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RISKALERT

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Legal Practitioners' Indemnity Insurance Fund NPC
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LEGAL PRACTITIONERS' FIDELITY FUND
SOUTH AFRICA

RISK MANAGEMENT COLUMN

WHO IS INSURED BY THE LPIIF?

In this edition, we continue with the series of articles aimed at addressing some of the common questions raised in respect of the Master Policy issued by the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF).

In the November 2020 edition, we explained who the LPIIF insures and the amount of cover provided. The December 2020 edition gave details on the excess payable. The current edition will cover who an insured is in terms of the policy.

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The statutory framework

A useful starting point is an examination of the applicable provisions of the Legal Practice Act 28 of 2014 (the Act). The LPIIF is the insurance vehicle established by the board of the Legal Practitioners' Fidelity Fund (the Fidelity Fund) to provide the insurance cover and suretyships referred to in section 77 of the Act. The relevant parts of section 77 of the Act read as follows:

*"77. **Provision of insurance cover and suretyships**- (1) The Board [of the Fidelity Fund] may-*

(a) acquire or form and administer a public company; or
(b) together with any other person or institution, establish a scheme, underwritten by a registered insurer,

In order to provide insurance cover, subject to the provisions of the Short-[t]erm Insurance Act, 1998 (Act No. 53 of 1998), to legal practitioners referred to in section 84(1) in respect of any claims which may arise from the professional conduct of those legal practitioners.

(2) The Board may enter into a contract with a company or scheme referred to in subsection (1), or any company carrying on professional indemnity insurance business, for the provision of group professional indemnity insurance to legal practitioners referred to in section 84 (1) to the extent and in the manner provided in the contract" (my emphasis).

RISK MANAGEMENT COLUMN continued...

The Short-term insurance Act has since been replaced by the Insurance Act 18 of 2017.

Section 84 (1) of the Act creates an obligation for certain categories of practitioners to practice with a Fidelity Fund certificate and reads as follows:

***"84. Obligations of legal practitioners relating to the handling of trust monies.**-(1) Every attorney or every advocate referred to in section 34(2)(b), other than a legal practitioner in the employ of the South African Human Rights Commission or the State as a state attorney or state advocate and who practices or is deemed to practice-*

(a) for his or her own account either alone or in partnership; or
(b) as a director of a practice which is a juristic entity, must be in possession off a Fidelity Fund certificate."

The obligation on an attorney to practice with a Fidelity Fund certificate received in-depth consideration in *NW Civil Contractors CC v Anton Ramaano Inc & Another* (1076/2018) (1024/2018) [2019] ZASCA 143 (14 October 2019). The Supreme Court of appeal, in that case, considered the implications of an attorney practising without a valid Fidelity Fund certificate in violation of section 41(1) of the Attorneys Act 53 of 1979 (the corresponding provision to section 84(1) in the repealed legislation) and analysed the previous decisions on that question. The LPIIF was admitted to the proceedings as *amicus curiae*. The court found that an attorney practising for his or her own account must be in possession of a valid Fidelity Fund certificate.

The LPIIF is an insurer registered in terms of the Insurance Act. The LPIIF's lines of business accord with section 77 of the Act. The insurance licence issued in terms of section 23 of the Insurance Act authorises the company to conduct business in the following classes and sub-classes of non-life insurance business:

Class of business	Sub-class
Liability	Professional indemnity
Guarantee	

The liability class of business is relevant for present purposes as the current focus is on the company's professional indemnity line of business. The guarantee line of business (executor bonds) will be addressed in a separate edition of the Bulletin. The company can only conduct business in the approved classes and sub-classes of business (see Chapter 4 of the Insurance Act).

The statutory framework applicable to the LPIIF thus only authorises the company to provide professional indemnity insurance to attorneys and trust account advocates with Fidelity Fund certificates.

The LPIIF policy

The relevant clauses of the policy read as follows:

"Who is insured?

