

**GENERAL COUNCIL OF THE BAR
OF SOUTH AFRICA**

UNIFORM RULES OF PROFESSIONAL CONDUCT

UNIFORM RULES OF PROFESSIONAL ETHICS

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UNIFORM RULES OF PROFESSIONAL ETHICS

1. INTRODUCTION

1.1 Definitions

In these Rules unless the context otherwise requires:

- 1.1.1 Words in the singular include the plural and words in the plural include the singular.
- 1.1.2 Words denoting the masculine gender include the feminine.
- 1.1.3 “Secretary” means the person elected as such from time to time at any Annual General Meeting and includes the Assistant Secretary and any member appointed to act as Secretary or Assistant Secretary by the Bar Council.
- 1.1.4 “Attorney” shall mean a practising attorney.
- 1.1.5 “Serving advocate” shall mean an advocate on military service which shall include National Service.
- 1.1.6 “Counsel” means any admitted advocate who practises as such and includes a pupil who is a member of any Society as well as a pupil who has been accepted as such by any Society.

1.2 Interpretation

- 1.2.1 In case there is any dispute as to the interpretation of any of these Rules, the interpretation given in any such Rule from time to time by the Bar Council shall be binding on all members.
- 1.2.2 These Rules are designed for the guidance of members of the profession. They are not intended to be exhaustive nor to cover every point that may arise in the course of practise of the profession of an advocate.
- 1.2.3 In case of doubt as to the proper course of conduct to be followed by counsel, counsel is obliged, depending on the circumstances, to obtain either a ruling from his Bar Council or the advice of a member of his Bar Council or of a senior member of his Bar.
- 1.2.4 Each Bar Council shall, in exceptional circumstances, have power to depart from the provisions of these regulations and shall be obliged to notify the Secretary of the General Council of the Bar accordingly.

1.3 Knowledge of Rules

It is the duty of all members to have knowledge of these Rules in their relationship with attorneys and their fellow members and in their general professional conduct.

Note: A new member should introduce himself or herself to every other member of the Bar. This should be done by visiting each member in his or her chambers. Pupil members also have this obligation. One member must not address or refer to another male member as "Mr". Surnames should be used except in those cases where members are on first names relationship. In the case of female members the usual rules of courtesy apply and they should be addressed and referred to as "Miss" or "Mrs" as the case may be.

1.4 Appearance in other Divisions

Counsel appearing in a Division in which he does not normally practise should observe both the rules of etiquette and professional conduct prevailing in the Division in which he normally practises and those of the Division in which he is appearing, but in the case of any conflict counsel must comply with the Rules of the Division in which he normally practises.

1.5 Misconduct

With regard to misconduct other than that of a professional nature, the duty of counsel is no higher than that of an ordinary citizen.

1.6 Reporting Misconduct to Bar Council

If counsel has reasonable grounds for believing that another counsel has been guilty of unprofessional conduct, it is his duty to report the matter to his own Bar Council, unless the information is privileged and such privilege is not waived.

1.7 Seniority

- 1.7.1 Senior Counsel are all members holding Letters Patent from H.M. The Queen or from the State President. Senior Counsel shall, unless the Bar Council otherwise directs, rank in seniority in accordance with their patents. All other counsel are Junior Counsel.
- 1.7.2 The seniority of Junior Counsel shall be reckoned from the time when he was first admitted in the Republic, or Namibia, provided that if his name has at any time been removed from the Roll of Advocates, and he has thereafter been readmitted as an advocate, his seniority shall date from the time of his readmission save that such time shall be ante-dated for a period equal to the total of any periods during which his name was on the Roll of Advocates.
- 1.7.3 Seniority may be waived by any member in any proceedings provided that no Senior Counsel may waive his seniority to a Junior Counsel.

1.8 Application for Silk

A Junior Counsel who wishes to make application for senior status shall do so only after obtaining such consent as is prescribed by his Bar or Bar Council (as the case may be). He shall pursue his application thereafter in the manner laid down by his Bar Council.

2. DUTIES OF COUNSEL IN CONNECTION WITH BRIEFS

2.1 Duty to Accept Briefs

Counsel is under an obligation to accept a brief in the Courts in which he professes to practise, at a proper professional fee, unless there are special circumstances which justify his refusal to accept a particular brief. In particular, every person who is charged before the Court has a right to services of counsel in the presentation of his defence. Subject to what has been said above, it is the duty of every advocate to whom the privilege of practising in Courts of Law is afforded, to undertake the defence of an accused person who requires his services. Any action which is designed to interfere with the performance of this duty is an interference with the course of justice.

2.1.1 Counsel may decline a specialist brief if he considers himself not competent to accept the brief.

2.2 Precedence of Briefs

Subject to 2.3, an earlier brief, once accepted, takes precedence over a later brief, should any conflict arise in regard to the performance of such briefs. A member wishing to surrender an earlier brief in favour of a later brief shall do so only with the consent of both instructing attorneys.

2.3 Obligation in Regard to Appeals

If a member is briefed in a trial case, such brief constitutes a retainer, by which the attorney is entitled to the services of the member on appeal, provided he exercises this right within a reasonable time. When, therefore, a member is briefed in a trial action which is set down for the same day as an appeal under the above circumstances, the brief in the appeal shall take precedence, save with the approval of the Chairman of the Bar Council.

2.4 Counsel shall give his personal attention to all briefs. It is improper to hand on a brief received by him to anyone else, except on the instructions of the instructing attorney.

2.5 It is improper for counsel to hold a brief for other counsel, except in the case of illness or the intervention of unforeseen and unavoidable contingencies causing the latter's absence *sine lucri causa* or for any other reason which, in the opinion of the Bar Council, is good and sufficient in the circumstances. This shall include the absence of a member on Bar business.

2.6 It is improper for counsel :

- (i) to accept a brief unconditionally; or
- (ii) to retain a brief previously accepted by him;

if the circumstances are such that he should reasonably foresee:

- (i) that he will not be able to attend to the brief within a reasonable time; or
- (ii) that he would have to surrender the brief for whatever reason; and
- (iii) that the surrender of such brief could cause inconvenience and/or embarrassment and/or prejudice to:

- (a) his client; and/or
 - (a) a colleague who is to succeed him in the brief; and/or
 - (c) instructing attorney.
- 2.7 Counsel shall not draw a bill of costs for an attorney, but may give an opinion on any matter arising from the bill of costs, draw submissions in taxation disputes or appear before a taxing master.
- 2.8 It is not improper for counsel to accept a brief to settle a matters as opposed to a brief on trial.
- 2.9 It is not improper for counsel to provide a duly signed typewritten pleading drafted by him to his instructing attorney.

3. DUTIES OF COUNSEL IN CONNECTION WITH LITIGATION

3.1 Duty to Client

According to the best traditions of the Bar, an advocate should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person.

Counsel has the same privilege as his client of asserting and defending the client's rights and of protecting his liberty or life by the free and unfettered statement of every fact, and the use of every argument and observation, that can legitimately, according to the principles and practice of law, conduce to this end; and any attempt to restrict this privilege should be jealously watched.

3.2 Duty to Court

Counsel's duty to divulge to the Court material facts of which he has knowledge is governed on the one hand by his overriding duty not to mislead the Court, and on the other by his duty not to disclose to any person including in a proper case the Court itself, information confided to him as counsel. The application of this principle in particular circumstances and the question of when counsel may be said to have knowledge of facts may be difficult to resolve, and in such cases counsel should refer to the Bar Council for guidance.

3.3 Duties regarding Cross-examination of Witnesses

- 3.3.1 Questions which affect the credibility of a witness by attacking his character, but are not otherwise relevant to the actual enquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well-founded or true.
- 3.3.2 An advocate who is instructed by his attorney that in his opinion the imputation is well founded or true, and is not merely instructed to put the question, is entitled *prima facie* to regard such instructions as reasonable grounds for so thinking and to put the question accordingly.
- 3.3.3 An advocate should not accept as conclusive the statement of any person other than the attorney instructing him that the imputation is well-founded or true, without ascertaining, so far as is practicable in the circumstances, that such person can give satisfactory reasons for his statement.
- 3.3.4 Such questions, whether or not the imputations they convey are well-founded, should only be put if, in the opinion of the cross-examiner, the answers would or might materially affect the credibility of the witness; and if the imputation conveyed by the question relates to matters so remote in time or of such a character that it would not affect the credibility of the witness, the question should not be put.
- 3.3.5 In all cases it is the duty of the advocate to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person and to exercise his own judgment both as to the substance and form of the question put.

3.4 Imputations of Criminal Conduct

Counsel defending a client on a criminal charge is not entitled wantonly or recklessly to attribute to another person the crime with which his client is charged, nor unless the facts or circumstances given in the evidence, or rational inferences drawn from them, raise at the least a not unreasonable suspicion that the crime may have been committed by the person to whom the guilt is so imputed.

