ETHICS

ATTORNEY AND COUNSEL

CAN AN ATTORNEY MARK THE FEE ON A BRIEF WITHOUT DISCUSSING WITH AN ADVOCATE

An attorney is entitled to mark a brief beforehand but it is not advisable to do so. It will be more correct for the attorney to discuss a fee with counsel before instructing him. If he does so however counsel may accept or refuse the brief. (3)

CAN YOU AGREE IN ADVANCE WITH COUNSEL ON A FEE FOR APPEARANCE BEFORE A TRIBUNAL

It is advisable for an attorney to arrange a fee with Counsel in advance as this eliminates the surprise element and the concomitant problems. It thus is permissible. It is the attorney's duty to keep his client advised in regard to the cost aspects of a matter and this can only be done if proper arrangements are made with advocates in regard to fees. It is also the duty of the advocate to discuss costs at the earliest possible moment.

MAY AN ATTORNEY REQUIRE AN ADVOCATE TO ATTEND A CONSULTATION AT THE ATTORNEY'S OFFICES

The rules of the General Bar Council prohibit an advocate meeting in an attorneys office but nothing prohibits an advocate under appropriate circumstances seeking special permission to do so. (3)

HOW IS A DISPUTE WITH COUNSEL ON FEES RESOLVED

It is the duty of the advocate and the attorney to discuss advocates fees at the earliest possible time. This often does not happen and the two assume that reasonable fees be charged. If this does not happen the attorney should do the following

1. Arrange to discuss fees with counsel and endeavour to resolve the dispute
2. If this is not possible refer the matter to the ombudsman at the Bar who will endeavour to mediate.
3. If this does not succeed lodge a complaint with the Secretary of the Bar Council who will arrange a proper hearing and debate the matter. (6)

CAN AN ATTORNEY ARRANGE A CONSULTATION BETWEEN COUNSEL AND CLIENT IF HE CANT BE THERE

An attorney may not under any circumstances arrange a consultation if he knows that he will not be able to be present. An attorney or his representative must always be present when advocate consults with his client. Should the attorney be prevented from attending the consultation because of unforeseen circumstances he must arrange for a partner, professional assistant or CA on his employ to attend the consultation. If it is necessary for the attorney himself to attend because it is the wish of his client that he does so, the consultation should rather be postponed.
ATTORNEY AND EMPLOYEES

IF AN EMPLOYEE OF AN ATTORNEY STEAL TRUST MONEY, CAN THIS LOSS BE RECOVERED AND IF SO FROM WHOM

Yes (1). Any trust creditor who suffered a loss as a result of the theft of trust monies, has a claim against the Fidelity Fund (1) for the balance of his loss after deduction of any money or benefits recovered from any other source than the Fund — such as the attorney’s personal estate (1). (3)

MAY AN ATTORNEY REMUNERATE AN EMPLOYEE BY WAY OF A SHARE OF PROFITS

NO. In terms of rule 79(1) an attorney may not share fees.

MAY AN ATTORNEY HIRE AN UNQUALIFIED PERSON IN RESPECT OF THE NON-PROFESSIONAL PART OF THE PRACTICE AND REMUNERATE HIM ENTIRELY ON A COMMISSION BASIS

YES

CAN AN ATTORNEY APPOINT AN UNQUALIFIED PERSON TO DEAL WITH DEBT COLLECTIONS UNSUPERVISED

It would be unprofessional to allow the person in question to run the collection matters unsupervised. There is, however, nothing wrong with allowing an unqualified person to do professional work if he is properly supervised by an attorney who will always bear the final responsibility.

MAY AN ATTORNEY APPOINT AN UNQUALIFIED BUT EXPERIENCED LADY TO DEAL ON HER OWN WITH DEBT COLLECTIONS

It is not as such unprofessional to allow unqualified personnel to do a professional’s work (1). The attorney must however exercise proper vigilance (1) over the work done and remains responsible (1) for the actions of his staff. It is unprofessional, dishonourable and unworthy conduct not to supervise staff.

NOTE: Attorney must pay her a salary and do not share fees.

MAY AN ATTORNEY ALLOW THE UNQUALIFIED EMPLOYEE TO DO THE FOLLOWING ON HER OWN
1.1. Interview clients and accept instructions – It would be in order if the interviews and instructions given are within the scope of the employee’s scope of experience / expertise, but otherwise not, as the client is entitled to professional service.