*5. Provided that each **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**, the **Insurer** insurers all **Legal Practices** providing **Legal Services**, including:*

*a) a sole **Practitioner**;*
*b) a partnership of **Practitioners**;*
*c) an incorporated **Legal Practice** as referred to in section 34(7) of **the Act**; and*
*d) an advocate referred to in section 34 (2) (b) of **the Act**. For purposes of this policy, an advocate referred to in section 34 (2) (b) of **the Act**, will be regarded as a sole practitioner.*

*6. The following are included in the cover, subject to the **Annual Amount of Cover** applicable to the **Legal Practice**:*

*a) a **Principal** of a **Legal Practice** providing **Legal Services**, provided that that **Principal** has a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;*
*b) a previous **Principal** of a **Legal Practice** providing **Legal Services**, provided that that Principal had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;*
*c) an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance, act, error or omission giving rise to the **Claim**;*
d) the estates of the people referred to in clauses 6(a), 6(b) and 6(c);
*e) subject to clause 16 (c), a liquidator or trustee in an insolvent estate, where the appointment is or was motivated solely because the **Insured** is a **Practitioner** and the fees derived from such appointment are paid directly to the **Legal Practice**.*

The words in bold text above are defined in the policy.

Only a legal practice conducted in one of the forms listed in clauses 5 (a) to 5(d) of the policy are indemnified by the LPIIF. It will be noted from section 34 (1) to 34 (7) of the Act, read with paragraphs 1.13 and 1.16 of the code of conduct for legal practitioners and rules 1.18 and 1.22. Incorporated practices are personal liability companies must comply with the section 34 (7) of the Act. A practice conducted in any other form of company (a Pty (Ltd), for example) will not be indemnified. A separate article will be published in a later edition of the Bulletin analysing the requirements for an incorporated practice.

Legal practices conducted in any format, other than those listed in clauses 5 (a) to (d) of the policy, will not be covered by the LPIIF. The Supreme Court of Appeal in *Propell Specialised Finance v Attorneys Insurance Indemnity Fund NPC* (1147/2017) [2018] ZASCA 142 (28 September 2018) confirmed that the LPIIF can only provide indemnity to insured practitioners (as defined in the statute and the policy).

RISK MANAGEMENT COLUMN continued...