3.5 Professional as Opposed to Personal Interest

3.5.1 Counsel should not become personally, as opposed to professionally, associated with his client's interest. He should not, e.g., stand bail for his client, nor take part in a public movement for his reprieve.

3.6 Postponements

3.6.1 Where counsel holds a brief to appear in any forum on a particular date or dates, it shall be improper conduct for counsel to seek or arrange a postponement of the matter or to cause the hearing thereof to be deferred in order to suit counsel's convenience unless:-

3.6.1.1 Counsel has obtained the consent of his instructing attorney to whom counsel has fully disclosed the reasons for requiring the matter to be postponed or deferred and counsel has been assured by the attorney that the client has agreed to such postponement or deferment; and

3.6.1.2 in any matter in which another party or other parties is or are involved, counsel has similarly disclosed the reasons for seeking the postponement or deferment to the legal representatives of the other party or parties.

3.7 Attendances of Attorney with Counsel in Court

3.7.1 Counsel shall not appear in the Constitutional Court, the Supreme Court of Appeal, the High Court or the Labour Court without the attendance of a representative of his briefing attorney provided that if the matter is of such a nature as not to warrant the costs of the attendance of more than one practitioner then that representative may be a candidate attorney or a clerk ("paralegal") who is able to communicate telephonically with the briefing attorney.

3.7.2 The same rule shall apply to inferior courts and lay tribunals unless the matter is of such a nature as not to warrant fees for the attendance of more than one practitioner provided that:-

3.7.2.1 counsel is able to communicate with the attorney by phone (tele- or cell-);

3.7.2.2 no civil action shall be settled or other decision made by counsel which requires the instruction of the briefing attorney without communication with the attorney.

3.7.3 This rule does not affect the entitlement of the briefing attorney to delegate his authority to another attorney and where that is done counsel shall regard the delegatee as the briefing attorney.

***Paragraph 3.6 inserted vide 1991 AGM resolution
Rule 3.7 inserted vide 2006 AGM resolution***

4. GENERAL PROFESSIONAL CONDUCT

4.1 Interviewing Clients and Witnesses

4.1.1 Save in exceptional circumstances, and save in *pro deo* and dock defences clients and witnesses should not be interviewed except in the presence of the attorney or his clerk.

4.1.2 Consultations should ordinarily be held in counsel's chambers or at his home.

4.1.3 Consultations may be held in attorneys' offices, if:

4.1.3.1 the attorneys' offices are situated in a centre other than the centre where counsel practices; or

4.1.3.2 the bulk of the documents, the number of persons involved, or other special circumstances make a consultation elsewhere than in the attorneys' office impracticable, provided that the prior consent of a member of the Bar Council be obtained.

4 . 2 Interviews after Witnesses have been sworn

- 4.2.1 It is, in general, undesirable to interview any witness after he has been sworn or has made a solemn declaration to speak the truth.
- 4.2.2 It is improper for counsel to interview a witness who is under cross-examination, unless circumstances make such an interview necessary. Where such circumstances exist, counsel who desires to hold the interview must inform his opponent before doing so.
- 4.2.3 It is in general improper for counsel to interview a witness after the cross-examination is completed and before re-examination.
- 4.2.4 In cases where circumstances render it necessary to interview a witness under cross-examination or before re-examination and the opponent objects, the court should be asked for permission.

4.3 Interviewing persons likely to be Opponent's Witnesses

4.3.1 Civil Proceedings

A litigant's legal representatives are entitled, at any time and for the purpose of obtaining information which may assist the litigant to prepare or to present any part, aspect or stage of his case, to interview any person whom they have reason to believe is in possession of such information. In particular, they cannot be deprived of this right by any of the circumstances that the other side has subpoenaed such persons to testify in the litigation, or has otherwise arranged for him to do so, or has interviewed or arranged to interview him in connection with the litigation, or has obtained or arranged to obtain a statement from him in that connection. The only limitations to this right are that :

- (a) when the litigation has commenced, but before such person has testified therein, an interview with him may not be held or, if it has started, proceed further once it is discovered that the other side has taken any of the above steps, unless and until the other side's legal representatives have been timeously notified by whatever means are adequate in the circumstances of the intention to hold or to proceed with the interview;
- (b) after such person has testified in the litigation as a witness for the other side, but before the litigation has finally been determined, he may not be interviewed in the absence of the other side's legal representatives, unless the latter, having been timeously notified by whatever means are adequate in the circumstances of the intention to hold the interview, have declined to attend it.

In the case provided for in paragraph (a) above :

- (i) it is the duty of the litigant's legal representatives, when the circumstances known to them are such that it is reasonable for them to suppose that the other side may have taken any of the above steps, to ascertain from such person whether or not the other side has in fact done so;

- (ii) the other side is not entitled to attend or to be represented at the interview.

In both the cases provided for in paragraphs (a) and (b) above, the other side's objection to the interview does not preclude the litigant's legal representatives from holding or proceeding with it.

4.3.2 Criminal Proceedings

- (a) Unless they have obtained the permission of the attorney-general or of the prosecutor to do so, and unless they comply with any conditions which either of the latter may have imposed when granting such permission, the legal representatives of an accused person may not, at any time after the accused person has been arrested or charged and before he has been convicted or acquitted in respect of the charge against him, interview any other person in connection with such charge or the evidence relating thereto whom they know to be a witness for the prosecution in relation to such charge, unless the court orders otherwise as provided by paragraph (b).
- (b) In the event of the attorney-general or the prosecutor refusing permission sought or imposing conditions which cannot reasonably be fulfilled, the legal representatives of an accused person shall be entitled to interview a state witness if so authorised by a competent court and subject to such conditions as may be imposed by that court.
- (c) It is the duty of the legal representatives of an accused person, when they do not know whether or not any other person is a witness for the prosecution in relation to the charge against the accused person but when the circumstances are such that it is reasonable to suppose that such other person may be, to ascertain either from such other person or from the prosecutor or the police, before endeavouring to interview such other person in circumstances in which to do so is prohibited in terms of paragraph (a) above, whether or not such other person is in fact a witness for the prosecution in relation to such charge.

- (d) For the above purpose of paragraphs (a) and (c) above, a witness for the prosecution in relation to a charge against an accused person:
- (i) is someone from whom at any time, whether before or after the accused person was arrested or charged, the prosecutor has or the police have obtained a statement in connection with such charge or the events from which it has ensued;
 - (ii) is also someone who, having been called by the prosecutor to do so, has testified during the trial resulting from such charge;
 - (iii) is, notwithstanding that the prosecutor has, or the police have, obtained a statement from him in connection with such charge or the events from which it has ensued, not someone whom the prosecutor has decided not to call to testify during the trial resulting from such charge.
- (e) It is the duty of every prosecutor to afford access, on request from the legal representatives of an accused person, to the statements of witnesses (whether or not the prosecution intends to call such witnesses) and such of the contents of a police (or investigator's) docket as are relevant to enable that accused person properly to exercise his right of fair trial, or on the ground that the prosecutor has reason to believe that there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or state secrets, or on the ground that there is a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice, provided that the prosecutor may decline such request if such access was not justified for the purposes of a fair trial or otherwise prejudicial to the proper ends of justice unless such disclosure is ordered by a competent court.
- (f) Where there has not been prior disclosure of the statements of witnesses in terms of paragraph (e), it is the duty of every prosecutor:

Rule 4.3.2.(e) amended vide 1996 EXCO resolution

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- (i) when he has decided that any person from whom he has or the police have obtained a statement in connection with the charge against an accused person or the events from which it has ensued will not be called to testify during the trial resulting from such charge, forthwith to notify the defence of that decision, to supply it with all the statements of such persons which are in his possession, except for any part thereof protected from disclosure by reason of some lawful privilege, and to inform it of any other statements of such person previously in his possession and of the reason for their having ceased to be;
- (ii) when any person from whom he has or the police have obtained a statement in connection with the charge against an accused person or the events from which it has ensued has been called to testify during the trial resulting from such charge, and when while doing so such person has contradicted or materially deviated from the contents of such statement, immediately to notify the defence of that circumstance and to supply it with such statement.

(g) For the purposes of paragraph (f) above, the defence is:

- (i) any legal representative of the accused person in a case in which he is legally represented;
- (ii) the accused person in a case in which he is not legally represented.

4.4 Affidavits from Witnesses

Affidavits should ordinarily not be obtained by legal practitioners from prospective witnesses, except in cases in which their evidence is intended to be presented by means of the production of affidavits deposed to by them.

4.5 Counsel Giving Evidence or Making Affidavits

4.5.1 Counsel must avoid, as far as is possible, putting himself in any position where he may have to make statements or give evidence in relation to matters which are in dispute in the case in which he is appearing.

