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NEWSLETTER

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THE PAYMENT OF FEES FOR LITIGATION EXPERTS

The attention of readers is drawn to the website www.lawblog.co.za and the recent exchange of opinions regarding the entitlement of litigation experts to payment of their fees. This topic touches most persons involved in MVA work.

There is a "blog" by Robert Koch that appears on www.lawblog.co.za which has been copied to the Law Society, the SA Medical Council and the Actuarial Society of SA. The reason for doing so was that experts who accept deferred payment of their fees are placed in an exposed and ill-defined position as regards their ability to recover their fees. The professional bodies would do well to assist their members by negotiating fair and reasonable protocols to govern the payment of expert fees.

Mr de Broglio, in his blogs, has advocated "an open and good relationship and work together with someone you have confidence in and who will come to the party whether the sun is shining or it is raining". The problem with such cosy relationships is that there is no structured agreement. If the "open and good relationship" breaks down then there are no rules to govern how to clean up the mess. When a marriage breaks down the spouses have the benefit of several Acts governing the dissolution of a marriage. Expert witnesses do not enjoy such protection.

It would be so nice if the professional bodies were to negotiate:

1. Standard contractual terms applicable between an attorney and an expert when nothing else has been negotiated in this regard. In other words when an expert gets a typical instruction: "Attached are the dates of birth and earnings information - Please do the necessary" (yes, that is all that appears in many instructions) then there are **standard terms that become binding on the attorney and the expert.**
2. When one attorney takes over a claim file from another attorney (and transfers are a frequent event) there is then no direct relationship between the expert and the new attorney. The new attorney can then refuse to pay the expert's fee and get himself some other expert. The "dumped" expert is entitled to claim his fees directly from the victim, but in practice tracing victims through the informal settlements is a task fraught with difficulty, and if the expert succeeds it is unlikely that there will be any money to pay his or her fee. What is needed is a **Law Society regulation that obliges the new attorney to attend to the recovery of the fee of the old expert.**
3. The Fidelity Fund guarantees claimants against attorneys who receive compensation money and then disappear with the money. However, the Fidelity Fund does not extend this protection to the fees of experts, notwithstanding that the RAF, when making a payment, often states express amounts for the fees of nominated experts.

The only hope for an expert is that he can trace the attorney who is handling the claim against the Fidelity Fund for the defrauded claimant. The Fidelity Fund is a creature of statute in terms of s26 of the Attorney's Act 53 of 1979. The wording in the Act is broad enough to cover expert fees, but the Law Societies have elected to adopt a narrow interpretation and to refuse to grant cover. The professional bodies for the experts would do well to negotiate **cover for expert fees by the Fidelity Fund**. It perhaps deserves mention that the Fidelity Fund is financed by the interest received by attorneys on their trust funds. Such interest is not paid to the persons on whose behalf funds are held in an attorney's trust account. An expert who agrees to deferred payment of his fees usually receives nil interest when he is eventually paid and thereby swells the interest that flows to the Fidelity Fund. What better reason for extending cover to expert witness fees.

4. "Defrocking", the striking off of an attorney from the roll of attorneys is usually a chaotic affair. Many, if not most, of the attorney's files disappear. The Law Societies commandeer what they can and distribute these to other attorneys. The defrocked attorney is usually rendered insolvent, a man of straw who cannot pay even part of his debts. Attempts on my part to trace files after such a debacle have turned up at most 10% of the files on which I am owed fees. The rest vanish into thin air. **A procedure is needed which acknowledges the financial interest of third parties, such as the experts, and provides for holding back claim files until proper steps have been taken to secure the fees of interested experts.** It is arguable that a Law Society can be held liable for damages suffered by third parties due to the reckless handling by the Law Society of the striking off of an attorney. There are no rules governing the striking off of an attorney. It would be a good thing if the striking off of an attorney required an application by the Law Society in terms of the Insolvency Act, with all that that entails by way of advertising and protecting the interests of third parties.

I should mention that the RAF does not provide experts with any assistance with tracing files, nor claimants, nor new attorneys. This is not without a number of well intended efforts by some RAF staff to be of help; but they do have more than enough of their own problems. The professional bodies for experts would do well to negotiate with the RAF for a procedure for providing such information. Ideally this would be **a small dedicated team of two or 3 persons authorised to access the RAF's data base. The experts should be prepared to pay for the salaries.** A Pretoria attorney, Gert Nel, has recently launched a Court action to obtain information from the RAF in terms of the Promotion of Access to Information Act 2 of 2000.

Robert J Koch cc has signed agreements with its customers. The relevant contract wording is published on www.robertjkoch.com and other parties are welcome to copy such parts thereof as they choose.

Readers who have something to say on this subject are invited to submit their own blogs to Michael de Broglio by email to: michael@onlinelaw.co.za. Hopefully Michael will see his way to publishing them on his website www.lawblog.co.za.

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