE. Principals are also jointly and severally liable for the actions of their co-principals. Lately, there has been a marked increase in claims arising out of lack of mutual supervision amongst co-principals.*

Ineffective supervision can lead to:

- Claims against your practice for professional negligence/breach of mandate;
- Claims against your practice for misappropriation of trust money or fraud;
- Loss of dissatisfied clients;
- Disciplinary action by your professional body (see text box above);
- Orders against you for costs *de bonis propriis* (which are excluded from cover in the scheme policy);
- Unhappy, unmotivated staff;
- Lack of teamwork and a stressful working environment;
- Damage to your practice’s reputation; and
- Decreased profitability.

7.2 What needs to be done?

For larger practices, it is desirable to have dedicated practice and risk managers to free up the rest of the professional staff to bring in the fees.

For smaller practices this is not usually possible and it is left to one or two busy practitioners to attend to both the effective running of the practice and the earning of fees. Be that as it may, *every practice*, regardless of size, needs to have its own comprehensive, well co-ordinated risk **and practice management plans and policies** in place.

Successful plans used by well-run practices usually incorporate, *inter alia*, policies and procedures for delegation and supervision, such as:

- A procedure for **checking all incoming documents and correspondence**, including e-mails. This may be time-consuming, but gives a good insight into what is happening in the firm and surprisingly often, an early warning of problems.
- The use of **file audits/reviews**. These need to be conducted regularly, particularly in the case of new or junior staff. (It is a good idea, for risk management purposes, to review the files of even the most senior practitioners.)
- Regular **meetings or brain-storming sessions** to discuss interesting or problematic matters and/or new legal developments. These can be very helpful in getting staff to discuss the problem in that file that just keeps being put to the bottom of the pile!
- Effective **mentoring systems, an open-door policy** and the encouragement of mutual respect and openness between employers and the employed, which also tend to draw out problems while they are still manageable.

It goes without saying that different degrees and styles of supervision are required for different co-workers and different types of matters/duties. By all means delegate, but ensure that the nature of the task is matched to the qualifications and experience of the delegate. The supervision style adopted will also depend on these factors.

7.3 Supervision of support staff

Very often, as practitioners, we rely heavily on our efficient support staff. A good personal assistant is an asset that very few busy practitioners can do without. Because of this, we sometimes lose sight of the fact that, although an assistant may be excellent at her/his job, *s/he does not have the years of legal and ethical training that give the attorney an understanding of the broader issues surrounding a matter and any actions taken in that matter.*

It can be a serious mistake to allow your assistant to become used to making unlimited, independent decisions and acting on them. Empowerment is important, but independence needs to be balanced with careful training, set boundaries and support. It is both a danger to your practice and unfair and demoralizing to support staff, when too much responsibility is assigned to them.

It is important that personal assistants and other support staff are warned about the dangers of giving out advice, information or documents in any matter or context. They should be encouraged to ask for help from professional staff.



Case Study 15: Some years ago, we had a claim that arose out of an assistant in an attorney's collections department (A) having undertaken to assist a debtor (B), who had come into the office to make an arrangement to pay off a debt. B had mentioned to A that she had received a summons from another firm of attorneys, in a different matter.

A took a "deposit" of R200 and drafted an "Appearance to Defend" the action. She gave the document to B and told her to deliver it to the plaintiff's attorneys. A failed to tell B what further steps to follow thereafter and inevitably, the plaintiff obtained a judgment against B.

Support staff members also need to be made aware of the dangers of failing to immediately bring correspondence and other important documents and pleadings to the attention of the professional staff. We regularly receive claims in which important documents like notices of bar have been filed away without their having been brought to the attention of the attorney concerned. Disastrous consequences usually follow!

A messenger's lack of understanding about the consequences of failing to serve and file documents timeously is another cause for a number of claims.

7.4 Supervision of paralegals

It is mostly in the area of conveyancing, that claims arising out of the failure to supervise paralegals occur. *Most of these matters do not arise from the paralegal or conveyancing secretary's lack of knowledge or experience in this field. They far more often stem from a lack of formal legal training and lack of adequate supervision.*



Case Study 16: The reader may be excused for finding the following facts unbelievable:

Having worked for the firm for a number of years, the conveyancer's legal secretary (A) was competent and trusted. So much so, that, when the conveyancer (B) went away on business (as he frequently did) he even went so far as to sign blank trust cheques for A to complete in his absence! In the end, of course the inevitable happened and in the region of R3 million was misappropriated by the secretary.

In dealing with conveyancing claims, we often find that the conveyancer does not check or review the conveyancing files at any time during the course of the transaction. The files that we receive when investigating claims, are sometimes very scanty.

In our experience, the conveyancer sometimes knows very little about his/her matter and is unable to give us an adequate account of what went wrong. The paralegal is sometimes the only one who knows anything about the matter. There can also be an element of fraud or dishonesty on the part of the paralegal.

A large number of our claims arise because of the free rein given to paralegals/secretaries. In some practices these trusted and powerful employees have been allowed to create little "empires" in which they run deals with estate agents and bridging finance companies. Some move money between files, obtain finance on transactions without the permission of the conveyancer and/or the seller/purchaser and of course some manage to make payments to themselves, their debtors or their family and friends.