4.5.2 In all cases, before counsel may make an affidavit or volunteer to give evidence concerning matters which became known to him while acting in his professional capacity, permission of the Bar Council must first be sought.

4.6 Evolving Schemes on behalf of Clients to evade Provisions of the Law

Counsel is entitled to advise his client whether any proposed conduct will contravene the law. Further, he is entitled to advise a course of conduct which will so order the affairs of the client as to avoid liability under taxing and other similar statutory provisions.

Counsel is clearly not entitled to devise a scheme which involves his client in the commission of any offence.

4.7 **Gifts from Clients**

It is not improper for counsel to accept from a client a gift of money or a gift of substantial value, which is intended as an additional fee, or as a reward for professional services rendered, provided that such gift is received by him through his attorney in the matter, and that the gift and the circumstances thereof are notified to the Bar Council. The Bar Council may in its discretion disallow the receipt of part or all of such gift if it considers that its size or nature and/or the circumstances under which it was received or tendered warrant such disallowance.

It is permissible to receive gifts of a personal nature from a client without notice to the Bar Council, but apart from such the fact and the circumstances of every honorarium accepted by a member must be reported to the Bar Council.

4.8 Company Meetings

If counsel is briefed to make representations or to speak on behalf of any client, e.g. at a company meeting, he should disclose that he is appearing as counsel even though he may also be entitled to appear in his own right.

4.9 Duty to Remain in Court

Counsel should remain in Court after he has completed his matter until counsel in the next matter has risen.

4.10 Interviewing Judicial Officer

It is undesirable, save in special circumstances, for counsel in a contested case in the absence of his opponent and without the latter's consent, to seek to interview the judicial officer who is hearing or is about to hear the case.

4.11 Position of Counsel briefed in a criminal case who is informed by his client that he is guilty of the offence charged

Where a client makes a confession to his counsel either before or during criminal proceedings, counsel should explain to the client the basis on which counsel may continue with the case, namely:

Counsel may not in the proceedings assert that which he knows to be untrue nor may he connive at or attempt to substantiate a fraud or an untruth.

He may appropriately argue that the evidence offered by the prosecution is insufficient to support a conviction and may take advantage of any legal matter which might relieve the accused of criminal liability.

He may not, however, set up an affirmative case which he knows to be inconsistent with the confession.

If the client, having been so informed, desires counsel to appear on the abovementioned basis, counsel should continue to hold the brief and act in accordance with the principles set out above. If the client desires counsel to give up the brief, counsel must do so.

4.12 Ill-feeling and Personalities between Counsel

Clients, not counsel, are the litigants. Whatever may be the ill-feeling existing between clients it should not be allowed to influence counsel in their conduct and demeanour towards each other or towards suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is improper to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

4.13 Judgment reserved - Further material to be placed before court

It is improper for counsel to attempt to place any further material, of whatever nature, before the court after judgment has been reserved without the consent of his opponent. Such consent should not be unreasonably withheld, particularly when the request made is to refer the court to authorities which will assist it in giving a correct judgment. Nonetheless, if consent is refused, the proper course is to request the court, through the Registrar, to receive the further material or, where appropriate, to make an application to re-open the case.

4.14 Appearances in Court

4.14.1 When appearing in court, counsel should wear clothes which are suitable to be worn under the gown and/or in court.

4.14.2 A member should arrange to be introduced to the judge or magistrate before his first appearance before that judge or magistrate. The introduction should be arranged with the judge's registrar.

4.14.3 In attendance at the Motion and Divorce Courts new members should sit in the back row benches reserved for advocates. The front row, in particular, should be left for the more senior members of the Bar.

4.15 No Right to Participate in other Callings while in Practice at the Bar

4.15.1 A member of the Bar is entitled to engage directly or indirectly in any occupation unless:

(i) his association with that occupation adversely affects the reputation of the Bar; or

(ii) such engagement prejudices the ability to attend properly to the interest of clients.

4.15.2 There is no objection to a member of the Bar holding a post as a part-time lecturer at a university or other educational institution which does not interfere with his carrying out his normal duties as a member of the Bar, but the holding of a full-time teaching post is incompatible with active practice as a member of the Bar save insofar as exemption is granted by the GCB in respect of Associate Members.

4.16 Partnerships

No relation in the least degree resembling partnership in practice is permissible.

4.17 **Advertising**

4.17.1 Counsel may advertise.

4.17.2 An advertisement must be factually true and must not be of a kind that is or might reasonably be regarded as:

4.17.2.1 false, misleading or deceptive;

4.17.2.2 in contravention of any legislation;

4.17.2.3 vulgar, sensational or otherwise such as would bring a court, the counsel, another counsel or the legal profession into disrepute or ridicule.

4.17.3 Counsel may on the basis of specialised qualification or experience and with the prior approval of his or her Bar Council advertise or hold himself or herself out as being a specialist or as offering specialist services.

Rule 4.17 amended vide 2002 AGM resolution.

4.18 Publications by Counsel

4.18.1 Legal Publications

4.18.2

4.18.3 Non-legal Publications

- (a)
- (b)
- (c)
- (d) Members of the Bar should not write articles in non-legal publications with regard to pending cases nor cases where the time for appeal has not expired.
- (e) It is contrary to professional etiquette for counsel to engage in newspaper correspondence or to issue press statements on the subject of cases in which they are or have been themselves concerned as counsel.
- (f) It is undesirable for a member to express an opinion in the press, by letter, article, interview or otherwise on any matter which is still pending in the Courts. Notwithstanding the foregoing, a member may express an opinion in the media, in general terms, on an issue which is still pending, provided that the member does not thereby purport to pre-judge the result.

Rules 4.18.1, 4.18.2, 4.18.3 (a) - (c) and 4.18.3(g) deleted vide 1991 AGM resolution

Rule 4.18.3(f) amended vide 2003 AGM resolution

4.19 Broadcasting and lectures

Rules 4.19.1 (l), (ii), (iii) and 4.19.2 deleted vide 1991 AGM resolution

4.20 Appearance on Television

Rules 4.20.1, 4.20.2, 4.20.4, 4.20.5, 4.20.6 and 4.20.7 deleted vide 1991 AGM resolution.

Rule 4.20.3 deleted vide 1996 EXCO resolution.

4.21 Statements and comments to the media

4.21.1 A member must not issue statements to any news or current affairs media in connection with any matter in which he/she is or has been briefed or instructed.

4.22 Classified Directories

Rule 4.22 deleted vide July 2008 AGM resolution

4.23 Publication and Discussion of Bar Matters

- 4.23.1 Proceedings of Bar meetings are strictly private and confidential and should on no account be communicated to the Press, unless the Bar Council or the Society specially indicates that communication should be made. The publishing of a list of office holders is, however, permissible.
- 4.23.2 Discussions with outside persons of any matter concerning professional work at the Bar and its members should be conducted with the greatest discretion. Many such matters and much of the information which comes to the knowledge of members in their practices or in the course of discussion with fellow members is of a confidential nature, and it should be treated accordingly.

4.24 Complaints regarding Attorneys

- 4.24.1 Counsel desiring to complain to the Law Society about an attorney's conduct should communicate with the Society only through the Bar Council.
- 4.24.2 Once the matter has been reported to the Law Society, it must be left in the hands of the Bar Council and the Law Society.

4.25 Judicial Appointments

Acting Appointments : Duty to deliver judgments

4.25.1 It shall constitute unprofessional conduct for a member who has acted as a judge to delay the delivery of judgment unreasonably in a matter heard by the member, which shall be determined from the time of completion of the relevant court proceedings.

4.26 Devil

- 4.26.1 It is essential that practising advocates should retain their professional independence. Any system of payment which converts a devil's services into employment by the members requesting such services is undesirable. Thus, although it is not improper for the member requesting such services to show his appreciation therefor in tangible form, any form of payment which obliges the devil to do the work is undesirable.
- 4.26.2 It is not within the etiquette of the profession for a devil to be obtruded on the notice of an attorney in respect of any brief worked up by the devil. The latter should not be present at a consultation, nor should he take any active part in the conduct of the case in court.

4.27 Robing

Counsel should robe before the Constitutional Court, the Supreme Court of Appeal, the High Court, Water Court, Income Tax Court, Court of Commission of Patents, the Special Court of Appeal against decisions in terms of the Maintenance and Promotion of Competition Act, the Land Claims Court, the Labour and Labour Appeal Court, all other courts and tribunals of a status similar to the High Courts and such other tribunals as the Bar Council may direct.

