NAVIGATING INNOVATIONS IN THE NEW CODE OF CONDUCT FOR LEGAL PRACTITIONERS[1]

Nick Youngson

by **Roland Sutherland**

The new statutory code reaffirms much that is familiar, but there are some material changes from the Red Book prescriptions, and several innovations to note.[2]

This paper introduces the Code,[3] emphasising the impact on individual practice. Institutional changes, affecting the Bar Council structure, are not addressed. The Code forms a *coherent whole* in terms of four *organising principles* underpinning professional legal ethics: 1) independence, 2) specialist expertise, 3) integrity, and 4) service in the public interest.

The Code applies to Attorneys, Advocates, Trust Account Advocates (TAAs) and employed legal advisers.[4] Other legal advisers, eg, tax planners, and labour consultants are excluded. The code largely replicates the traditional ethos of the Bar.

The Code stipulates what constitutes 'counsel's work' in an unclosed list, of several familiar functions.[5] Acting as arbitrator or mediator, both 'non-litigator' roles, is included.[6]

Bar Councils' discretion to deal *ad hoc* with ethical novel questions is abolished. You may approach the Bar Council, for an *interpretative* ruling.[7] The Bar forfeits power to regulate discipline when the Legal Practice Council (LPC) is established, which exercises discipline through sub-structures.[8]

Section 44(1) of the LPA reserves for the High Court power to regulate proper conduct.[9] A judicial gloss on the code is sure to develop.

Independence

Code 13.9 and 17 deal with independence, stating the familiar. Code 16 beefs up 'commitment to practice' in terms of which getting involved in other callings that may interfere with your practice of the law is forbidden.

The interests of your client are 'paramount,' *subject* to a whole range of exceptions. Your duty to your client must be balanced with your duties to the court and to colleagues.

The Cab Rank rule has been reinforced, and now extends, expressly, to *pro bono* briefs.[10] There is clarity on how Cab Rank obligations are restricted to your chosen field of practice.[11] A general practitioner must take whatever comes from whomsoever presents the brief. A specialist practitioner must take matters within the chosen field. A High Court practitioner may decline a Magistrates' court brief. An exclusively civil practitioner may decline a criminal brief.

The referral Rule has been reinforced.[12] Except for the TAAs, counsel can take briefs *only* from attorneys or from Legal Aid South Africa or from an accredited 'arbitration centre'.

When attorneys brief you to arbitrate and mediate, there is no problem. But 'accredited arbitration centres' may appoint too - what does that mean? Both offer mediation and arbitration services. Does the Code mean to make that distinction between arbitration and mediation? Must we read 'arbitration' to mean

all Alternative Dispute Resolution (ADR)? It is not clear. What is interesting is that whilst we may prognosticate that the LPC shall, as the GCB has done, accredit domestic arbitration centres and mediation centres, what about the rest of the world? The LPC may accredit some of the well-known international arbitration bodies but what about the arbitration centre at Vladivostok or Luanda, whom no-one has ever heard of, before you are offered the appointment? How will that work? Will it mean, if you are offered an appointment you need to approach the LPC to ask whether it will accredit it, perhaps *ad hoc*? Even if the LPC is really efficient, it would take time to achieve formal accreditation, which presumably implies some degree of vetting, not something to be sorted out on the trot. If you wait too long you may forfeit the appointment.

Counsel's *control* over the case is given considerable emphasis reinforcing the existing rule.[13] The obligation to give frank advice to clients is beefed up.[14] The code specifically says that thou shalt not pander to your client's whim. Sycophantic advice is professional misconduct.

Control over the conduct of a case is beefed up in regard to *where* you consult. The Johannesburg Bar local rule about consultation venues is replicated.[15] It provides that thou shalt consult in chambers. Counsel must have a prescribed reason to deviate from using chambers, ie the number of witnesses makes it impractical, or the number of documents to inspect are too voluminous, or in an urgent application, after hours, a secretary is needed to type up papers in an attorney's office, or you are involved in out of town matters.

