

# RISK ALERT

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- Written records of instructions: Meeting the regulatory requirements 1

## RISK MANAGEMENT COLUMN

### WRITTEN RECORDS OF INSTRUCTIONS: MEETING THE REGULATORY REQUIREMENTS

The importance of a legal practice having a written record of the terms of the mandate undertaken by it has long been emphasised as an essential risk management tool. A letter of engagement is one example of the various types of documents used to record the terms of the engagement between the legal practice and its clients. It has been gleaned from the engagements with legal practitioners that letters of engagement are, generally, gaining wider use in the profession. This is a positive development.

There are, however, still many legal practices that do not make use of any form of documented record of the mandates they receive, who they are acting for, the ambit of the instruction and other terms of the mandate or even the fee and billing arrangements. Some firms use a generally worded power of attorney or other forms of outdated precedents as the record of the instruction. These fail to succinctly capture the essence of the instructions and the obligations of the parties. We have received several requests for general guidance on how to draft a letter of engagement. The resources listed at the end of this Bulletin will assist practitioners in this regard. Generally, the letter of engagement



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should cover the following -

1. the identity of the client (and the requirements of the Financial Intelligence Centre Act 38 of 2001 (FICA)). The client's contact details (and alternate contact persons, if necessary) and banking details will mitigate the risk of cybercrime as well;
2. a detailed scope of the instruction;
3. the servicing team in the firm;

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4. the use of counsel, correspondent attorneys or other expert outside of the firm;
5. fees, expenses and billing;
6. instructions to invest client money as part of the mandate, if applicable (section 86(4) of the Legal Practice Act 28 of 2014 (the Act));
7. the terms of the contingency fee agreement (if applicable);
8. breach, dispute resolution and termination;
9. confidentiality, data protection and the relevant provisions of the Protection of Personal Information Act 4 of 2013;
10. any other applicable provisions (including those required by regulation); and
11. the signatures of the parties.

Changes to the mandate or the terms of the engagement must, similarly, be

recorded, explained to the client and signed by the parties. Other professions (most notably the auditing profession) often include a provision limiting liability to double the professional fee, but it is uncertain whether or not such a clause will be upheld in the case of a legal practice.

Firms can also develop checklists applicable to their individual circumstances and areas of practice. Such a checklist will assist the firm in auditing and reviewing its compliance with the regulatory requirements.

We have prepared an example of a statutory checklist below. It must be noted that this example is not an exhaustive list of the statutory requirements. The list is not prescriptive and not all the provisions highlighted will apply to every legal practice, instruction or area of practice. For purposes of illustration,

the checklist below covers some of the essential topics addressed in the Act, the Rules issued in terms of the Act and the Code of Conduct. It will be noted that the topics covered range from documenting the ambit of the instruction, to the recordal of complaints to the Legal Practice Council (the Council) and the investment Rules. We have, as far as possible, used the exact wording of the regulatory requirements or paraphrased where necessary- this approach has been followed to avoid losing the essential elements of the regulatory prescripts. These can be summarised by legal practices in the development of their own statutory compliance checklists. Regulatory compliance is one the main risks facing legal practitioners and it is hoped that the checklist below will assist firms in developing measures to ensure and monitor compliance with the regulatory requirements.

### A SAMPLE OF THE PROVISIONS PRESCRIBING WRITTEN RECORDS

Number	Subject	Applicable provision in the statute, rules, Code of Conduct or other subordinate legislation	Description	Is the requirement applicable to the matter the legal practice is dealing with? (Yes/ No)	Is compliance therewith (where applicable) documented in the file? (Yes? No)	Date of review and name of the partner/ director/ responsible person who has conducted the review
<b>1</b>	<b>Acceptance of the instruction and documenting the scope thereof</b>					
1.1	Receipt of instructions	Section 34 (1)	Does the legal practice have a confirmed instruction to act on behalf of the client/s in the matter at hand?  (Section 34 of the Act provides that '[an] attorney may render legal services in expectation of any fee, commission, gain or reward as contemplated in the Act or any other applicable law, upon receipt of a request from the public for that service.")			

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1.2	Setting out the instruction to the attorney in writing: Rule 35 (see also section 95(1) (zC) read with section 34 (4) of the Act)	Rule 35.3	On receipt of written instructions from a client, an attorney must ensure that they set out the intended scope of the engagement with sufficient clarity to enable the attorney to understand the full extent of the mandate. In the event of uncertainty regarding the scope of the mandate, the attorney must seek written clarification of the intended scope of the instruction			
		Rule 35.4	If verbal instructions have been received from the client, such instructions must be confirmed in writing as soon as possible by the attorney, setting out the latter's understanding of the scope thereof			
1.3	Investment mandates	Rule 56.2.2	Investment instructions must be written, detailing the manner and form of the investment (Rule 56.1). The investment instruction may be incorporated into the written contract in terms of which the person concerned has given instructions to the firm - (see also 3.6 below)			
1.4	Complaints against legal practitioners	Schedule 5 [Rule 45.2] Form of laying a complaint of misconduct against a legal practitioner	Section 3 of the complaint form enquires from the complainant: "Was there a written letter of engagement? If so, please provide a copy"			