4.28 Notice to Opponent

- 4.28.1 Where a member is not compelled according to the Rules of Court to deliver heads of argument, but nevertheless decides to do so *ex gratia*, there is no rule of professional practice, etiquette or courtesy, which requires him to make such heads available to his opponent, unless those heads have been made available to the court.
- 4.28.2 Where a member does, however, hand in heads of argument *ex gratia*, he must not hand his heads to his opponent at any time later than that on which he has handed the heads to the Court.
- 4.28.3 Apart from those cases where the Rules of Court make it obligatory to do so, a member must inform an opponent timeously of the fact:
- (a) that a legal point, not evident on the papers, which may catch an opponent unawares and may embarrass him is being taken;
 - (b) that it is proposed to take an exception or a technical point, or to make an application under Rule 30 relating to pleadings, which may embarrass his opponent.

Rule 4.28.3 amended vide 1989 EXCO resolution

4.29 Recommending Counsel or Attorneys

4.29.1 Counsel of sufficient experience and standing may request his or her instructing attorney to instruct a particular counsel, who is junior, to act with him or her in any matter and may to that end surrender such portion of his or her fee as he or she may agree with the instructing attorney and the junior counsel concerned, the amount of such portion to constitute junior counsel's fee in the matter, such fee to be paid to the junior counsel by the particular instructing attorney.

4.29.2 Save in exceptional circumstances, it is improper for counsel to recommend a particular attorney or firm of attorneys to lay clients.

4.30 Appearance before tribunal of which counsel is a member

Save in exceptional circumstances, and with the prior consent of his Bar Council, it is improper for counsel to appear on brief before a statutory court, board and tribunal of which he is, at the time of his appearance, a permanent, temporary or acting member.

**Rule 4.29.1 amended vide resolution adopted at July 2000 AGM.
Rule 4.30 inserted vide resolution passed at 1986 Exco meeting.**

5. **BRIEFS**

- 5.1.1 Counsel may render professional service for reward only if briefed to do so.
- 5.1.2 Counsel may be briefed orally, but it is desirable that he receives a written brief.
- 5.1.3 Counsel may insist on a written brief and may refuse to continue to act unless he is furnished with a written brief.
- 5.1.4 In the case of *pro deo* defences counsel is briefed when the Bar Council, or the Court, or the Attorney-General, allocates the defence to him.
- 5.1.5 Counsel who is briefed at any stage of a case (e.g. to draw the particulars of claim or other document initiating the proceedings or to draw pleadings or settle affidavits or to appear in any interlocutory application in any proceeding) thereby receives a special retainer and is, therefore, ordinarily entitled to be briefed at every stage throughout that case, unless he is given express notice to the contrary when receiving such first brief.
- 5.1.6 Rule 5.1.5 does not apply when:
 - 5.1.6.1 counsel is briefed on a purely formal motion which does not necessitate the merits of the case being laid before him. (An application for leave to sue by way of edictal citation is not regarded as a purely formal motion).
 - 5.1.6.2 consolidation of actions is ordered in terms of the Rules of Court.
 - 5.1.6.3 two counsel have been briefed: the senior need not be briefed in relation to requests for further particulars, interlocutory applications or the drawing of documents for such applications.
- 5.1.7 Counsel who has appeared for a party in any proceeding, is not entitled as of right to brief on appeal.
- 5.1.8 If counsel is offered a brief to which other counsel is entitled, and such other counsel states that he has not given up his claim to the brief, counsel to whom the brief is being offered must ascertain from the attorney why the brief has not been offered to counsel who is normally entitled to it.

Unless a sufficient explanation is offered, counsel offered the brief must refuse to accept it, or, if he has received it, return it. In considering what is a sufficient explanation, the following shall apply:

- 5.1.8.1 The wish of the lay client to be represented by counsel other than counsel so entitled is a sufficient explanation.
- 5.1.8.2 If the attorney explains that he is not prepared to pay the fee required by counsel normally entitled to the brief, counsel to whom the brief is offered must first enquire from counsel normally entitled to the brief whether that is in fact so.
- 5.1.8.3 Change of an attorney is not in itself a sufficient explanation.

5.2 Retainers

- 5.2.1 (a) No retainer shall be binding on a member unless given in writing.
- (b) A retainer is the retainer of the lay client.

5.2.2 General Retainers

- (a) No general retainer shall be binding for more than one year from the date of receipt thereof.
- (b) Counsel is not bound to accept a general retainer.
- (c) A general retainer implies that:
- (i) during the existence of the retainer the holder will be briefed in every matter in which his client is concerned and in which it is appropriate, having regard to his standing and the nature of the matter, that he should be briefed.
 - (i) the holder will accept all briefs in which it is appropriate having regard to his standing and the nature of the matter that he should be briefed, which are offered in matters in which his client is concerned if it is possible for him to do so and that he will not act for the other side.
- (d) The holder's obligation under a general retainer does not require him to give up a brief which he has already accepted from another client, even if it is possible for him to do so.
- (e) A general retainer applies only to proceedings to which the client on whose behalf the retainer was given is a party. A general retainer on behalf of a body corporate or unincorporate does not apply to any proceeding to which the individual members or a member of the body and not the body itself are parties. A general retainer on behalf of a holding company does not, in the absence of an express arrangement, apply to proceedings in which a subsidiary company, and not the holding company itself, is a party.

- (f) A general retainer applies to a proceeding in which the client on whose behalf it is given appears separately, but not to a proceeding in which he appears jointly with another person.
- (g) The giving of a general retainer confers no authority on counsel. A brief must be delivered in order to authorise counsel to take any step in a proceeding.
- (h) If, after the commencement of any proceeding to which a general retainer applies -
 - (i) no brief or special retainer is delivered to the retained counsel within a reasonable time, or
 - (ii) the retained counsel is offered a brief on the other side and has enquired of the attorney acting for the lay client in such proceeding whether he is to receive a brief or special retainer, and has not received a brief or special retainer within seven days or has received an answer in the negative, the counsel may treat the general retainer as determined and with or without determining the general retainer may accept a brief or retainer from the party on the other side provided that:-
 - (aa) the non-delivery of a brief to a senior holding a general retainer on any occasion on which it is usual to instruct a junior counsel only and junior counsel only is in fact instructed, shall not operate to determine the general retainer of the senior.
 - (bb) where more than one junior counsel hold general retainers the delivery of a brief to one only of such counsel, on any occasion on which it is usual to instruct one junior counsel only is in fact instructed, shall not determine the general retainer of the other or others of such counsel.

The same rule shall apply where more than one senior counsel hold general retainers.

- (cc) the non-delivery of a brief or special retainer which counsel has intimated that he cannot be required or ought not to accept shall not operate to determine a general retainer.

It follows from the above that the fact that counsel who is offered a brief on behalf of a lay client knows that another counsel has a general retainer from that client, does not preclude the former from accepting the brief.

5.2.3 Special Retainers

- (a) A special retainer implies that the member will take the brief if possible, and that he will not act for the other side. The acceptance of a special retainer does not oblige counsel to accept the brief on dates for which he would not otherwise have been or have held himself available to accept briefs.
- (b) There is no obligation on counsel to return a special retainer fee should he subsequently find it necessary to return his brief for any proper reason. The consideration for a special retainer fee is that the recipient will not take the brief for the opponent.
- (c) A counsel who has received a special retainer is entitled to a brief on every occasion on which counsel is briefed in a proceeding to which the special retainer applies.

Provided always that a special retainer does not entitle a senior to a brief on any occasion on which it is usual to instruct a junior counsel only, and a junior counsel only has, in fact, been instructed. When more than one junior counsel has been retained, only one of such junior counsel is entitled to a brief on any occasion on which it is usual to instruct one junior counsel only, and one junior counsel only has, in fact, been instructed.

5.2.4 Reservation of Hearing Date

If counsel, at the request of an attorney, has agreed to reserve a hearing date and has done so, he is entitled to charge a fee on hearing, even when no brief has been delivered, unless informed by the attorney a reasonable time beforehand that his services will not be required on that date.

5.3 Representations to Public Officials

- 5.3.1 Members are permitted to accept briefs to make representations to ministers, officials or statutory bodies, but are not obliged to accept such briefs.
- 5.3.2 It is desirable that all interviews should take place in the presence of counsels instructing attorney, except where this would stultify the purpose of the interview or would serve only to increase the costs unnecessarily and substantially.
- 5.3.3 (a) For work of this nature counsel should charge on the basis of his usual fees for ordinary work. (See Rule 7.1.1)
- (b) It is improper for counsel in assessing his fee to have regard to any relationship, friendship or influence with or special means of access to the minister, official or body in question.
- 5.3.4 In general, unless there are good reasons to the contrary, appointments for interviews should be arranged by the instructing attorney and not by counsel.
- 5.3.5 Information which is required to be conveyed from the minister, official or body concerned to the client should, wherever practicable, be conveyed by the instructing attorney.
- 5.3.6 Counsel may make written representations to such persons or bodies. Such representations should ordinarily be in the form of a memorandum which may be signed by counsel, but should be forwarded to the person or body concerned through his instructing attorney. It is undesirable for counsel to conduct correspondence with such persons or bodies on behalf of the client and such correspondence should ordinarily be dealt with by the attorney.
- 5.3.7 It is improper for counsel briefed in such matters:
- (a) to seek to procure the exercise of a discretion or the grant of an indulgence to his client where such exercise or grant would be contrary to any law;

(b) to add his personal recommendation or approval to an application made by him on behalf of his client.