Some conveyancers sign off payments or documents without carefully checking the file. Because there is no supervision and there are no file audits or other thorough checks and balances, these problems are only discovered when it is much too late.



Case Study 17: In a series of bridging finance claims against a conveyancer, (A) his secretary (B) had attended to a number of unauthorized bridging finance transactions. A only got wind of this when B came to him for signature of one the cheques and he requested the file.

B had been working with minimal supervision, as she was a senior conveyancing typist, and A trusted her judgment.

In previous *Bulletins*, I have referred to claims caused by ill-supervised secretaries, particularly ones who are left to draft documents that are not subsequently properly checked. The case studies below shows what can happen in a situation like this:



Case Study 18: In one such matter, the Homeowner’s Rules referred to in the Deed of Sale were omitted in the Title Deeds. This omission had to be rectified for all the properties in the development, at considerable expense.



Case Study 19: In another such matter, a deeds search had revealed that there was an attachment of the property. Despite this, the secretary attempted to register a second bond over the property, in favour of the mortgagor. The bond could not be registered. Unfortunately, the money had already been paid over to the “mortgagee” on date of lodgment.



Case Study 20: In this matter, the secretary (A) had had to amend certain transfer documents, as the property description was incorrect. She felt sorry for the client because of the delays in the matter. She decided to make it quicker and easier for the client (B). Instead of asking B to come and sign the documents again, she forged B’s signature to the amendments.

The amended property description became the centre of a dispute.

The unfortunate A apparently had the best of intentions, but clearly had no understanding of legal ethics and the implications of what she was doing. She should have been properly trained and more effectively supervised.

*In the same vein, many secretaries allow clients to sign documents without witnesses present. The “witness” subsequently signs the documents. **There are clearly ethical problems and dangers in this practice.***

7.5 Supervision of candidate attorneys

Generally speaking, a candidate attorney (CA) enters your offices knowing little or nothing about practice. S/he will have acquired some knowledge of the law, legal principles and research, but will need to be trained and mentored to become a “fit and proper” practitioner, who has learnt something about the running of legal matters and successful, ethical practices.

From discussions with a cross-section of CA’s, it seems that each practice has its own way of dealing with this phenomenon. The methods range broadly between the following two extremes:

- The CA is immediately given a pile of files that the other professionals do not want. S/he must sink or swim. The practice is busy and there is certainly no time to spend on training people who will not bring in fees and still have to be paid a salary. This CA spends a lot of time telephoning colleagues and friends for advice on what to do in these files. S/he learns to be independent and live by her/his wits, but the dangers to the practice, inherent in this approach are obvious.
- The CA receives good theoretical training and then is circulated for certain periods of her/his articles with practitioners in various fields of law, so that s/he can be exposed to as many areas of practice as possible. The problem is, so I am told, practically, s/he does not learn much. S/he learns how to do the menial tasks, like photocopying, serving and filing, paginating court files, or conducting limited research. S/he is usually not allowed to take part meaningfully in any matter, or to run a matter on her/his own. This extreme will probably protect your practice against potential claims, but certainly will not empower the CA or properly fulfill your duties as a principal.

The ideal probably lies somewhere between these two extremes. This will entail some delegation coupled with *effective* supervision which *should* as stated before, empower while providing broad guidelines, appropriate training, review and constructive feedback. *The building blocks are inspiration, respect, openness, two-way communication and leading by example.*



Case Study 21: The candidate attorney (S) was given the responsibility for the running of a claim against the Road Accident Fund. He failed to lodge the claimants' claim within 3 years of the date of accident and the claim became prescribed.

From the file notes it is clear that this claim became prescribed because there was not enough supervision of S who dealt with the file. She made a note on file, wherein she stated that she had asked that Y fill in the amounts to be claimed. She noted that Y was rude and did not help, he told her to do it herself.

If Y had looked at the file he would have realized that the claim was prescribing 5 days later. S lodged the claim two days late.

It is clear that the inexperienced candidate attorney was left to run the matter by herself without sufficient guidance and supervision and this resulted in the claim prescribing.

7.6 Supervision of other professionals

This article focuses to a certain extent on effective supervision of non-professional and junior staff. It is no less essential that all other professional staff, ranging from professional assistants through to senior attorneys need to be supervised. Even single practitioners need to establish methods for self-supervision and self-assessment.

Clearly, the level and methods of supervision will be tailored to the supervisee's level of experience, ability and proven track record.

As some practices have learnt from bitter experience, even your most trusted senior colleagues can let you down!



Case Study 22: The bank instructed the practice to register a bond over a property. The conveyancer employed by the practice confirmed to the bank that the bond had been registered, when no bond was in fact registered. (It transpires that staff members were paid bonuses for meeting their monthly targets and this seems to have been the reason for the deception.) The bank paid the “mortgagee” and also the conveyancer’s fees.

The deception only came to light at a later stage, when the debtor defaulted on mortgage payments. By this time the conveyancer had left the employ of the practice.

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21 June 2011.**