CONTINGENCY FEES ITO THE CONTINGENCY FEES ACT 66/1997

1. Introduction

1.1 The Contingency Fees Act No 66 of 1997 ("the Act") came into operation with effect from 23 April 1999 by Proclamation No R48/1999, as set out in Government Gazette No 20009 of 23 April 1999. The form of a contingency fees agreement was prescribed in the same gazette. Contingency fees are now permissible, provided that the strict guidelines imposed by the Act, the applicable form and the rules of the Society are adhered to. It is to be noted that no regulations have as yet been enacted.

1.2 A contingency fee agreement is an agreement between the practitioner and his/her client to the effect that the practitioner will charge no fees if the client is unsuccessful in the matter concerned. This system therefore enables a client (in certain circumstances) to instruct a legal practitioner on a "no success, no pay" basis. Prior to the enactment of the Act, such system was not recognised in South African Law due to common law restraints.

1.3 Should the client be successful, the fee payable to the legal practitioner (in terms of a contingency fee agreement) may be recovered from the proceeds of the litigation, and may be higher than the practitioner's normal fee. The reason is that the practitioner concerned bears the risk of not being compensated in a number of cases.

1.4 The Act builds in a number of safeguards to prevent potential abuses of the contingency fees agreement, namely -

1.4.1 "capping" the additional or "uplift" fee at an amount of 25% of the amount awarded or recovered by the client.

1.4.2 specifying the details to be set out in a contingency fees agreement.

1.4.3 permitting a "cooling off period".

1.4.4 providing for a review of such agreement by the professional body concerned.

2. **Background**

2.1 In the report of the SA Law Commission (being Project 93 – speculative and contingency fees), it is stated that "the availability of contingency fee arrangements has been described as the poor man's key to the courthouse. Its inherent characteristic of facilitating access to justice is probably the most valid argument in favour of the introduction of contingency fees".

2.2 As arrangements of this nature could easily be subject to abuse, it is necessary for strict guidelines to be adhered to in regard to the charging of contingency fees in terms of the Act.

2.3 One of the primary negative factors relates to the potential for a conflict of interests to arise, for example where a practitioner might be tempted to advise his or her client to accept a settlement, which might be lower than could be expected at trial, in order to secure his or her own fee, and to avoid the additional expenses of a trial.

3. **The criterion of reasonable fees**

Rule 14.3.11 of the CLS Rules provides that a practitioner is entitled to a reasonable fee for his or her work. The Act is premised upon the conclusion of a special arrangement between the practitioner and his or her client relating to a fee (termed "the success fee") which is greater than the "normal fee" to which a practitioner would be entitled, namely the reasonable fee which such practitioner would charge for the work, if such fee were to be taxed or assessed on an attorney and own client basis. Reference should thus be made to the provisions of Rule 14.3.11 and the tariff (be it High Court or Magistrate's Court, or Law Society) applicable in respect of the type of work. Over-reaching will still constitute unprofessional conduct.

4. **Applicable Principles**

4.1 In ascertaining the reasonableness of a contingency fees agreement, the most important element will thus be whether it is appropriate in the circumstances of the particular matter, and thus whether it best serves the interests of the client. It is to be noted in passing that criminal proceedings and family law matters are expressly excluded by the definition of "proceedings" in section 1 of the Act.

4.2 The practitioner is entitled to conclude a contingency fees agreement if in his or her opinion there are "reasonable prospects" that the client may be successful in the proceedings. This is in terms of Section 2(1) of the Act. It is a matter for debate (upon which there are divergent views) as to whether contingency fees agreements may be concluded between an attorney and his/her client in every such matter, even where there is virtual certainty that the claim will succeed (such as in certain personal injury/MVA claims). In the 1996 Annual Report of the SA Law Commission, in recommending that in the event of a matter being conducted successfully, a practitioner should be entitled to an "uplift" to a maximum of 100% of their normal fees, the view was expressed that in practice, this would mean that legal practitioners would be entitled to charge double their normal fees if they conduct their client's cases successfully.

4.3 A practitioner should always bear in mind that when a contingency fees agreement is reviewed by the professional body concerned, he or she may be called upon to furnish information setting out his or her reasons for considering the "success fee" (as it is termed in the Act) to be appropriate, and disclosing what the practitioner's usual fee in a similar matter would have been, but for the contingency fees agreement having been entered into.

4.4 A contingency fees agreement will be unenforceable when it provides for an inappropriately large fee, i.e. one which is excessive, in the circumstances of the matter, the recovery, and the relative risks borne by the practitioner. The fee must be commensurate with the work actually done. It is apparent that further debate may be required as to the circumstances entitling a practitioner to conclude a contingency fees agreement, and in what circumstances (if any) a taxing committee would consider a fee to be inappropriate, bearing in mind that the Act has explicit provisions that the "success fee" has an uplift of 100%, in other words that it may be up to double the "normal fee", (provided that it does not exceed 25% of the total amount awarded to or obtained by the client in consequence of the proceedings concerned). It is to be noted that such total amount excludes any amount awarded or obtained in respect of costs. Similar provisions were enacted in the UK in respect of what are there termed "conditional fees".

5. **Summary**

5.1 A contingency fee may only be entered into in the circumstances, and in the form contemplated by the Act.

5.2 Such agreement may only be in writing (in the prescribed form).

5.3 The practitioner concluding such an agreement should take care to ensure that the implications thereof are fully explained to his or her client. All matters dealt with in the agreement must be so explained.

5.4 The conclusion of an agreement in terms of the Act does not detract from the fundamental principle of reasonableness of a fee, taking all circumstances into account.

5.5 A practitioner should be particularly careful to avoid a potential conflict of interests between the interests of the client (which are paramount) and his or her own pecuniary interest in the outcome of the matter (which must always be subject to the interests of the client).