- 5.3.8 Where there is a provision in any law for the determination of a dispute by any kind of prescribed procedure, including but not limited to an adversary procedure or public hearing, it is improper for counsel to make private representations on behalf of his client to the tribunal or any member of it instead of or in addition to the prescribed procedure, or to go behind the tribunal by making private representations to any minister, official or other body to whom the tribunal is required to report or to make recommendations.
- 5.3.9 The provisions of sub-rules 5.3.4, 5.3.5 and 5.3.6 above shall not apply to dealings between counsel and the Attorney-General or Senior Public Prosecutor or members of their staff.

5.4 Briefs from Spouses or Relatives

Rule 5.4 deleted vide July 2008 AGM resolution

5.5 Briefs which could cause Embarrassment

5.5.1 Counsel is not obliged to accept a brief if he has previously accepted a brief to advise another person on or in connection with the same matter. He is precluded from doing so:

- (a) if any confidential information having any bearing whatsoever on the matter in question was disclosed to him as a result of his first brief; or
- (b) if it might reasonably be thought by the person first advised that, if counsel were to accept the second brief, he would be prejudiced.

5.5.2 Opinion given to the Other Side

Where counsel has given an opinion to one side and is not briefed to argue the case for that side, he is not necessarily precluded from taking a brief to argue the case for the other side. If he has been placed in possession of facts which would embarrass him in the conduct of the case, he must refuse the brief. In all cases, however, he must obtain the permission of both attorneys before he can accept the brief.

5.5.3 Counsel previously acting as Commissioner or Counsel in enquiry under the Companies Act

5.5.3.1 Counsel who has sat as a Commissioner at an enquiry held in terms of the Companies Act and has submitted the report on the evidence is not entitled to accept a brief on behalf of the State to prosecute any of the Directors or Officers of the Company for contraventions of the Act or for any offence revealed during the enquiry, nor is he entitled to accept a brief for the defence of any person who gives evidence during the enquiry.

5.5.3.2 Counsel who has appeared for the Liquidator at an enquiry under the Companies Act is not permitted to accept a brief on behalf of any person charged with an offence in connection with the Company in question.

5.5.4 Appeals

Where counsel has held a brief for a party in any proceeding he is not entitled to accept a brief on appeal for the opposite side.

5.6 Independence of Counsel

5.6.1 A brief should not be accepted if counsel occupies a position with respect to the client or an opposing litigant which compromises, or which might reasonably be expected to compromise, counsel's independence. A brief should also not be accepted where a position previously occupied by counsel with respect to a client or opposing litigant compromises, or might reasonably be expected to compromise, counsel's independence.

For example:

- (i) A director should not accept a brief on behalf of a company of which she or he is a director.
- (ii) A member of a municipal council should not accept a brief on behalf of that council.
- (iii) A person who was previously a director of a company ought not to accept a brief on behalf of that company with regard to a matter which arose when counsel was a director.
- (iv) Counsel who was previously an attorney acting in a matter should not accept a brief as counsel in the same matter where the extent of his or her control and direction of the matter as an attorney, or counsel's established relationship with the client, would compromise the expectation that counsel's advice with respect to and conduct of the matter be independent.
- (v) A brief should not be accepted where, by reason of any particular relationship (familial or otherwise) between the client and counsel, or between an opposing litigant and counsel, counsel's ability to act independently would be compromised.

New rule 5.6 adopted vide July 2008 AGM resolution

- 5.6.2 Where a brief should be refused under rule 5.6.1 by reason of counsel's position or previous position with respect to the client, a member may nevertheless accept such brief with the prior permission of the Bar Council granted in exceptional circumstances, but subject to such conditions as the Bar Council may stipulate, which may include a direction that counsel's position or previous position with respect to the client be disclosed to any court or tribunal before which counsel may appear on such brief.
- 5.6.3 A brief should not be accepted in circumstances where, by or on behalf of counsel, and deliberately or otherwise, undue influence has been brought to bear upon the client to make the decision to brief such counsel, whether such undue influence was exercised prior to or at the time when counsel was a member of a constituent Bar.

5.8 Arbitrations

- 5.8.1 A member who acts as arbitrator or umpire in an arbitration should obtain a brief from an attorney, except in the case of a member receiving an instruction from a formal arbitration body recognised by the General Council of the Bar of S.A. Normally the attorney who approaches the advocate to obtain his consent to act in such capacity should provide the brief.
- 5.8.2 A member may not appear before an arbitrator unless he is briefed by an attorney.
- 5.8.3 When acting for any tribunal or person whose decision has been, is about to be or may be attacked or questioned on review, counsel may settle the formulation of the reasons for such decision, for the purposes of their disclosure either in affidavits filed in the review proceedings or in any other document supplying them, by expressing them in language which he/she regards as appropriate and simultaneously indicative of their true meaning, as intended by the tribunal or person who gave the decision.

Counsel may not, however, when settling the formulation of such reasons, in any material respect or to any material extent add to, subtract from or alter the true meaning of such reasons, as intended by such tribunal or person.

5.9 Curator Ad Litem

- 5.9.1 A member who has been approached by an attorney to act as curator-ad-litem should obtain a brief from the attorney who nominated him to act in such capacity.
- 5.9.2 Where counsel has been appointed curator-ad-litem in relation to any matter and the applicant's attorney is thereafter blacklisted, the curator, having been appointed by the Court, may not refuse to continue as such. His fees as curator may be charged against and recovered from the estate.

5.10 Commissioner

A member who has been approached by an attorney to act as a Commissioner under the Companies Act should obtain a brief from such attorney.

5.11 Senior Junior relationship

5.11.1 It is recommended that senior counsel be briefed with another senior or a junior:

- (A) in any matter in which, in the opinion of the senior counsel the circumstances warrant and make it desirable that another senior or junior be employed, and
- (B) in any other matter in which in accordance with the existing practice of the society concerned as at the 1st January 1986 another senior or a junior was required, unless the society in general meeting otherwise resolves.

5.11.2

5.11.3

5.11.4 A member may, but is not obliged, to hold a brief or act professionally with an attorney who is in private practice in the Republic, but only on the following basis:

- (a) The matter is one which the circumstances warrant and make it desirable that two or more counsel be employed;
- (b) The member's instructing attorney shall also be the instructing attorney for the attorney concerned;
- (c) The attorney concerned is not the member's instructing attorney and is also not from or associated with the firm of attorneys to which the member's instructing attorney belongs;
- (d) The member shall obtain the permission of the Bar Council in all matters where the member is required to act as a junior to an attorney."

Rule 5.11.1 amended w e f 1/5/86

Rule 5.11.2 deleted w e f 1/5/86

Rule 5.11.3 deleted vide July 2004 AGM resolution

Rule 5.11.4 amended vide March 2008 Exco resolution

- 5.11.5 Where two seniors are retained in a case it is recommended that, in addition to them, a junior should also be briefed.
- 5.11.6 A senior may be briefed without a junior in any case which the senior was engaged before taking silk. The senior shall be considered to have been engaged in a case if he was briefed at any stage in the proceedings, but not if he has merely advised before the institution of the proceedings or on the prospects of appeal. For the purpose of this rule, any appeal shall be considered as part of the original proceedings.
- 5.11.7 It is the duty of a junior who is briefed with a senior to be present throughout the hearing of the case in which he has been briefed and it is improper for him to absent himself therefrom in order to attend to any other brief, provided that in special circumstances, which could not reasonably have been foreseen, a junior may, with the consent of his senior and instructing attorney, absent himself from court during a portion of the hearing, but if, as a result thereof, he is absent during any substantial part of any day's hearing, he shall not be entitled to charge a fee in respect of that day, except with the consent of his instructing attorney and the special leave of the Bar Council.

5.12 Brief must be from Attorney or Patent Agent

5.12.1 No member shall take instructions or fees except through the medium of an attorney, provided always that a member may accept a brief from a duly qualified Patent Agent in any Court in which he is entitled to practise or on opinion.

Provided further that at the Criminal Sessions of a Superior Court a member may, when requested thereto by a prisoner, undertake the defence of such prisoner without the intervention of an attorney for a fee not exceeding R100,00, provided further that a member may at the request of the Judge undertake a criminal defence or any other matter.

5.12.2 The first paragraph of sub-rule 5.12.1 does not apply to prosecutions undertaken for the State or to *pro deo* and dock defences, or to matters undertaken at the request of the Court.