There is new rule about family connections and conflicts of interest. [16] In other jurisdictions there is an acute awareness of the public perception of unfairness if there is a family connection implicating counsel; ie you appear before your father, or the client has, as a partner or employee, your spouse or a close relative. The problem is not academic; eg *SARFU* ruled that the invitation of the litigant to the wedding of the son of a judge did not compromise the hearing. This was a pragmatic and perhaps unreliable precedent, if the *Pinochet* case is considered.[17] A criminal appeal in which the judge's wife appeared for the State was strongly disapproved of by the SCA.[18]

Specialist Expertise

Specialist expertise is tied in with the duty of diligence. The Code provides for concrete implied undertakings upon accepting a brief.[19] Taking a brief on trial implies an undertaking that you shall remain available throughout the trial and you shall give proper attention throughout the preparation phase. If your availability is incompatible with those obligations, you ought to refuse the brief. If unexpectedly, you cannot honour your commitment, you must give timeous notice to avoid prejudicing your client. These duties are not themselves new; rather, the code establishes a more effective system of accountability which will be less benign about failures than hitherto.

The duty of diligence requires an evaluation of whether it is proper to accept a brief because acceptance implies you can handle it competently; if you cannot, you must decline. Sometimes, lack of competence is resolved by calling for a leader, but not all briefs require a leader. Counsel who choose to practise in limited fields must take care; eg. a family law specialist who is offered an insolvency case needs to reflect.

The prohibition on double briefing and overreaching is replicated.[20] There are the usual exceptions, eg if you have an RAF brief on trial for Monday, and it settles on the previous Wednesday, you can charge a reserved day fee in terms of the rule of court, but if you have got two trials on Monday and one settles early and you attend court to have the settlement made an order, you cannot charge a trial fee for that, i.e. a formal appearance. *Geach*, remains vital reading.[21]

All practitioners must give early advice on the prospects of success, a novel duty.[22] Most of the anxiety will be the attorney's, who would then brief counsel for advice based on what little information exists, i.e. - before pleading or discovery. Counsel must advise whether it is worth investing in the matter. It is insufficient to advise a cause of action exists. More is required to advise on prospects of success. Attorneys need such advice quickly and you must respond circumspectly.

Code 20.12 compels you to advise about ADR in *appropriate* cases. In a family, building or a labour case, ADR is a real option. In what other types of cases is it 'appropriate'? In particular, in commercial or delictual matters, are the specific circumstances *appropriate* for ADR? In RAF matters an institutionalised environment for settlement already exists - is ADR still 'appropriate'? If two experts about the brain damage differ is it appropriate for third expert to mediate? Counsel should develop a considered approach to 'ADR suitability' and, prudently, record advice given, lest there later be a backlash.

Counsel must actively guard against prescription.[23] You might already do so, but now it is specific obligation.

Counsel must maintain legal skills. *All practitioners* must keep 'reasonably abreast' of legal developments. The means more than reading the law reports. *Counsel* have an additional duty, ie, to 'participate in the programmes' of skills advancement provided by the LPC. [24] Continuing Legal Education takes centre stage. Exactly what is 'provided' depends on the LPC's appetite and available resources. The Bar's offering is free – that this will continue is not obvious. In England, counsel are certified at four levels of competency to take on a criminal case. At level 1, you can appear in a guilty plea to a low-level crime. At level two, you can appear in a minor offence trial, and so on. Only seasoned counsel accredited at level 4 may appear in murder cases. Will the LPC follow suit?

Contemplative Chris

"Code 59 is new – when consulting with a witness whose credibility is at issue it is compulsory to consult with that witness separately from other witnesses. This is not, currently, standard practice."

Integrity

There is a new rule to preserve the '*privilege* and confidentiality' of clients.[25] Why it is necessary to protect privilege in the code is unclear because that's the law anyway. The risk of breaching *confidentiality* is a far greater danger; i.e. idle chatter in the lift, asking someone for advice about a difficult issue, mentioning clients' names and poor email discipline.

Code 59 is new – when consulting with a witness whose credibility is at issue it is compulsory to consult with that witness separately from other witnesses. This is not, currently, standard practice.

You may not use *undue pressure* to get your client to settle or to plead guilty.[26] Where do you draw the line? If, in a family dispute, you struggle to discover where the husband hid the assets, do you advise the soon-to-be ex-wife that you can't disprove he is the pauper because the Maserati belongs to his father? Is this *pressure* and is it *undue*? This is not an easy decision. The important point is not to browbeat your client. The refrain: 'I am innocent, my counsel advised I plead guilty' is not a fiction, particularly, in *pro bono* matters where you might not have an attorney present and a credibility contest between you and your erstwhile client arises. To protect yourself, never consult alone. Also, prudence dictates to keep a paper trail of your encounter with clients, and if you ever are alone, even more so, to rebut later allegations of unprofessional conduct.

