



**Legal Practitioners
Indemnity Insurance
Fund NPC**

Est. 1993 by the Legal Practitioners Fidelity Fund

**THOUGHTS ON LIMITATION OF LIABILITY CLAUSES IN ATTORNEYS'
LETTERS OF ENGAGEMENT**

10 MARCH 2022



Agenda

In this presentation, I will:

1. Recap the basis for the liability of attorneys to third parties and demonstrate the main risk areas of legal practice;
2. Give a brief overview of letters of engagement as a risk management tool for attorneys; and
3. Pose some questions on whether or not limitation of liability clauses are appropriate for inclusion in the letters of engagement of a legal practice.



Attorneys' liability

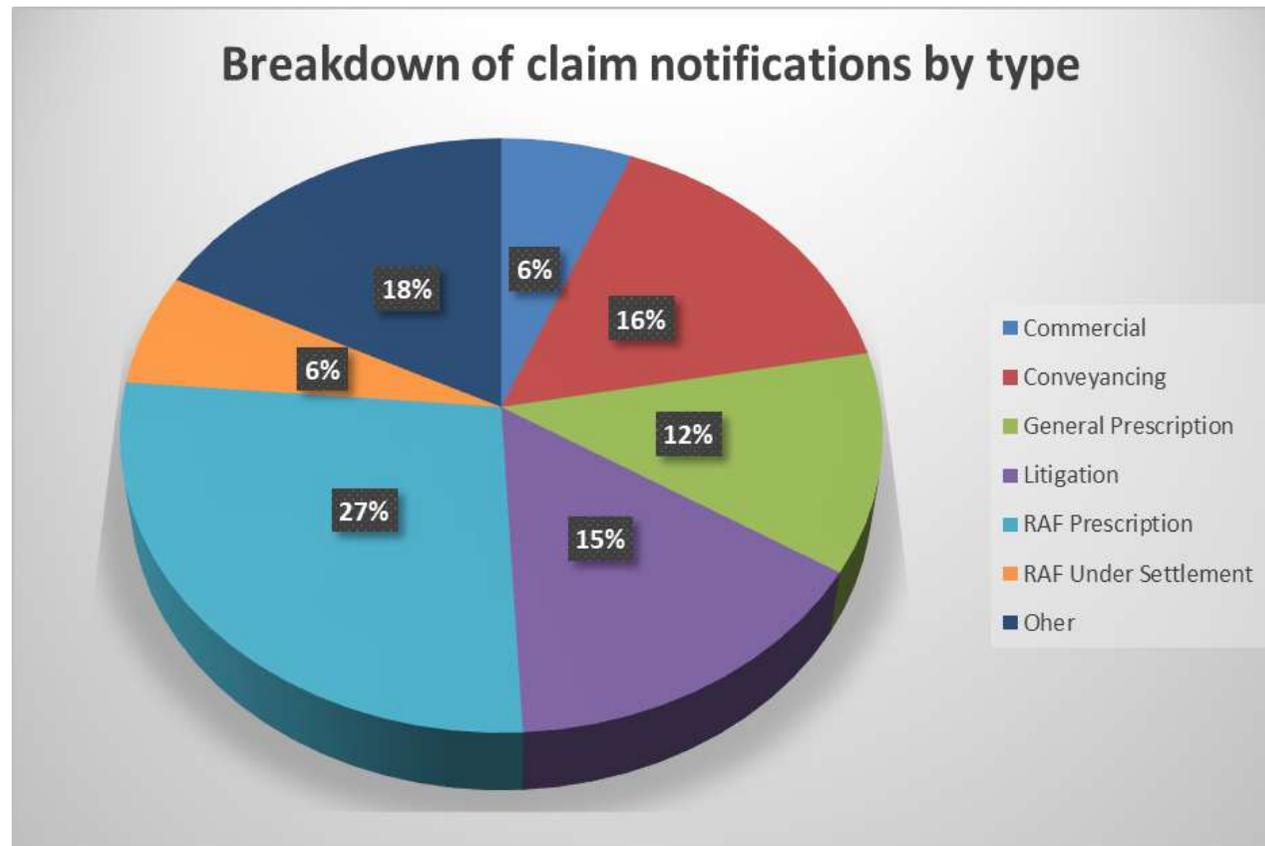
- An attorneys' liability in a professional indemnity claim will be based on a breach of either:
 1. The terms of the contact (mandate) between the law firm and the party concerned (the claim will be framed in contract); or
 2. A duty of care owed by the attorney to the claimant (such claims are framed in delict); or
 3. A fiduciary duty owed by the attorney to the claimant.
- The professional liability of attorneys potentially extends to non-clients
- Professional ethical duties are also owed to clients and non-clients