5.12.3 Referral

A member may take work from a person who is not a practising attorney:

5.12.3.1 who is employed by or works for a community-based law centre, university clinic, the BLA Legal Education Centre or any other institution or organisation which the GCB determines is similar in nature; or

5.12.3.2 in circumstances which the GCB determines it is in the public interest to do so;

subject to such conditions as the GCB may from time to time impose, including, but not limited to -

(1) A requirement that a member may accept instructions to act without the support of an attorney only if he or she is satisfied that the work in question can be properly and competently carried out without such support, having regard in particular to the limits of the scope of an advocate's functions;

- (2) A requirement that any prospective client should be fully advised, in writing, of the services that advocates offer and of the limits of the scope of those services;
- (3) A requirement that all instructions to act without an attorney should be accepted on appropriate written terms of work, that a copy thereof be lodged in such instance with the secretary of the member's Bar and that detailed case records should be maintained; and
- (4) An obligation to advise a client if at any stage the member considers that the assistance of an attorney is needed, and for the member to decline to act (or cease to act) if such advise is not heeded.

5.12.4 **Pro Bono work**

A local Bar Council shall require its members to undertake pro bono work on the basis that :

- 5.12.4.1 it allocates such work amongst its members on a basis that is fair, reasonable, equitable and transparent;
- 5.12.4.2 where a member is required to take instructions from a person who is not a practising attorney, the provisions of rule 5.12.3 shall apply;
- 5.12.4.3 a member may recover fees in terms of a written contingency fee arrangement lodged with and approved by the Bar Council prior to the commencement of the work.

***Rules 5.12.3 and 5.12.4 adopted vide 2002 AGM resolution
Rule 5.12.4 amended vide 2007 AGM resolution***

6. LEGAL ASSISTANCE

- 6.1 It is the duty of all counsel to undertake pro deo defences when directed to do so by the Bar Council.

6.2 Circuit Court Prosecutions

Prosecutions will be allocated by the Secretary in accordance with directions given from time to time by the Bar Council in consultation with the Attorney-General.

6.3 Legal Aid

- 6.3.1 It is the duty of all counsel, so directed by the Bar Council, to undertake legal aid matters.
- 6.3.2 Payment in respect of legal aid matters takes place in terms of the prevailing agreement between the GCB and the Legal Aid Board.
- 6.3.3 Where counsel claims payment of his fees directly from the Legal Aid Board he shall not thereafter seek to claim or recover payment of those fees from the instructing attorney.

7. FEES

7.1 Fees must be reasonable

7.1.1 Counsel is entitled to a reasonable fee for all services. In fixing fees, counsel should avoid charges which over-estimate the value of their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his lack of means may require a lower charge, or even none at all.

In determining the amount of the fee, it is proper to consider:

- (a) the time and labour required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause;
- (b) the customary charges by counsel of comparable standing for similar services; and
- (c) the amount involved in the controversy and its importance to the client.

No one of the above considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

**[This rule equally applicable to contingency fees]*

7.1.2

7.1.2.1 Save as set out below, counsel shall at the earliest possible opportunity after having been offered a brief endeavour to agree with the attorney -

7.1.2.1.1 the fee to be charged by counsel, or where this is not practicable;

7.1.2.1.2 the basis upon which counsel will compute or arrive at his fee.

- 7.1.2.2 Without derogating from paragraph 7.1.2.1 above, such endeavour should be undertaken at the latest before the brief is marked.
- 7.1.2.3 An agreement relating to counsel's fees may include a proviso as to unforeseeable circumstances.
- 7.1.2.4 The rule set out in paragraph 7.1.2.1 shall not apply in:
 - 7.1.2.4.1 exceptional circumstances;
 - 7.1.2.4.2 the situation where attorneys and counsel regularly deal with each other and the basis upon which counsel charges is known to the attorneys.
- 7.1.2.5 If, despite an endeavour to reach agreement in regard to counsel's fees, no agreement is reached, or where, due to exceptional circumstances, no such endeavour has been made, counsel may determine a reasonable fee in accordance with the provisions of paragraph 7.1.1 above. If a dispute should arise concerning the reasonableness of such fee, the provisions of paragraphs 7.1.5.1 to 7.1.5.4 shall be applicable.
- 7.1.2.6 No agreement between counsel and attorney shall justify an excessive fee.

7.1.3

7.1.4 Where a Bar Council lays down from time to time a scale of minimum fees for particular services, such scale:

- (a) Shall be the fees recommended by the Bar Council as the minimum fees normally charged for such services;
- (b) shall be as a guide for the convenience of members and it shall not be unprofessional conduct for a member to charge less than the recommended minimum fees.

7.1.5 Full fees or no fees at all irrespective of results must be charged.

7.1.5.1 If a dispute arises concerning the reasonableness of counsel's fee and subject to the provisions of paragraph 7.1.5.5 and the provisions of any applicable constitution, the Bar Council or a committee of the Bar Council or a committee constituted according to such constitution may be requested to determine what a reasonable fee should be under the circumstances. At least one practising attorney, nominated by the local attorneys' association or the Law Society will take part in the enquiry.

***Rule 7.1.3 deleted vide July 2008 AGM resolution
Rule 7.1.4 renumbered 7.1.5 wef 1/5/86***

- 7.1.5.2 The dispute will be decided on the basis of written or oral representations of the parties concerned and, if necessary, on the basis of evidence.
- 7.1.5.3 Counsel must satisfy the Bar Council that the fee was, in the circumstances, a reasonable one.
- 7.1.5.4 A decision in terms of paragraph 7.1.5.1 in relation to the reasonableness of a fee is final and binding unless an appeal is noted in writing within seven days after such decision to a committee of the General Council of the Bar. The notice of appeal must contain the grounds of appeal and must be delivered to the honorary secretary of the Bar Council concerned.
- 7.1.5.5 If a dispute arises concerning the reasonableness of counsel's fee, the Bar Council may refer such dispute for mediation to an ombudsman who is a member of such bar and who has from time to time been appointed to that position by the Bar Council concerned. If such mediation is unsuccessful then a reasonable fee is to be determined in accordance with the provisions of paragraph 7.1.5.1.
- 7.1.5.6 If it appears to the Bar Council that a member may be guilty of unprofessional conduct arising from the charging of fees, then the Bar Council may institute disciplinary proceedings against such member.

Rules 7.1.5.1, 7.1.5.2 and 7.1.5.4 amended vide 1989 AGM resolution and rule 7.1.5.6 retained

Rules 7.1.5.5 and 7.1.5.6 introduced vide 1989 AGM resolution.

7.2 Marking of Briefs

- 7.2.1 All briefs must be marked with a fee at the earliest reasonable opportunity after which the work in respect of which the fee is debited has been done.
- 7.2.2 If the fee is not marked by the attorney, this is an invitation to the member to mark it at a reasonable amount and if no objection is taken to the amount by the attorney, the member is entitled thereto.
- 7.2.3 Once marked, the fee may not be increased or reduced by reason of the result of the case, nor may a fee in any circumstances be altered later than one month after it has been marked unless the consent of the Bar Council to make such alteration is obtained.
- 7.2.4 A brief may not be marked "at such a fee as may be allowed on taxation".
- 7.2.5 Rules 7.2.1, 7.2.3 and 7.2.4 shall not apply when counsel is briefed to act for the Law Society in disciplinary matters.

7.3 Agreement to charge no fees

- 7.3.1 A member may take a brief subject to an agreement to charge no fees; in such a case no fee shall be recoverable by the member and he must immediately give notice that he is receiving no fees to the registrar or clerk of the Court and to the secretary.
- 7.3.2 When a member agrees to charge no fees, no fees for such member shall be brought up for taxation by the attorney instructing him.
- 7.3.3 Deleted - 6/11/2004
- 7.3.4 Deleted - 6/11/2004
- 7.3.5 In determining the success fee to be charged counsel should, *inter alia*, have regard to the following aspects:
- 7.3.5.1 An estimate of the amount, or other relief that may eventually be obtained by the client;
- 7.3.5.2 An estimate of the eventual chances of success, or failure;
- 7.3.5.3 An estimate of the amount of work involved and the complexity of the case;
- 7.3.5.4 The percentage by which the success fee exceeds the normal fee of counsel.
- 7.3.6 Counsel in determining the amount of the success fee to be charged, should specify his normal fee, plus a percentage, being the success fee.