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2		Fees and billing				
2.1	Acting on a contingency basis	Contingency Fees Act 66 of 1997	If the firm is acting on a contingency basis, there must be a written contingency fee agreement that complies with all the provisions of the Contingency Fees Act. Regard should be had to the various judgements delivered by the courts on contingency fee agreements for guidance on the requirements for validity of such agreements			
2.2	Written fee agreements	Section 35: Fees in respect of legal services (Note: though section 35 of the Act is yet come into operation, legal practitioners are advised to develop measures that meet the requirements of section 35, in anticipation of its implementation)	Section 35(3)- Does the fee agreement comply with the prescribed tariff? If it does not, is the deviation from the tariff recorded in a written agreement?			
			Section 35 (7)- Has a written cost estimate notice been given to the client when instructions were initially received (or as soon as practically possible thereafter)?			
			Does the written cost estimate specify all the particulars of the legal services, including the following:			
			(a) the likely financial implications including fees, charges, disbursements and other costs;			
			(b) the hourly fee rate and an explanation to the client of their right to negotiate the fee payable;			

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			(c) an outline of all the work to be done in each stage of the litigation process, where applicable;			
			(d) the likelihood of engaging an advocate and the different fees that can be charged by different advocates, depending on factors such as seniority or expertise, and			
			(e) in litigious matters, the legal and financial consequences of the client's withdrawal and the costs recover regime.			
			Has the written fee estimate been explained to the client? (Section 35(8))			
			Is there a written record of the client agreeing to the envisaged legal services and the incurring of the anticipated legal costs? (Section 35(9))			
2.3	Fee agreements with counsel	Provisions of the Code of Conduct relating to agreements about fees (paragraphs 26.1, 26.7 and 48.5 of the Code)	Has a brief marked with a fee been offered to counsel and has counsel agreed in writing to the initial marked fee?			
			Does the written agreement with counsel provide for any of the following:			
			(a) that the fees will be paid prior to the performance of any obligation in terms of the brief?			
			(b) a shorter payment period than the standard period?			
			(c) a special collapse fee in the event that the matter does not proceed as envisaged?			

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3 Trust account investments in terms of section 86(4) of the Act						
3.1	Investment mandates	Section 86(4) read with Rule 54.17	Is there a written mandate to open a separate trust account or other interest-bearing account for the purpose of investing any money of a particular person?			
		Section 86(6)	Where trust funds are deposited into an account, other than with a bank that the Fidelity Fund has made arrangements with in terms of section 63(1)(g), has the written consent of the Fidelity Fund been obtained?			
		Rule 54.18	Where the firm will receive any commission, fee or other reward from a bank with which the trust investment has been made, has the receipt of such income from the bank concerned been disclosed in writing to the person giving the mandate to invest?			
3.2	Reports to clients in relation to investments	Rule 55.5	If the firm is carrying on an investment practice, has it provided at least one written report annually to the client on income earned, capital movements, commission earned or other changes made by the firm in carrying out the mandate in that year?			
3.3	Transfers from investment accounts	Rule 54.14.7	Written authorisation for the payment of any guarantees issued by the bank on the strength of trust guarantees, that any amount withdrawn from the trust investment account is promptly deposited into the trust banking account.			

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3.4	Restrictions on certain investments	Rule 55.11	Prior specific written instructions from the client in respect of each investment in shares or debentures in a company not listed on a licenced securities exchange in South Africa (if that company is not a subsidiary of a listed company) or unsecured loans.			
3.5	Compliance with the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act)	Rule 55.12	If the firm conducts an investment practice, it must comply with the requirements of the FAIS Act.			
3.6	Investment of funds by firms on behalf of persons otherwise than in terms of investment practice Rule 55	Rule 56.1	The firm can only invest funds on behalf of any person if there is an existing written instruction from that person detailing the manner and form of the investment.			
		Rule 56.2.1	If the mandate to invest was not obtained beforehand, or in cases of emergency, the firm must obtain the written instructions to invest and details of the manner and form of investment as soon as possible.			
		Rule 56.3	If the firm does not receive the written investment instructions within a month after it has, in writing, requested such instructions, it must notify the Legal Practice Council in writing and, simultaneously, furnish the Council with copies of all its letters of request and any responses thereto.			

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4 Consider applicable requirements arising from other legislation					
4.1	Depending on the circumstances of the individual mandate and matter being undertaken by the firm, there may be additional requirements for the written record of the mandate. An example is the PFA Guidance Note.	PFA Guidance Note 6 of 2018 (dated 19 October 2018) issued in terms of the Pension Funds Act 24 of 1956	Where recovery of arrear pension fund contributions is outsourced by a board of management of a pension fund to a firm of attorneys, the agreement between the pension fund and the firm of attorneys must, at least, include a provision that (i) any amount recovered by an attorney in respect of arrear contributions must be transmitted into the fund's bank account within 7 (seven) business days of receipt, and (ii) the defaulting employer must provide the relevant contribution statement as required in terms of section 13A(2)(a) and regulation 33(1) of the Pension Funds Act together with the outstanding contribution.		

### OTHER RESOURCES

Regard can be had to the following publications for more information on documenting the instructions:

- “The importance of the inhouse compliance function in a law firm”, De Rebus, September 2019
- “Letters of engagement- documenting the ambit of the instruction given to the attorney”, De Rebus, October 2016
- Risk Alert Bulletin, November 2011
- The engagement management section of the document on risk management tips for legal practices available on the LPIIF website (accessible at <https://lpiif.co.za/wp-content/uploads/2017/10/Risk-Management-Tips.pdf>)