LPIIF CLAIM STATISTICS

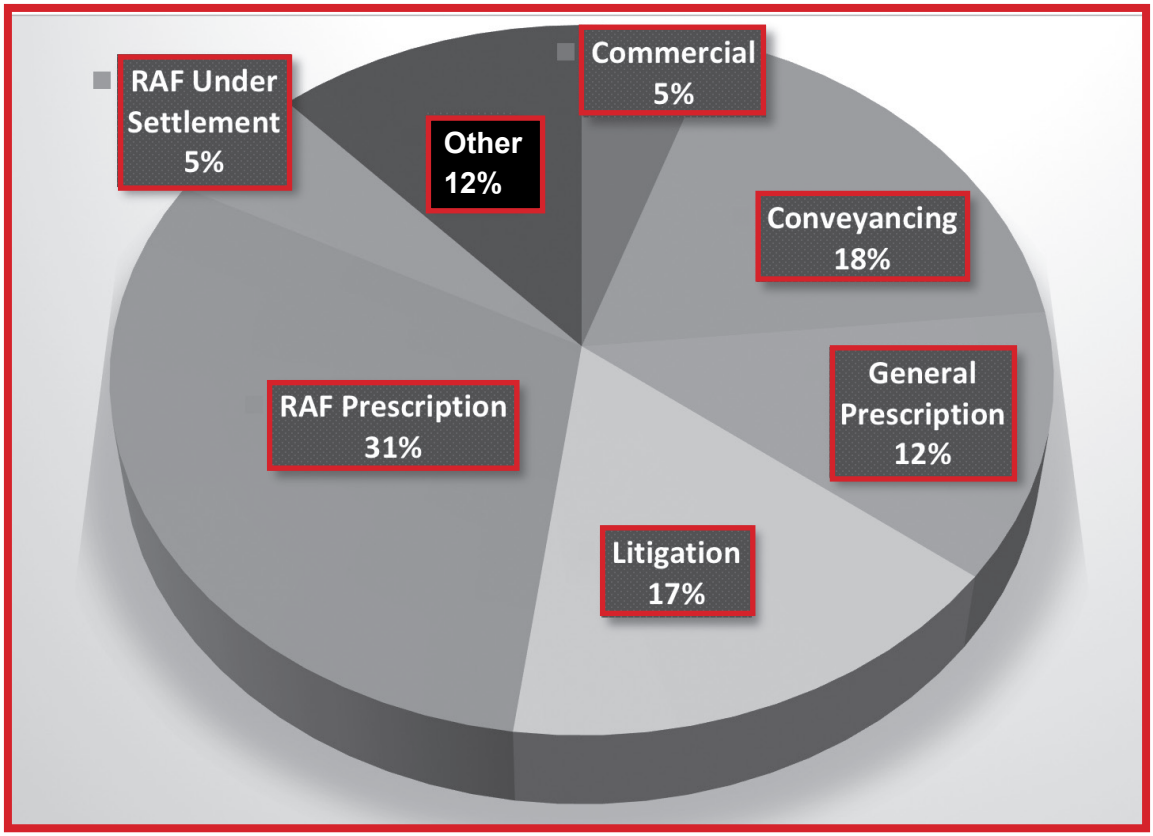

Table 1

The reserve requirement for outstanding claims notified to the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) was actuarially assessed at R665 566 300 as at the end of December 2020. The stabilisation in the number of claims notified since 2017 is welcomed, but the overall value of claims notified is still a serious cause for concern. The growth in the number and value of professional indemnity claims threatens the long-term sustainability of the LPIIF. Practitioners must thus address the underlying circumstances within their practices that could, potentially, lead to claims.

In table 1 above, the claims notified between 1 July 2005 and 31 December 2020 have been broken down into the various claim types.

Prescribed Road Accident Fund (RAF), general prescription, conveyancing and litigation claims continue to make up the highest number and value of claims notified. These claim categories have made up the highest numbers of notifications for over a decade. The category designated as 'other' includes claims arising from legal services rendered relating to the Liquor Act 27 of 1989, medical malpractice claims (prescription or under-settlement), wills and estates, wrongful arrest claims, liquidations and matters arising from circumstances where the insured practitioners have acted as trustees, liquidators or administrators.

The LPIIF website (www.lpiif.co.za) contains a section with numerous risk management materials that practitioners can have regard to in order to enhance the risk management measures in their respective practices.

The LPIIF's Practitioner Support Executive, Henri van Rooyen, can also be contacted to arrange risk management training for the firm. This service is offered at no cost. Please send an email to risk@lpiif.co.za to arrange risk management training for you and your staff.

THE STANDARD OF CONDUCT EXPECTED OF LEGAL PRACTITIONERS

By: Thomas Harban,
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Introduction

The standard of conduct reasonably expected of a legal practitioner appears, at face value, to be a straightforward topic. However, digging deeper into the subject, amorphous and multifaceted are the adjectives I would use to describe it.

A word search of the Legal Practice Act 28 of 2018 (the Legal Practice Act) indicated that the phrase 'norms and standards' appeared three times, with 'professional conduct' being referred to four times in the legislation. The word 'ethics' could only be located in the definition of 'code of conduct'. The relatively few appearances of these and related phrases in the legislation belie their importance to legal practice. Topics relevant to the professional standard of conduct can be gleaned from numerous other parts of the Act, the Rules and the Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (the Code of Conduct) issued in terms of the Act. Furthermore, over the last century, the courts have developed extensive jurisprudence on the subject.

Ethical and professional conduct

Ethical and professional conduct are core to legal practice, locally and in other jurisdictions. In 2011 the International Bar Association (IBA) adopted the International Principles on Conduct for the Legal Profession. The IBA document covers 10 principles, being:

(i) independence;
(ii) honesty, integrity and fairness;
(iii) conflicts of interest;
(iv) confidentiality / professional secrecy;
(v) clients' interest;
(vi) lawyers' undertaking;
(vii) clients' freedom;
(viii) property of clients and third parties;
(ix) competence; and
(x) fees.

The 10 principles identified in the IBA document are all covered in the standards of professional conduct applicable in South Africa. One interesting distinction between South Africa and many other jurisdictions is that, in some jurisdictions professional ethics are taught as a course in the academic program for law students, whereas in South Africa I am not aware of such a course being taught as a full credit at all universities. Including ethics as a compulsory subject in the academic program will go a long way in enhancing compliance with the ethical standards that the law graduates will be expected to meet when they commence commence practice, take up corporate counsel roles or even roles in the public sector (as will be noted from *General Council of the Bar of South Africa v Jiba and Others* (CCT192/18) [2019] ZACC 23; 2019 (8) BCLR 919 (CC) (27 June 2019). The fact that ethics is one of the subjects addressed in the admission exams for legal practitioners is, in my respectful view, not sufficient. The subject goes to the core of the requirements that legal practitioners must meet and thus needs broader and more in-depth consideration than it currently receives in the path to admission as a legal practitioner. It is hoped that a greater emphasis on professional ethics will also be included in the practical vocational training for candidate legal practitioners and the continuing professional development program to be developed and implemented.