1.2. Enter into negotiations with debtors and arrange payment – This kind of activity does lie within the scope of the ability of an experienced collections clerk, but again, proper vigilance by the attorney must be maintained.

1.3. Generally, give legal advice to clients – No, it is not acceptable. The giving of legal advice requires professional training and know-how. A client is entitled to a degree of training/education, care and competence that comes with being a qualified professional.

1.4. Handle elementary High Court matters, and brief counsel – No, it is not acceptable. High court cases require professional attention of a specialised nature — more than what a collections clerk is capable of doing. Especially instructions to an advocate/counsel requires the control of an attorney over the matter, which won’t be the case if a collections clerk gives the instruction. It is detrimental and unworthy to the image of the profession if it is condoned that an unqualified person is allowed to be the point of contact with counsel.

1.5. Sign cheques – An attorney should never give sole signature rights to any employee. He is negating his responsibilities of control over the finances of the firm and is creating a risk situation for his clients.

**MAY AN ATTORNEY SHARE FEES WITH HIS CA OR PAY THE CA A COMMISSION BASED ON THE FEES THE CA GENERATES**

He may not share fees with his CA but may pay him a commission.

**MAY AN ATTORNEY ALLOW A SECRETARY TO CONSULT WITH CLIENTS AND TAKE INSTRUCTIONS**

The secretary may interview the client to take formal instructions. In all other cases this should not happen because the client is entitled to professional advice and service.

**IS IT FEASIBLE TO IMPLEMENT A COMPUTERISED BOOKKEEPING OF WHICH YOU HAVE NO KNOWLEDGE.**

Yes, It is OK. Computerised accounting software packages is commonly used in normal practice. The responsibility remains with the attorney personally to have sufficient knowledge of the package, system and software so as to keep proper control over his accounting and ensure that the firm’s accounting remains at the levels required by the regulations pertaining to attorney bookkeeping.

**WHAT DO YOU IF YOUR BOOKKEEPER HAS STOLEN MONEY AND THEREFORE NOT PROPERLY ACCOUNTED TO CLIENT AND YOU ARE TO APPEAR THE NEXT DAY**

An attorney must immediately notify the Law Society. His auditor must be called in to do a forensic investigation. Attempt to postpone the matter without inconvenience/prejudice to the client and the court. Head the investigation. Pay trust shortages out of his own pocket and inform the Law Society that he has done so. Acknowledge to the client affected by the
discrepancy and apologise. Fire the bookkeeper. Increase his own control over the bookkeeping to prevent re-occurrence.

**ATTORNEY AND CLIENT**

**CAN YOU BORROW MONEY FROM A CLIENT WHERE HE HAS SPARE CASH WHICH HE WISHES TO INVEST**

One is dealing with the question of conflict of interest (1)

A attorney may borrow money from a client (1).

A client may lend money to his/her attorney (1).

The attorney should look after the interests of his client when finalising the terms of an investment on behalf of a client (1).

The attorney would be presumed to want to do the “best deal” for himself in entering into a loan contract (1):

The attorney should therefore advise the client to refer any agreement relating to the loan to the attorney which the attorney himself had drawn up to another attorney for objective advice (1) or

The attorney should advise the client to consult another independent advisor to finalise the terms of the loan contract to his own attorney (1).

None of the above prevent the attorney from continuing as attorney for his client in other matters (1).

**CAN YOU AS ATTORNEY REVEAL DETAILS AT TO YOUR CLIENTS AFFAIRS TO THE MEDIA**

The attorney's conduct is not acceptable. Interviews with the media about a client's affairs are precluded without the client's consent under the general rule of confidentiality. Even with that consent the attorney may not publicise his practice by way of press interviews unless this is in the clear interest of the client or in the public interest. This may happen if the media have published incorrect information and if a story requires amplification.

The confidence of the client is absolute and must be preserved by the attorney with certain exceptions i.e. the death or disability of a client where information may be given to executors, administrators, trustees etc

**MAY AN ATTORNEY DIVULGE INFORMATION GIVEN BY HIS CLIENT IN CONFIDENCE**

Yes in very limited circumstances. eg. To the client's executor after his death and to his curator if the client is placed under curatorship because he is incapable of managing his affairs or of course if the client waives his right to confidentiality.