See “The attorney-client relationship: Does the person who pays the piper exclusively call the tune?” in the December 2021 edition of the Risk Alert Bulletin



Claim statistics as at 31 December 2021

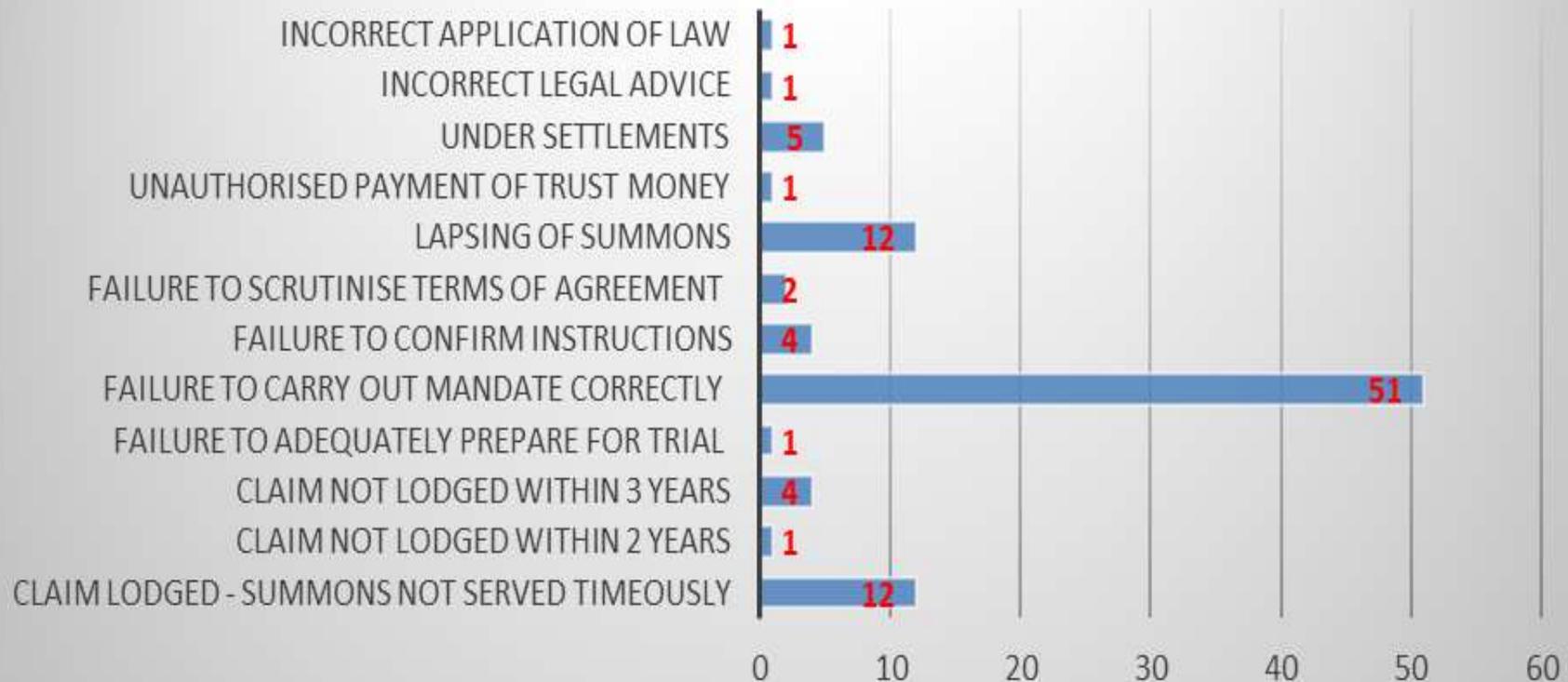
- On 31 December 2021 the Legal Practitioners Indemnity Insurance Fund NPC had 2360 outstanding claims with a total value of R692, 964, 800
- The breakdown of outstanding claims by type on that date was as follows:



What errors or omissions lead to indemnified claims in 2021?