The Code of Conduct provides that:

"3. Legal practitioners, candidate legal practitioners and juristic entities shall-

3.1. maintain the highest standards of honesty and integrity;

….

3.11 use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner;

…

3.13 remain reasonably abreast of developments in the law and legal practice in the fields in which they practice; [and]

…

3.17 comply with provisions of [the Code of Conduct] and any other code applicable to them and with those of the rules with which it is their duty to comply."

The Code of Conduct is "a written code setting out rules and standards relating to ethics, conduct, and practice for legal practitioners and its enforcement through the [Legal Practice Council

(LPC] and its structures". (definition in section 1 of the Legal Practice Act). It is trite that a failure to comply with the provisions of the Code of Conduct may lead to action being taken by the LPC against the legal practitioner, candidate legal practitioner or juristic entity concerned. Practitioners must thus ensure that their conduct and that of everyone in their practices meets the prescribed standards. Non-compliance with the Code of Conduct may result in disciplinary action being taken against practitioners by the LPC and professional indemnity (malpractice) claims being brought by third parties.

The Code of Conduct defines a "legal practitioner" as "an advocate or attorney admitted and enrolled to practice as such in terms of sections 24 and 30 respectively of the Act", a "candidate legal practitioner" as "a person undergoing practical vocational training, either as a candidate attorney or as a pupil", and a "juristic entity" means "a commercial juristic entity established to conduct legal practice as an attorney, as contemplated in section 34(7) of the Act and a limited liability legal practice as contemplated in section 34(9) of the Act." The Code of Conduct thus applies to the broad pool of legal practitioners equally.

The fit and proper requirement

The standard of conduct is the high ethical and professional standards that legal practitioners are expected to meet at all times. It is these high professional standards that allow society at large to entrust their affairs (and their monies) to the honourable and noble profession that the legal profession is accurately described as. The role of legal practitioners is of particular importance in a constitutional democracy. The legislative objectives listed in the preamble to the Legal Practice Act include "[ensuring] that the values underpinning the Constitution are embraced and that the rule of law is upheld." The public, the courts, fellow practitioners and the administration of justice as whole rely on the integrity of legal practitioners. Delivering the unanimous judgment of the Constitutional Court in *General Council of the Bar of South Africa v Jiba and Others*, Jafta J noted that:

"[1] The proper administration of justice may not be achieved and justice itself may not be served unless truthful facts are placed before the courts. Legal practitioners are a vital part of our system of justice. Their important role includes preventing false evidence from being presented at court hearings, and by so doing they protect judicial adjudication of disputes from contamination by fabricated facts. As a result, the law demands from every practitioner absolute personal integrity and scrupulous honesty.

[2] One of the reasons for holding legal practitioners to this high ethical and moral standard was furnished on these terms in [Ex parte Swain 1973 (2) SA 427 (N) at 434]:

"[I]t is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court."

[3] To underscore this requirement, the Admission of Advocates Act [74 of 1964] … demands that before an advocate may be permitted to practise, she must satisfy the High Court that she meets all conditions, including the qualities of honesty and integrity. If satisfied, the High Court may admit the advocate into the profession and direct that her name be included on the roll of advocates in the custody of the Department of Justice and Constitutional Development.

[4] If an advocate, having been so admitted and enrolled, fails to measure up to the required standard or it is established that she is no longer fit and proper to practise, an application may be instituted in the High Court by a relevant body for the removal of her name from the roll of advocates. Once an order of that kind is granted, the advocate concerned is not allowed to practise.

[5] This matter is about the fitness of the respondents to practice as advocates. The misconduct charge was that they are no longer fit and proper persons to continue to practice as advocates. It arose from the conduct in litigation where they deposed to affidavits which were presented to courts as evidence and their failure to comply with court rules and directives" (footnotes omitted. My emphasis).