There is a new twist to illegally getting and using privileged information. Sometimes an envelope appears mysteriously to provide dirt on the adversary. How do you deal with it? The code forbids use of that information and you also must disclose the fact of possession to *all* parties.[27] This presupposes you know it was illegally obtained. How will counsel know? Do you interrogate your attorney on every document sent to you? When you get the damning internal memo or cell-phone recording, you must interrogate the source to make sure you are not inadvertently complicit in the illegal procurement. You can use the material later if it you get it legally.

Service in the public interest.

'The public interest', here, does not mean *pro bono* work nor transformation initiatives which you as an individual, or the Bar, pursues. The Profession of Advocacy justifies itself on the grounds that it exists to serve the public interest; i.e. it is the essence of the profession. It is in that context that new stronger rules about support for the judicial process and duties to the court are framed. Formerly implied, these injunctions are now express, i.e. counsel must not abuse the process and must promote expeditious litigation.[28]

The 'norm of the reasonable fee' derives from the Red Book; i.e. computing a fee must take into account the complexity, the amount of work involved, your own seniority, its importance and so forth. The norm remains unchanged. [29]

There are several innovations to fees regulation.

When you accept a brief there are *implied default terms* for how you are be paid. [30]At present, only the Gauteng Bars apply a 97-day rule, which is now abolished in favour of a 30 day rule.

Juniors of less than five years standing get special treatment.[31] This rule says that they are a *vulnerable class.* Attorneys must negotiate and agree on fair, market-related fees and must pay promptly. This is an astonishing intrusion in a part of the code about counsel's ethics, imposing a duty on attorneys, who are made personally liable for counsels' fees', forbidden to agree discounted rates, and are compelled to pay early.

Contingency fees are referred to by alluding to the Contingency Fees Act.[32]All the rules which hitherto imposed additional or duplicated duties are abolished.

There is an anomaly between the *pro bono* rule in the Code and section 92 of the LPA.[33] The *pro bono* rule says once you accept a *pro bono* brief you cannot afterwards change the nature of the brief and earn a fee. Not all briefs on *pro bono* result in money judgments. But section 92 of the LPA says that, *ex lege*, when a lay litigant concludes a contingency fees agreement there is a deemed cession of the claim for costs. If you appear *pro bono* in a criminal matter it doesn't matter because there are no costs. But, if in a civil matter on contingency, you could get a fee from the costs order, why ever take the brief *pro bono*? *Prima facie*, the cab rank rule says you may not refuse a *pro bono* brief. Is your counter-offer to take it on contingency a refusal of the *pro bono* brief? In my view - no. If that view is wrong, the code must be amended to eliminate absurdity. Whether you are placed in that dilemma depends on the attorney's awareness of this distinction. If you do '*pro bono* type' work where contingency is applicable, it would make sense always to do so on contingency.

A Johannesburg local rule on collapse fees now applies to everyone. If you are asked to reserve a period and want to be secured against idleness if the matter settles or postpones, you must in writing agree a collapse fee agreement with your attorney stating what payment is due on collapse.[34] In my view, it is prudent to agree upfront, to avoid resistance to agreement. Another reason derives from an implicit contradiction with Code 3.12 which says you may not make 'unreasonably timed demands' for payment to a client.[35] This rule affects mainly attorneys, but counsel are implicated. If an attorney does not ask for cover well in advance, and a week before trial asks for cover, will the client allege an 'unreasonably timed' demand? If so, what is counsel to do? The LPC is empowered to decide if the demand is unreasonable, but how long might that take? The attorney is committed to run the case during that period; you have accepted the brief. What will happen if the attorney cannot pay? The code provides that if an unreasonably timed demand for money is made, you may not refuse to perform the mandate even though you are not secured in funds.

Another new rule is related to the double-briefing rule. If you reserve next Wednesday for a trial and it settles the previous Friday, you are released, and you can charge your reserved fee - or can you? The new rule changes the position radically.[36] If fortuitously you get a brief in court for that Wednesday, then you cannot get paid for both matters. Moreover, in order to get paid for the day that you have reserved and for which you do not get another *court brief*, you must give a certificate to the attorney stating that fact. Textually, it would include the noting of a judgment too, but assume that is excluded. To illustrate the difficulty, suppose you are released from a trial and you take an opposed motion of an elementary nature, or you take one unopposed motion on that same day that you had initially been briefed on trial. You cannot charge for the trial that you had reserved. Similarly, suppose you have reserved for a trial at a fee of Rx; it settles, then you are offered an unopposed brief on that day; in order not to sacrifice your Rx fee, you refuse the unopposed court brief. Is that violating the cab rank rule? If you are purely a trial practitioner a refusal is no breach; otherwise *prima facie*, it is. This is a perspective of the profession that is hostile and articulates a belief that counsel unfairly exploit fee-earning opportunities.