7.3.3 & 7.3.4 deleted vide November 2004 AGM resolution

- 7.3.7 The Bar Council may review any such agreement and set aside any provision thereof, of any fees claimable in terms thereof, if in the opinion of the Bar Council the provision, or fees, are unreasonable or unjust.
- 7.3.8 The Bar council may in reviewing and setting aside the fees claimable by Counsel, determine the fees claimable by counsel and payable by the client, which are reasonable and just in the circumstances.
- 7.3.9 Counsel shall mark fees on his brief whenever he renders service in such a matter in accordance with the provisions of Rule 7.2.1 and shall in marking his brief specify separately his normal fee, the success fee and the total fee. Thereafter the provisions of Rules 7.2.2, 7.2.3 and 7.2.4 shall apply.

7.4 Keeping of Fee Books

It is the duty of every member to keep proper fee books showing at least:

- (i) a record of fees earned;
- (ii) the briefing attorneys; and
- (iii) sufficient detail to identify the matter and the nature of the work done.

Counsel must also keep records which are sufficient to enable him to identify all outstanding fees and the period thereof. Fees received must be banked and bank deposit slips reflecting the amounts banked should be available at all times.

7.5 Rendering of Fee Lists

Save insofar as the Society in General Meeting resolves otherwise, each member shall at the end of each and every month render a memorandum of all fees due to him.

7.6 Payment of Fees

7.6.1 Counsel may require fees to be paid in advance. If this is not done, fees do not become payable before the end of the period determined by the Society in General Meeting, and counsel cannot insist upon payment of fees before that time.

7.7 Overdue Fees

7.7.1 Counsel shall, not later than a date which has been predetermined by his/her Bar Council, send to attorneys fee lists in respect of all work done for such attorneys since the sending of the previous fee lists and which remain unpaid at that date.

7.7.2 Attorneys shall have to the last day of the second month following upon the month in which the work was carried out and in respect of which an account has been delivered to fully settle the outstanding amount.

7.7.3 In the event of non-payment of any fee after the date upon which the fee was due and payable, the member shall forthwith report the fact of non-payment to the Bar Council in a manner prescribed by the Bar Council.

7.7.4 It shall be the duty of counsel who has placed an attorney on the list of defaulters to inform the Bar Council forthwith of any relevant payments received.

7.7.5

7.7.6 If a dispute between an attorney and counsel as to the amount of a fee has been referred to the Bar Council for determination in terms of Rule 7.1.5.1 and the Bar Council is satisfied that there is a *bona fide* dispute, it may grant an extension of time for the payment of the fee in question, or such portion thereof as is in dispute, pending its determination, but if no such extension of time is granted, the attorney concerned shall be obliged to pay the fee in question by the due date.

7.7.7 An attorney who has been placed on the list of defaulters shall only be removed therefrom once he has paid all amounts owing to counsel at all Bars who have informed the Secretary of the fact that amounts are owing to such counsel whether or not such amounts are due and payable in terms of sub-paragraphs 1 and 2 above.

7.7.8

7.7.9 The Bar Council shall publish, for the information of members, details of attorneys on the list of defaulters in such a way as to ensure the confidentiality of the information and shall inform the Secretary of the GCB and the local Law Society accordingly and shall publish details of attorneys removed from such list.

7.7.10 Attorney's Application for Extension of Time

An attorney who may be unable to pay fees due by him when the payment is due in terms of sub-paragraph 7.7.2 above, may apply to the Bar Council for an extension of time. The Bar Council will grant an extension of time only in special circumstances. Mere inability to pay is not sufficient, as it is presumed that attorneys cover themselves before they brief counsel.

7.7.11 Compromising with Defaulting Attorney

Save with the prior consent of the Bar Council it is not permissible for counsel to compromise the amount of fees owing by an attorney who has been placed on the list of defaulters.

7.7.12 Withdrawing Notice of Indebtedness

A member may not withdraw a notice of indebtedness given to the Secretary in respect of an attorney who has been placed on the list of defaulters unless such indebtedness has been discharged in full.

7.7.13 Bona Fide Dispute

If any dispute shall arise between a member and an attorney as to the amount of fees due, the member, before reporting such attorney as a defaulter, shall submit the dispute to the Bar Council for resolution.

7.7.14 Dissolution of Partnerships, Change in Membership of Companies of Attorneys or Winding-Up of Such Companies

Where a partnership or company of attorneys briefs counsel and thereafter the partnership is dissolved, or there is a change in the membership of the company, or the company is wound up, counsel may demand payment of his fees from any partner or member of the company. Should the fees remain unpaid after the lapse of the prescribed period, the names of all partners or members of the company shall be placed on the list of defaulters, but payment by any one will operate to discharge all from liability.

7.7.15 Portion of Fees Taxed Off

The fact that the Taxing Master has disallowed a portion of fees charged by counsel in an attorney and client bill of costs is not in itself sufficient reason for the Bar Council to take action in regard to a dispute between the attorney and the member.

7.7.16 Waiving of Fees

- (a) Fees may be waived only with the permission of the Bar Council.
- (b) An application by an attorney on the list of defaulters for waiver of fees shall be made to the Bar Council by the attorney himself.
- (c) If a member is approached by an attorney on the list of defaulters for a remission of fees, total or partial, the member should refer the matter to the Bar Council and inform the attorney accordingly.

7.7.17 Brief from an attorney on the defaulters list

7.7.17.1 Notwithstanding the provision of any other rule, a member shall be under no obligation to accept a brief from an attorney whose name appears on the list of defaulters.

7.7.17.2 A Bar Council, having caused the name of an attorney to be entered on the list of defaulters, may at its discretion remove the name of such attorney, or replace it on the list, without obtaining the consent of the counsel directly concerned.

7.7.18 A member may levy interest on amounts due and payable by an attorney to that member, calculated from the due date for payment until the date of receipt of payment, at the mora rate, prescribed from time to time.

7.8 Improper Arrangement Re Fees

Counsel may not agree with the attorney briefing him that counsel will await payment of the fees payable on that brief until the attorney shall have received them from the lay client.

7.9 Fees payable only by attorneys

7.9.1 Fees for any professional services may only be paid by or through an attorney, or by the Legal Aid Board, save in the cases set out in Rule 7.1.3.

7.9.2 (a) Where the member has reported an attorney for having defaulted in respect of payment of the fee which is due and payable, and a demand has been made by the Bar Council for payment, unless the attorney submits a dispute about those fees to the Bar Council for resolution under its auspices within 30 days of demand, the member may forthwith sue the attorney for the fees.

(b) Where a dispute about fees has been made the subject matter of an enquiry under the auspices of the Bar Council, and the conclusion of such enquiry is that a sum is due and payable by the attorney to the member, unless the attorney settles fully that indebtedness within 30 days of the outcome of the enquiry being communicated to him, the member may forthwith sue the attorney for the fees.

7.10 Agreement to act on a contingency basis

- 7.10.1 Counsel acting on a contingency basis shall be obliged to comply with the Contingency Fees Act, 66 of 1997 (“the Act”) and the prescribed agreement published in Government Gazette 20009 of 1999 dated 18 April 1999, Government Notice R547 together with any subsequent amendment or substitution of that agreement and a failure to do so will constitute a breach of these Rules.
- 7.10.2 The agreement as between the attorney and the client shall be counter-signed by counsel after having satisfied himself or herself that the agreement complies with the relevant provisions of section 2 and 3 of the Act.
- 7.10.3 The agreement shall explicitly state whether counsel elects to charge counsel’s normal fees or a fee higher than normal fees as contemplated in section 2(1)(b) of the Act and in either event the agreement shall clearly state what the normal fees chargeable by counsel for the services to be rendered are or would be.
- 7.10.4 If counsel stipulates for a fee higher than counsel’s normal fee than such higher fee shall be explicitly stated in the agreement and in no circumstances shall that higher fee exceed the normal fee charged by counsel by more than 100 percent.
- 7.10.5 The higher fee charged by counsel shall be taken together with the fees charged by the attorney for the purposes of applying the 25 percent limit in the proviso to section 2(2) of the Act.
- 7.10.6 If either the attorney or counsel stipulates in the agreement for a fee higher than the normal fee, then the fees of both the counsel and attorney shall be brought to account when applying Rule 7.10.5 above notwithstanding that the other had elected in the agreement to charge normal fees. However, as between the attorney and counsel, the agreement may provide that any abatement of fees required upon the application of Rule 7.10.5 shall be borne only by the attorney or counsel who stipulated for a fee higher than normal.
- 7.10.7 Counsel shall ensure that the higher fee charged remains proportional to the endeavour and services rendered by counsel on behalf of the client. A mere delay in payment where little or no risk of failure exists will not entitle counsel to a significant enhancement of counsel’s normal fees.