Writing in *Vassen v Law Society of the Cape of Good Hope* (468/96) [1998] ZASCA 47; 1998 (4) SA 532 (SCA); [1998] 3 All SA 358 (A) (28 May 1998), Eksteen JA noted that:

" … it must be borne in mind that the profession of an attorney, as of any other officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members; and it is the duty of the [law society] to ensure, as far as it is able, that its members measure up to the high standards demanded of them. A client who entrusts his affairs to an attorney must be able to rest assured that that attorney is an honourable man who can be trusted to manage his affairs meticulously and honestly. When money is entrusted to an attorney or when money comes

GENERAL PRACTICE continued...

to an attorney to be held in trust, the general public is entitled to expect that that money will not be used for any other purpose than that for which it is being held, and that it will be available to be paid to the persons on whose behalf it is held whenever it is required. Here once again the [law society] has been created to ensure that the reputation of this honourable profession is upheld by all its members so that all members of the public may continue to have every confidence and trust in the profession as a whole. The fact that an attorney may be regarded as the pillar of society who serves the community in civic or political spheres, or who works indefatigably for the upliftment of the poor and the defenceless members of society, cannot in respect of his profession, be seen as a substitute for that honesty, reliability and integrity which one is entitled to expect of an attorney. One does not entrust money to a person because of his good deeds in the community, but because he is an attorney who can be trusted and on whom one can rely" (my emphasis).

Alas, this has not always been so, as the following passage from Bosielo JA's judgment in *Steyn v Ronald Bobroff & Partners* (025/12) [2012] ZASCA 184 (29 November 2012) demonstrates:

"[2] In order to appreciate and understand the crucial role which a [present-day] attorney plays in many people's affairs, I deem it necessary to give a brief evolution of the profession of an attorney over the years. In his book, The Judicial Practice of South Africa, (4 ed) vol 1, at p 31 G B Van Zyl said the following about the profession of an attorney:

'In ancient days the profession of an attorney was considered as "infamissima vilitas," servile, of no value, and contemptible. But under the Roman Emperors Diocletian and Maximilian it became an office of respect and good repute. Many people still think at the present day as the ancients did before the period of these Emperors. Even Lord Macaulay, the learned historian, who in all his professional career held only one brief, for which he received a guinea, could not refrain from remarking: "That pest whom mortals call attorneys." But the present consensus of opinion, all the civilised world over, is that the profession of an attorney is an honourable and respectable one, and to be held in the utmost esteem. An attorney is nowadays an indispensable adjunct to everyone, not only in lawsuits but in many other private affairs, and his office is deemed both necessary and praiseworthy. It is essential, therefore, that the relationship between him and the public should be better known; as also what is expected of him and what his obligations are'."

Fortunately, the regard with which the profession is held in the eyes of the public has rightly improved significantly since the ancient times referred to above. However, a concerningly high number of legal practitioners still fail to meet the required professional standards. The Legal Practitioners' Fidelity Fund (the Fidelity Fund) annual report for 2019 noted that R1,3 billion had been paid in trust money theft claims in 13 years. This is a shockingly high figure for liability arising out of dishonesty. There is a long list of suspended and struck-off legal practitioners published by the LPC on its website (accessible at https://lpc.org.za/members-of-the-public/list-of-struck-off-lps/). It is, unfortunately, the cases of malfeasance that make the headlines, tarnishing the image of the profession as a whole though the defaulting practitioners make up a small number of the overall professional population.

The courts have dealt with several cases where it is alleged that the legal practitioners concerned have failed to meet the standard of professional conduct expected of them. Regard can be had to the following judgements which demonstrate how the courts have approached the assessment of the standard of professional conduct required of legal practitioners: *Ex parte Swain* cited above, *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T), *Law Society Transvaal v Behrman* 1981 All SA 470 (A), *Kekana v Society of Advocates of South Africa* [1998] ZASCA 54; 1998 (4) SA 649 (SCA), *Vassen v Law Society of the Cape of Good Hope* (cited above) , *Jasat v Natal Law Society* (78/98) [2000] ZASCA 14; 2000 (3) SA 44 (SCA); [2000] 2 All SA 310 (A) (28 March 2000), *Swartzberg v Law Society, Northern Provinces* 2008 All SA 438 (SCA), *Malan and another v The Law Society, Northern Provinces* 2009 (1) All SA 133 (SCA), *General Council of the Bar of South Africa v Jiba and Others* (referred to above), *Nthai v Pretoria Society of Advocates and Others* [2019] ZALMPPHC 23 and *Johannesburg Society of Advocates and Another v Nthai and Others* (879/2019; 880/2019) [2020] ZASCA 171 (15 December 2020).

The three-stage enquiry developed by the courts when dealing with applications to strike legal practitioners off the roll includes an enquiry regarding whether the practitioner is 'fit and proper' to be a legal practitioner. A failure by a legal practitioner to meet the standards of integrity may thus result in being struck from the roll. Ethics, integrity and compliance with the ethical standards are thus at the core of what makes a legal practitioner.