The Red Book provides for charging interest on overdue fees.[37] The Code replicates that.[38] If you agree to interest payments on overdue fees, there is a direct practice management implication because of the kind of accounting system you apply, whether electronic or manual, catering for VAT implications on interest paid and so forth.

You may now choose to give credit to your attorney.[39] The novelty is that you need not get fees committee permission. There is no role for the Bar Council to play nanny anymore. You need to prepare yourself to deal with such overtures. You need a default position which suits you and upon which you are prepared to offer or refuse credit. The Bar's protection is abolished. Counsel must be mature about the business dimensions of practice.

The blacklist is retained.[40] An innovation is that instead of being circulated only to counsel, the blacklist gets circulated to all legal practitioners. Whether that level of embarrassment will make the blacklist work better than at present is doubtful. My view is that attorneys who default are incapable of being embarrassed and greater exposure as a defaulter is unlikely to make a difference. Whether there is any utility to the blacklist remains as much a controversy now as ever. Absent collegiality, the blacklist does not work. It is a specific exception to the Cab Rank Rule that you can refuse a blacklisted attorney's brief.[41]

The regulation of fees enquiries has changed. The current position is that a complaint is reported to the fees committee; an Ombud examines it. If not settled, a fees enquiry will convene. An appeal lies to the GCB. The code abolishes an appeal; the next step is a review under the Promotion of Administrative Justice Act 1 of 2000.[42] The professional debtor is likely to launch a review, regardless of merits. A litigation kitty seems prudent, or insurance, if affordable, might be taken out. Perhaps the Bar might create a collective insurance scheme. A

Roland Sutherland *is a Judge of the High Court, Gauteng Division.*

Notes

1 This is an abridged version of a talk to the Johannesburg Bar, May 2017.
2 The Red Book: *Uniform Rules of Professional Conduct,* General Council of the Bar of South Africa, www.sabar.co.za
3 The 'Code of conduct for Legal Practitioners, candidate Legal Practitioners and Juristic entities' 10 February 2017; GN 81 of 2017 (GG 40610) pursuant to the Legal Practice Act 20 of 2014. At the time of writing it was not yet in force.
4 Code: 67.
5 Code: 15
6 Code: 15.12.13 and 15.12.15
7 Code: 14.7
8 Section 23, LPA.
9 Section 44, LPA.
10 Code: 18
11 Code: 18.1
12 Code:19
13 Code: 17.3; Red book: 5.6
14 Code: 22.10
15 Code: 17.7; Johannesburg Bar local rule: 4.1
16 Malcolm Wallis *"The Family Business curtailed"* (2010) December pp 70-74 Advocate, www.sabar.co,za
17 President, RSA v SARFU 1999 (4) SA 147 (CC); but see too: R v Bow Street Metropolitan Stipendiary Magistrate & other Ex Parte Pinochet Ugarte (No 2) 1999 All ER 577 (HL)
18 Dube v The State 2009 (2) SACR 99 (SCA)
19 Code: 20
20 Code: 20.8 – 20.10
21 GCB v Geach and others 2013 (2) SA 52 (SCA)
22 Code 3.10; Section 35 of the LPA
23 Code 20.13
24 Code: 24
25 Code: 3.6
26 Code: 22.11
27 Code: 61.10
28 Code: 64
29 Code: 25; Red book: 7.1
30 Code: 26.6
31 Code: 26.6.2
32 Code: 28.
33 Code: 27; section 92 of the LPA.
34 Code: 26.6.3; see Fluxmans Incorporated v Lithos Corporation of SA 2015 (2) SA 295 (GJ)..
35 Code: 3.12; section 35 of the LPA.
36 Code: 26.6.5
37 Red book rule: 7.7.8
38 Code: 26.6.6
39 Code: 26.6.1
40 Code 32.1.6
41 Code: 32.1.7
42 Code: 33