**MAY AN ATTORNEY DISCUSS THE FACTS OF A MATTER WITH A KNOWLEDGEABLE COLLEAGUE**

There is an onus of confidentiality on an attorney regarding his/her client's affairs and the client is the only one who can waive this. It is advisable to inform client that the attorney is going to consult a knowledgeable colleague and to assure client that this action will not in
any way impede the confidentiality the attorney owes to client. It is advisable to get the client’s permission in this regard. It should also be wise not to reveal the identities of the parties concerned.

**MANDATES**

**IF YOU ARE INSTRUCTED IN A MATTER WHICH IS THE FIRST OF ITS KIND TO BE DEALT WITH BY YOU, HOW DO YOU GO ABOUT QUALIFYING YOURSELF FOR THE MANDATE**

This type of instruction is common and attorneys should not turn away such work; this is the manner in which young attorneys gain experience and knowledge. There is nothing wrong in asking a colleague for assistance and even following a precedent, but self study remains the most important aspect. I will tell my client that I will make sure about the legal position and procedure. I will firstly study the rules of court and authorities (like court judgments) that explain the rules in a handbook on the subject. If I experience any problems to find the authorities, I will utilise the reference facilities in a good library. As a guide for drafting the applicable documents, I will refer to practice guides (Forms and Precedents). The most important thing is that my client’s documents should be drafted adequately and completely and that I should prepare and qualify myself to present his case competently.

**SHOULD YOU ACCEPT AN INSTRUCTION TO DRAFT AN APPLICATION FOR REZONING**

The candidate has to understand that if he is not capable of handling the brief he should rather not accept the mandate. He must also be aware of the fact that experts are available to handle this type of specialised work and that it would make better sense to brief town and regional planners.

**CAN YOU REPRESENT BOTH PARTIES IN A SALE OF PROPERTY/SHARES AGREEMENT**

Yes, you may represent both parties as there is no conflict between them.(1)

**YOU ARE CONSULTED BY A MARRIED COUPLE ON A DIVORCE AND THEY ASSURE YOU THAT THEY HAVE SETTLED THEIR MAJOR DIFFERENCES, BUT LATER ON YOU REALISE THAT THEY HAVE NOT REACHED AGREEMENT**

7.1 If an attorney has consulted with both parties in a dispute he runs the risk of having a conflict of interest. He may have compromised himself by doing so.

7.2 If the disputes relating to the joint estate are of such a nature that the involvement of the attorney has not been compromised he may continue to endeavour to reach a settlement by mediating between the parties.

7.3 If however his knowledge is such that his independence is compromised he MUST withdraw as attorney of both parties.

7.4 In this instance he should refer each party to other attorneys.
WHAT IF A LESSEE UNDER A LEASE AGREEMENT WHICH YOU DRAFTED FOR A CLIENT ASKS YOU TO REPRESENT HIM IN A DEBT COLLECTION MATTER

There is no reason why the attorney cannot under these circumstances act on behalf of the lessee. There is no conflict of interest regarding the lessor. If the attorney should act on behalf of the lessor against the lessee at any stage in the future, a conflict of interest may develop but in the absence of bias there will be no transgression of the rules of ethics.

CAN YOU REPRESENT THE WIFE OF A FORMER CLIENT WHO HAS DIVULGED PERSONAL INFORMATION TO YOU ABOUT HIS FINANCIAL SITUATION

Should the attorney in the course of this conversation gain information which is of such a nature that it would compromise the other person if he should act, it may not be done. The good relationship existing between attorney and the person may be a factor that does not warrant action against him.

CAN YOU ACCEPT A BRIEF TO ACT AGAINST YOUR CLIENT IN A MATTER ENTIRELY UNRELATED TO MATTERS FOR WHICH YOU ACT FOR THAT CLIENT

Example 1

This is a borderline case. It can be argued that because you would not have received information which could have a bearing on the action you are asked to institute, you may act. On the other hand it can equally be argued that because of the longstanding relationship which you have with the first client you should not act against it in any matter. It would probably be unwise to accept the mandate from a business point of view because you would probably lose the first client.