Legal practitioners who are not in private practice (corporate counsel) must also comply with the Code of Conduct. Part VII of the Code applies specifically to corporate counsel.

A law firm conducting an investment practice must, in terms of rule 55.12, comply with all the requirements of the Financial Advisory and Intermediaries

Services Act 37 of 2002 (the FAIS Act) and the regulations issued terms of that Act. There is a specific code of conduct issued for entities operating in terms of the FAIS Act. If a legal practice is registered in terms of the FAIS Act and there is a conflict between the FAIS Code and that issued in terms of the Legal Practice Act, which code will apply? What is the effect of paragraph 3.17 of the Code of Conduct in the event of such a conflict?

In the culture where collegiality between legal practitioners is encouraged, one wonders how the obligation on practitioners to report conduct of their colleagues will be applied. The Rules, for example, prescribe the following:

"Reporting of dishonest or irregular conduct"

54.36 Unless prevented by law from doing so every legal practitioner is required to report to the [Legal Practice] Council any dishonest or irregular conduct on the part of a trust account practitioner in relation to the handling of or accounting for trust money on the part of that trust account practitioner."

The standard of care in assessing professional liability

It must be pointed out that not every breach of the ethical standards or the professional duties will result in a professional indemnity claim against a legal practitioner. Similarly, not every professional indemnity claim can be said to be a result of a breach of the Code of Conduct. Some professional indemnity claims arise out of *bona fide* errors made by legal practitioners. However, professional indemnity claims may well arise from a failure to meet the required professional standards of conduct. Breaches of the duty of care may be an indication that a practitioner, in breach of their professional duties, is not paying sufficient attention to their practice. (If you find this paragraph somewhat confusing and potentially contradictory, please have regard to the two opening sentences at the beginning of this article.)

In assessing whether there is negligence on the part of the defendant in a professional indemnity claim, the courts assess the conduct of the practitioner concerned against the standard of care expected of a legal practitioner in similar circumstances. One might ask: has the practitioner against whom the professional indemnity claim is brought:

(i) used their best efforts to carry out work in a competent and timely manner and not taken on work which they do not reasonably believe they will be able to carry out in that manner (as prescribed by paragraph 3.11 of the Code of Conduct)? Time-barred claims would immediately come to mind when carrying out the work timely is concerned. Practitioners will be well advised to have regard to Rampai J's judgment in *Mlenzana v Goodrick and Franklin Inc* (4423/08) [2011] ZAFSHC 111 2012 (2) SA 433 (FB) (14 July 2011) as a case study when conducting training in their practices on paragraph 3.11 of the Code of Conduct; or

(ii) remained reasonably abreast of developments in the law and legal practice in the fields in which they practice (as prescribed in paragraph 3.13 of the Code of Conduct)? The risk of claims against practitioners following from incorrect legal advice provided will be reduced by complying with this rule.

The jurisprudence on this point has been developed by the courts over a period of more than a century. In *Van der Spuy v Pillans* 1875 Buch 133 at 135, De Villiers CJ remarked that:

"I do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be proficient in his calling, and if he does not bestow sufficient care and attention in the conduct of business entrusted to him, he is liable, and where proved the Court will give damages against him."

Commenting on these words of De Villiers CJ, Bosielo JA, in *Steyn v Ronald Bobroff & Partners*, stated the following:

"[3] The attorney's profession having become more diverse and sophisticated, these wise words are, to my mind, more apt today than they were during the time of De Villiers CJ. Indubitably, this is the yardstick against which the respondent's conduct in this case has to be adjudged".

Dealing with the questions before the court, Boshielo JA went on to note that:

"[27] In the absence of clear evidence to prove what a reasonable attorney in the position of the respondent, faced with a similar case under similar circumstances, would have done, I am unable to conclude that the respondent failed to act with the necessary care, skill and diligence which would ordinarily be expected from a reasonable attorney. It is axiomatic that the conduct of a reasonable attorney concerning a case that he/she handles will primarily be determined, amongst others, by the facts and circumstances of the case, the investigations which had to be done, the nature and extent of the injuries suffered and the complexity of the matter. It would in my view be unwise to attempt to determine the conduct of a reasonable attorney in vacuo. As Van Zyl eloquently stated in his work, The Judicial Practice of South Africa (above) at p 46, '…the degree of negligence or want of prudence, or useless work, must depend upon the nature of each case'."

