REPORTING ON ATTORNEYS’ TRUST ACCOUNTS IN TERMS OF THE ATTORNEYS ACT AND THE RULES OF THE LAW SOCIETIES

Introduction
In terms of section 78 of the Attorneys Act, 1979 (the Act) and specific rules of the respective Law Societies, an attorney’s trust account is required to be audited. Where an attorney’s practice is not incorporated in terms of the Companies Act, there is no further requirement for audit other than that referred to above. There has been some debate about the ambit of the auditor’s duties in terms of the Act and the specific rules of the Law Societies, particularly with regard to whether such rules extend to the business accounts of the attorney’s practice. SAICA has sought Senior Counsel’s opinion on this matter.

Legislation and rules
An attorney’s practice must comply with the requirements of the Act and with the provisions of the rules of the statutory provincial Law Society applicable to that attorney. There are four statutory Law Societies, namely:

- The Cape Law Society;
- The KwaZulu Natal Law Society;
- The Law Society of the Free State; and
- The Law Society of the Northern Provinces.

In pursuance of their powers in terms of the Act, each of the Law Societies has published rules regulating various aspects of the attorneys’ practices within their jurisdiction. The rules of the Law Societies generally are similar to each other. In this circular, reference is made to the rules of the Law Society of the Northern Provinces, as these were the rules referred to by Senior Counsel in his opinion.
Section 78(4) provides as follows: “Any practising practitioner shall keep proper accounting records containing particulars and information of any money received, held or paid by him for or on account of any person, of any money invested by him in a trust savings or other interest-bearing account referred to in subsection (2) or (2A) and of any interest on money so invested which is paid over or credited to him”.

Section 78(6) provides as follows: “For the purposes of subsections (4) and (5), ‘accounting records’ includes any record or document kept by or in the custody or under the control of any practitioner which relates to - …………………
(d) his practice”.

Rule 68.1 provides as follows: “A firm shall keep in an official language of the Republic such accounting records as are necessary to represent fully and accurately in accordance with generally accepted accounting practice the state of affairs and business of the firm and to explain the transactions and financial position of the firm including and without derogation from the generality of this rule —

68.1.1 records showing its assets and liabilities;
68.1.2 records containing entries from day to day of all moneys received and paid by it on its own account;
68.1.3 records containing particulars and information of all moneys received, held and paid by it for and on account of any person as well as of all moneys invested by it in terms of section 78(2) or section 78(2A) of the Act and of any interest referred to in section 78(3) of the Act which is paid over or credited to it, as
well as any interest credited to or on any separate trust savings or other interest-bearing account referred to in section 78(2A)’.

**Issue**

Section 78(6)(d) refers specifically to the accounting records of an attorney’s practice despite the fact that the heading to section 78 of the Act refers to “trust accounts”. It could be interpreted that the accounting records of an attorney’s practice as specified in this section include the business accounts of the practice.

Rule 68.1 seems to support this interpretation, as it makes reference to an attorney’s practice being required to keep proper accounting records in accordance with generally accepted accounting practice, which will represent fully and accurately the transactions and financial position of the practice, including records showing its assets and liabilities.

An alternative view, however, is that the auditor has no statutory duty in terms of section 78 of the Act to report on the business accounting records. In so far as the rules purport to impose such a duty, they are ultra vires the provisions of the Act.

The alternative view holds that section 78 of the Act addresses trust money. Section 78(4) refers specifically to the duties of an attorney in relation to trust money, and section 78(6) in turn refers back to section 78(4). The auditor’s duties therefore extend to reporting on the trust accounting records of the attorney’s practice and no more.

In the light of these divergent interpretations SAICA sought Senior Counsel’s opinion on whether, in terms of the Act and the rules of the Law Society of the Northern Provinces, an auditor is required to audit the attorneys’ practice business accounting records.

**Legal opinion**

Senior counsel, Schalk Burger’s opinion on the above issue is that the reference to “his practice” in section 78(6)(d) of the Act is not a reference to all accounting records of the practice including the business accounting records, but includes the business accounting...
records only to the extent necessary to enable the auditor to perform his mandate in terms of Rule 70.4 (duties of an auditor). This involves an investigation into the attorney’s trust account. This follows from the introduction to section 78(6) (“For the purposes of sub-sections (4) and (5)”).

.14 The Third Schedule of the rules (the form of report by the independent accountant) was reviewed by Senior Counsel for purposes of his opinion. He pointed out that, in terms of the Third Schedule, the independent accountant (reference used in the Third Schedule for independent auditor) has to certify, inter alia, as follows:

2. “I/we examined ... the trust accounting records and trust account transactions of the firm with specific reference to the following provisions of the Act and the following rules of your Society:

2.1 ...
2.2 Rules 68.1, 68.6 ...

.15 In Senior Counsel’s opinion, the introduction to paragraph 2 makes it clear that the accounting records were examined only in the context of the trust account and trust account transactions and not in the wider context, suggested by an unqualified reading of Rule 68.1.

.16 Since Senior Counsel gave his opinion, the Third Schedule of the rules has been replaced by a new form of report. The opening paragraph of the report now reads as follows:

“I/We have audited the trust accounts of the abovementioned firm to determine whether those accounts were maintained in compliance with sections 78(1), 78(2), 78(2A), 78(3) and 78(4) ... and with rules 68.1 ...”

The third paragraph of the report reads as follows:

“This report covers the accounting records relating to the firm's trust accounts and does not extend to the financial statements of the abovementioned firm taken as a whole”.

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Senior Counsel’s opinion was given on the basis of the earlier version of the Third Schedule of the rules. The portions of the Third Schedule quoted above lend further support to Senior Counsel’s opinion that the “accounting records” of an attorney’s practice may be examined by the auditor only to the extent that the auditor is required to perform his mandate of carrying out an investigation into the attorney’s trust accounts.

**Conclusion**

On the basis of Senior Counsel’s opinion, auditors of attorneys’ trust accounts should investigate the business accounts only to the extent that they need properly to audit the trust accounts.

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I Schoole
Executive President