Breakdown by underlying error or omission





The letter of engagement

The letter of engagement sets out the terms of the mandate given to the attorney by the client and can include:

- The scope of work (the instruction)
- If the client is instructing you in a representative capacity, record that as well
- The servicing team in the firm
- Is the use of counsel or some other outside expert a possibility?
- Fees, expenses and billing (see section 35(7)-(12) of the Legal Practice Act, though the application of section 35 has been postponed)
- The contingency fee agreement (where applicable)
- Conflicts of interests
- Confidentiality
- Storage of documents
- Client identification and verification (FICA)
- Termination of the engagement
- Dispute resolution
- Counterparts
- General
- The signatures of the parties
- Update the document and get all parties to sign as and when circumstances change
- See also “Letters of engagement- documenting the ambit of the instruction given to the attorney”, *De Rebus*, October 2016



Letters of engagement continued

- There are several provisions in legislation and the rules that prescribe a written record of the instructions. These include:
 1. Rules 35.3 and 35.4 (read with sections 34 (1), 34 (4) and 95(1)(zC) of the Legal Practice Act 28 of 2014):
 - on receipt of written instructions from the client, an attorney must ensure that the intended scope of the engagement is set out with sufficient clarity to enable the attorney [and the client, I presume] 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
 2. Other areas that can be included are investment mandates (where applicable)

A checklist with some of the matters that must be documented in writing is published in the August 2021 edition of the Risk Alert Bulletin



Limitation of liability clauses

- Limitation of liability clauses are aimed at prospectively limiting the liability of the contracting party/ parties
- Some of the other professions include a limitation of liability clause in their contracts with their respective clients – in some instances this is included at the behest of their professional indemnity insurers and the liability could be limited to, for example, double the fee or certain classes of damages can be excluded/ limited
- Some commercial professional indemnity insurers encourage the use of limitation of liability clauses by attorneys and take that into consideration when assessing and rating the risks- this will affect the premium levied and other terms of cover
- I am not aware of any South African case where a limitation of liability clause in an attorney's contract of engagement with a client has been considered by the courts
- Limitation of liability clauses in attorney client contracts are prohibited in several international jurisdictions
- The Legal Practice Act and the rules are silent on this



Limitation of liability clauses continued

- Some of the factors that arise for consideration are:
 - Public policy
 - Would the clauses be ethical?
 - Jurisprudence developed in SA in respect of unconscionable contracts, disclaimers and indemnities will need to be considered
 - The general position in other jurisdictions
 - The unequal bargaining power of the attorney (as a legal expert) as opposed to the client (usually a lay-person) in many instances
 - Would the type or quantum of damages sought to be limited even have been considered by the parties when they contracted?
 - Can parties contract out of liability arising from statute (see section 34 (7) (c) of the Legal Practice Act as an example)?
 - How effective would such clauses be where the action against the attorney is brought in delict or based on a breach of a fiduciary duty rather than contract?
 - Third parties will not be party to the contract between the attorney and the client, and the limitation of liability clause cannot be enforced against them



The CPA and indemnity clauses

For guidance, let us look at how the courts have dealt these matters in recent years:

- ***Cooper v Shamwari Hospitality (Pty) Ltd*** 2021 JDR 0924 (ECG)
- ***Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others*** [2020] ZACC 13
- ***Barkhuizen v Napier*** 2007 (7) BCLR 691 (CC)
- ***Schierhout v Minister of Justice*** 1926 AD 99
- ***Hanson v Liberty Group Ltd & others*** [2012] JOL 28202 (GSJ)



Food for thought from the SCA

In *G4S Cash Solutions (SA)(Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and Another* (“G4S”) 2017 (2) SA 24 (SCA) at [16] held (in the context of the limitation of liability clauses in the contracts concluded between the parties- not an attorney client relationship):

“Turning to clause 9.9 it follows from the above interpretation that the subclause envisages a loss and resultant claim arising pursuant to or during the provision of services by the appellant to the respondents in terms of the agreements. In my view the clear wording of the agreements shows that the parties did not contemplate that clause 9.9 would encompass delictual claims of the nature averred in the respondents’ particulars of claim. These delictual claims did not arise pursuant to or during the services rendered by the appellants nor while the money was in the possession of the appellant, but in circumstances where the respondents handed over the money to unknown third parties. Had the appellant intended the time limitation in clause 9.9 to also apply to delictual claims of this nature, it could easily have drafted the agreements to include such claims. Its failure to do so justifies the inference that the parties did not intend clause 9.9 to encompass the respondents’ delictual claims.”

Thank you for the opportunity to address you today

Thomas Harban

March 2022

Email risk related queries to

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A large, faint watermark of the LPIIF logo is visible in the background. The logo consists of a stylized house-like shape with a triangle on top and horizontal lines below, all enclosed within a circular border. The letters 'LPIIF' are prominently displayed in the center of the logo.

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