THE LAW SOCIETY
OF THE
NORTHERN PROVINCES

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VAN DIE
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Incorporated as the Law Society of the Transvaal
Ingelyf as die Prokureursorde van Transvaal

Serving Gauteng, Mpumalanga, Limpopo & North West Provinces
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Your ref/U verw: Mr Grobler / djp / 05/10/2011

Our ref/Ons verw: MJSG / sl / 109/10

12 October 2011

His Honourable Judge W J van der Merwe
Deputy Judge President
North Gauteng High Court
PRETORIA

Fax: 086 640 1361

Dear Mr Justice Van der Merwe,

PRACTICE DIRECTIVE: PARAGRAPH 6.16 – SETTLEMENT AGREEMENTS AND DRAFT ORDER

A separate letter was addressed to you on 1 September 2011 confirming the willingness of the Law Society to participate in the stated case to determine the validity of common law contingency fee agreements, which included a proposed model common law agreement on which you still have to comment.

A further memorandum will be furnished to you shortly on the proposed stated case to convey the suggestions of the Law Society in this regard.

With reference to your letter dated 5 October 2011, the Law Society believes it is important to deal separately with agreements purporting to be in terms of the Contingency Fees Act, 1997, but which, in the view of the Court, do not comply with the Act.

Given the peremptory agreement which is required to be used in terms of the Act as proclaimed in 1999, there is limited scope for variation and/or amendment to such agreement. To the extent that the Courts encounter amendments or variations not provided for under this Act, the Law Society is obliged in terms of the Act and its statutory duty to consider complaints in this regard. It will most definitely do so, which can however only realistically be done when a complaint is received in terms of our disciplinary procedures.

Common Law Contingency Agreements

The Council has been of the view since 2002 and remains of the view that it will not be unprofessional conduct for attorneys to make use of common law contingency fee agreements outside the Act. Whilst the Council published suggested guidelines for such common law agreements, the guidelines were simply just that i.e. guidelines, and did not seek to prescribe what a common law agreement could or could not include.

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For example, although no minimum or maximum percentage is prescribed and given that attorneys and their clients are free to negotiate a contract in the same way as any other contract between competent parties, we indicated to our members that should the 25 % cap referred to in the Act, be exceeded, it will have to be justified, having regard to the various aspects which will have to be considered. This will *inter alia* include the complexity of the matter, the overhead cost structure of the firm, the extent of the disbursements to be covered by the attorney, the anticipated period that the attorney would have to carry such disbursements and wait for payment of fees, as well as other criteria such as those referred to in Rule 80 of the Law Society's rules.

Following the judgment given in the matter of *PricewaterhouseCoopers Inc./ National Potato Co-operative Ltd.* by the Supreme Court of Appeal and the lack of certainty as to whether a Court would uphold common law contingency fee agreements as a result thereof, we have cautioned our members to provide for alternative fee agreements with clients in the event that the common law agreement was disputed or ruled invalid by a Court.

The Council understands that most attorneys utilising common law contingency agreements also contract in the alternative with clients on a straight rate per hour basis and/or in terms of the Contingency Fees Act, 1997.

For all the above reasons, the Council very much welcomed your kind undertaking to consider a proposed model common law agreement which the Council truly believes is fair and workable and which will obviate many of the criticisms you have raised in your letter under reply. We would very much welcome engaging with you on this agreement.

The Council will of course investigate and seriously consider any matter referred by any Court. We believe an approved model common law agreement may address many of the issues raised by you.

I shall communicate with you again with regard to this matter as soon as circumstances permit.

Regards,

M J S GROBLER
Director