Steyn v Ronald Bobroff & Partners arose out of circumstances where the respondent has acted for the applicant in pursuing a claim against the Road Accident Fund. In *Margalit v Standard Bank of*

SA Ltd (883/2011) [2012] ZASCA 208 (3 December 2012), the court considered whether there was negligence on the part of a conveyancer. In that case Leach JA stated that:

[22] I turn to consider the crucial issue of the second respondent's alleged negligence. I preface my remarks by observing that of course not every act which causes harm to another is actionable in delict. The action complained of must also be wrongful, the concept of which has been authoritatively dealt with in cases such as Le Roux v Dey 2011 (3) SA 274 (CC) para 122 and the various judgments referred to therein. It is unnecessary to deal further with this issue as counsel for the respondents conceded that, should the delays in transfer, [affecting what] occurred after the rates clearance certificate had been provided, have been due to the second respondent's negligence, both respondents should be held liable for the agreed damages and the appeal should succeed. Negligence on the part of the second respondent [a firm of conveyancing attorneys], and not wrongfulness, is therefore the crucial issue that has to be decided.

[23] A conveyancer is of course 'an attorney who has specialised in the preparation of deeds and documents which by law or custom are registerable in a deeds office and who is permitted to do so after practical examination and admission….Like any other professional, a conveyancer may make mistakes. But not every mistake is to be equated with negligence, and in a claim against a conveyancer based on negligence it must be shown that the conveyancer's mistake resulted from a failure to exercise that degree of skill and care that would have been exercised by a reasonable conveyancer in the same position….

[24] Although at times a court may need expert evidence on a particular professional practice to determine whether a professional person acted negligently, that is not a fixed and inflexible rule and the views of a professional, while often helpful, are not necessarily decisive. The nature of the conduct complained of may well be such that a court, even without the benefit of professional opinion, may determine that the conduct complained of was of such a nature that it clearly falls below the mark of what can be regarded as reasonable. This in my view is such a case (I should mention that the expert evidence called by the parties in this case, while extremely helpful in explaining the mysteries of certain procedures in the deeds office, did not deal pertinently with all the issues relevant to the second respondent's negligence) ….

[26] To avoid causing such harm, conveyancers should therefore be fastidious in their work and take great care in the preparation of their documents. Not only is that no more than common sense, but it is the inevitable consequence of the obligations imposed by s 15(A) of the [Deeds Registry Act 47 of 1937] as read with [regulation] 44, both of which oblige conveyancers to accept responsibility for the correctness of the facts stated in the deeds or documents prepared by them in connection with any application they file in the deeds office."

Some of the other cases where the standard of the reasonable legal practitioner in the circumstances of the defendant were applied in assessing negligence are: *Mazibuko v Singer* [1979] 1 All SA 30 (W), *Rampal (Pty) Ltd and another v Brett, Willis and Partners* [1981] 3 All SA 213 (D), *Slomowitz v Kok* [1983] 1 All SA 79 (A) and *Mlenzana v Goodrick and Franklin Inc* (cited above).

It will be noted in time how the courts will use the provisions of the Legal Practice Act, the Rules and the Code of Conduct in further developing the test for liability in professional indemnity claims.

A final point needs to be made in order to address a common misconception. The LPIIF is an insurance company independent of the LPC. A legal practitioner notifying the LPIIF of a claim made against her/him, must not fear that the LPIIF will report that matter to the LPC as a matter of course. The only circumstances listed in the LPIIF Master Policy under which the insurer will report an insured legal practitioner to the regulator are where either:

(a) There is a material non-disclosure or misrepresentation by the insured practitioner in respect of the application for indemnity, the LPIIF reserves the right to report the conduct to the regulator and to recover any money incurred because of the insured's conduct (clause 35); or
(b) The insured fails or refuses to provide information, documents, assistance or cooperation to the LPIIF or its appointed agents.

Conclusion

It will be noted from the judgments referred to that a failure to meet the professional standards potentially attracts quadruple jeopardy for the practices concerned-

(i) a striking off the roll;
(ii) criminal prosecution
(iii) civil liability in the malpractice claim; and
(iv) the reputational damage flowing from the publication of practitioner's name on dishonourable list on the LPC website and being named in an unfavourable court judgement.

A straightforward risk mitigation measure is suggested: Learning, implementing and monitoring compliance with the required professional ethical standards of conduct at all times.