- 7.10.8 Where the circumstance which renders fees payable is the successful recovery of a money claim, then the contingency fee agreement shall make provision for what shall happen upon only partial recovery being achieved and the contingency fee agreement must provide a formula for abatement, if the fee is to be abated. The contingency fee agreement must further provide for the order of payment to counsel, the attorney and client upon recovery of the claim itself and costs.
- 7.10.9 In concluding a contingency fee agreement it shall be recorded whether the client is financially able to pay the fee before having received payment from the other party. In the event of a client who is unable to pay such fee in part or in whole, it is improper to stipulate that the fees are payable prior to receipt of payment from the other party of sufficient funds to discharge the client's obligation in respect of fees.
- 7.10.10 If a contingency fee agreement is concluded then counsel may stipulate as counsel's normal fee that it is *'such a fee as may be allowed on taxation'* notwithstanding the provisions of Rule 7.2.4.
- 7.10.11 The contingency fee agreement shall provide that in the event that the client refuses to accept the advice of counsel then counsel may withdraw and if counsel withdraws for that reason or is otherwise obliged to withdraw for professional reasons, then the fees earned to date of withdrawal shall remain payable in the event of success.
- 7.10.12 If counsel takes over a brief from another counsel and there is a reasonable possibility that the prior counsel had concluded a contingency fee agreement, then in addition to counsel's obligations in terms of Rule 5.1.8, counsel shall be further obliged to inquire as to whether or not the prior counsel had acted in terms of a contingency fee agreement and shall not accept the brief unless adequate arrangements have been made to secure the payment of fees of the prior counsel upon success.
- 7.10.13 At the earliest reasonable opportunity after performance of any work in respect of which a fee may be raised, counsel shall mark the brief with the fee which may become payable in respect of such work under the contingency fee agreement. Save where circumstances arise which require an abatement of the fee in terms of the contingency fee agreement, such a fee may not be altered later than one month after it has been marked unless the consent of the Bar Council to make such

alteration is obtained.

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- 7.10.14 The provisions of Rule 7.1.5 shall not apply to fees payable in terms of a contingency fee agreement. Where the client is able to pay fees in part, irrespective of the outcome of the case, the contingency fee agreement may be concluded in terms which render its provisions applicable only to part of the fees payable in the case, provided that the extent of the client's non-contingent fee portion shall be stated in the contingency fee agreement.

8. PUPILS AND PUPILAGE

8.1 Pupilage

- 8.1.1 Pupilage will extend over the period 15 January to 31 December of any year.
- 8.1.2 Subject to the discretion of the Bar Council of each Society the last date for registration for pupilage for the following year will be 30 September.
- 8.1.3 An application for pupilage is to contain the information and supporting documentation as prescribed by the Bar Council.
- 8.1.4 Each Bar Council shall set up bodies and prescribe the procedures for the purpose of making application for pupilage and of accepting or declining applications for pupilage.
- 8.1.5 Each Bar Council will be entitled to determine a limit to its numbers for pupilage based on its own capacity.
- 8.1.6 Each Bar shall subscribe to general guidelines to be issued by the General Council of the Bar which shall contain the criteria for accepting applicants for pupilage in cases where the number of applications exceed the number of places for pupilage.
- 8.1.7 The General Council of the Bar and any Society are permitted to levy a pupilage registration fee in addition to an examination fee, subject to the determination of a maximum amount by the General Council of the Bar.
- 8.1.8 Subject to the provisions of Clause 8.1.9 hereof no person shall be accepted as a pupil unless they are as at the date of commencement of pupilage an admitted advocate.
- 8.1.9 Unless a Society otherwise resolves, any person who has filed an application to court for his admission as an advocate and who has been approved by the Bar Council, shall be eligible to be admitted as a pupil member, provided that no person whose name appears on the roll of attorneys shall be eligible to be so admitted, unless he or she has filed an application for the removal of his or her name from such roll and the law society concerned has indicated in writing that it has no objection to such application for removal; and provided further that unless and until he or she has been admitted as an advocate such pupil shall not:-

- 8.1.9.1 appear as a pupil advocate in any respect as is contemplated by the Rule;
- 8.1.9.2 be entitled to write the National Bar Examination.

8.2 Period of Pupilage and Exemptions

- 8.2.1 An applicant for admission to the Society who has not already been a practising member at a member Bar of the General Council of the Bar shall be required to complete pupilage as a pupil member.
- 8.2.2 The period of pupilage shall be as set out in clause 8.1.1 hereof subject to the provisions of clause 8.2.3 hereof.
- 8.2.3 The Bar Council of a Society may exempt any applicant for pupilage from service of the full period as aforesaid by granting a partial exemption provided that:-
 - 8.2.3.1 No person shall be granted an exemption unless that person has practiced as a legal practitioner for a period of four years after admission as such;
 - 8.2.3.2 No person may be exempted from the requirement of obtaining a pass in the National Bar Examination and satisfactorily attending the practical course in advocacy training which is referred to in Clause 8.8.1.2. hereof.
- 8.2.4 Notwithstanding anything contained in rules 8.2.1, 8.2.2 and 8.2.3 above, the General Council of the Bar has the power to exempt any person from the requirements thereof.

8.3 Curriculum

The curriculum for the examination shall be determined by the General Council of the Bar in consultation with the National Bar Examination Board.

8.4 Pupilage Programme

8.4.1 The pupilage programme for any year shall be determined by the General Council of the Bar.

8.4.2 The programme of examinations in any year shall be determined by the General Council of the Bar in consultation with the National Bar Examination Board.

8.5 Pupil Supervision System

8.5.1 Each pupil will be assigned one junior member of a Society as a pupil mentor, provided that each Bar Council has the discretion to appoint more than one mentor for a pupil.

8.5.2 The pupil mentor has an obligation and a duty to ensure that the pupil advocate obtains the prescribed training and experience within the period of pupilage. The pupil mentor may involve the assistance of other members of the Society in this regard.

8.5.3 It shall be the duty of every junior member of the Society to accept appointment as a mentor to pupil members.

8.5.4 It shall be the duty of all members of a Society to assist in the training of pupils.

8.5.5 The General Council of the Bar may:-

8.5.5.1 prescribe guidelines for mentors from time to time;

8.5.5.2 prescribe guidelines on the co-ordination and structure of pupilage at a Society and the supervision and co-ordination thereof.

8.6 Appearance by Pupils

8.6.1 A pupil advocate who is not an admitted advocate may not appear.

8.6.2 A pupil advocate may appear robed with his or her pupil mentor or another member of a Bar approved by the pupil mentor at any time during pupillage without remuneration.

8.6.3 A pupil advocate may with the pupil mentor's consent appear on brief and for remuneration with or independently of a pupil mentor (or other approved member of a Bar) in prescribed matters and in circumstances and on conditions prescribed and regulated by the National Pupillage Sub-Committee from time to time.

8.6.4 Any appearance by a pupil advocate in terms of this clause shall be subject to the following conditions:-

8.6.4.1 The pupil remains subject to the overall supervision and direction of the pupil mentor.

8.6.4.2 The presiding judge or officer is informed beforehand of the fact that the pupil is a pupil;

8.6.4.3 The pupil must in open court when placing himself or herself on record state clearly his/her status as a pupil;

8.6.4.4 A pupil in accepting such a brief must place on record with the instructing attorney that he/she is a pupil and must ensure that the attorney is fully aware thereof.

8.7 Extra-mural employment of pupils

8.7.1 A pupil shall be entitled to be gainfully employed otherwise than as an advocate during pupillage provided that:-

8.7.1.1 the nature of the work performed by the pupil does not offend the provisions of Rule 4.15; and

8.7.1.2 the work is undertaken outside of ordinary office hours; and

8.7.1.3 the work does not interfere with any part of lectures and other training, notwithstanding that such may take place outside of ordinary office hours; and

8.7.1.4 the work is not either by reason of its nature or by reason of the amount of time to be applied to it, likely to interfere with the pupil's ability to study and perform the tasks allocated to him or her as part of pupillage training.

8.7.2 Any pupil undertaking such gainful employment shall be obliged to disclose the nature and extent of it to the pupil's mentor, and if the mentor is in any doubt as to whether such employment is appropriate during pupillage, the matter shall be referred to the Bar Council for a ruling.

8.8 Competency to practice

8.8.1 A pupil advocate is entitled to practice as a member of a Society once such pupil has fulfilled the following requirements:-

8.8.1.1 the pupil has obtained a pass in the Bar examination set by the National Bar Examination Board, and

- 8.8.1.2 the pupil has satisfactorily attended the practical course in advocacy training conducted under the supervision of the National Advocacy Training Committee and has been assessed as competent by the Society's Advocacy Training Committee*, and (* wef 1/1/2005)
- 8.8.1.3 the pupil has been issued with a certificate signed by the pupil's pupil mentor and the Society's pupil co-ordinator (or a person appointed by the Society's pupil co-ordinator) to the effect that the pupil has satisfactorily served the pupillage applicable to the pupil.

Rule 8 replaced vide July 2004 AGM resolution

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9. **MILITARY SERVICE**

Rule 9 deleted vide 1996 AGM resolution