Example 2 – acted for H in acquisition of business and perused his financial statements, wife OCOP asks you to act in divorce proceedings

No, because in the course of the acquisition of the business you have obtained financial information which could be relevant in divorce proceedings between the parties.

Example 3 – act for insurance company collecting debts in short term insurance matters, client has substantial life insurance claim – can you act?

Yes, because in this case you have not obtained information which could prejudice your erstwhile client. It should however be borne in mind that it may not be good business to act against the company concerned but there is nothing ethically wrong from doing so.

WHAT HAPPENS IF YOUR CLIENT WHO IS SELLING A BUSINESS CONSULTS YOU WITH THE PURCHASER AND YOU DISCUSS THE TRANSACTION, AND THEN YOU PREPARE A DRAFT. DO YOU HAVE A DUTY TO PROTECT THE INTERESTS OF THE PURCHASER?

The purchaser is not your client and no contractual relationship exists between the two of you. It may be argued that these circumstances may place a duty on the attorney to protect the interests of the purchaser or at least to advise him to consult another attorney. A purchaser may be an astute businessman who is not uninformed at all but it may also be clear to the attorney that another purchaser may be prejudiced by certain terms and
conditions in a contract. The safe option would always be to advise a party who is unrepresented to seek independent advice.

What would you do if after some time you are instructed to issue a summons against the purchaser? After having had meetings with both parties and having discussed various issues relating to the transaction it would be better not to act against the purchaser. It may be better to refer the seller to another attorney to assist him. However, many attorneys would act on such an instruction.

What happens if you proceed with the summons and later have to give evidence? Will you continue to act? No. I have to withdraw as attorney of record and refer my client to another attorney to continue with the matter if the evidence required from me turns around a major issue. If it is of a formal nature however, I will continue to act.

MUST AN ATTORNEY ACCEPT THE FIRST MANDATE OPEN TO HIM, OR CAN HE CHOOSE FROM EITHER MANDATE

The general rule is that a practitioner is entitled to accept or refuse any work offered to him unless for special reasons there is some obligation to accept or refuse work. The attorney enjoys a delictus personae with respect to the client or clients. The attorney is accordingly free to choose either of the two mandates.

REFUSING A MANDATE/IS A MANDATE EVER OBLIGATORY

The general rule is that a practitioner is entitled to accept or refuse any work offered to him unless in terms of the rules he is obliged to accept or refuse it. In circumstances where there is a right to refuse, but no obligations to do so the attorney enjoys a delictus personae regarding the client and a delictus rei regarding the work offered.

The obligation to refuse arises when there is conflict of interest by the attorney, lack of qualification by the attorney, lack of expertise by the attorney, inability of performance through overburden, conflict between confidence and disclosure, duty to a colleague or where the work offered is illegal or improper.

It is not proper for an attorney to undertake and charge for work which the absence of legal qualifications does not allow him to perform, eg an attorney who is not a conveyancer should not undertake the transfer of fixed property. Neither should he prepare the documents and request a colleague to sign on his behalf and to execute the transfer. It is not improper for an attorney to refuse to act if the attorney is convinced that his client has no case.

There is seldom a duty to take on work. The occasion may however arise when there is a duty to assist an established and regular client in the case of emergency. Such a client may well be prejudiced by the delay in obtaining another attorney should his regular attorney refuse to act. The established client faced at night or during a weekend with an urgent application to court or with arrest is entitled to expect his attorney that he take what measures an to relieve the emergency. There is also a duty on the attorney to act if there is no other attorney available. This can easily happen in small towns.

WHAT MUST YOU DO IF CLIENT REFUSES TO COOPERATE IN PREPARATION FOR TRIAL AS DOES NOT PROVIDE YOU WITH INSTRUCTIONS OR FUNDS
One is entitled to withdraw.

**WHEN MAY AN ATTORNEY TERMINATE HIS MANDATE**

He may only terminate his mandate on good cause shown. For example, failure by the client to provide him with funds, being asked to do something dishonourable or being hindered by the client or prevented from conducting the case or failure to furnish instructions.

**WITHDRAWING AS AN ATTORNEY IN A CIVIL/CRIMINAL CASE**

When an attorney withdraws from a case he should do so timeously and should inform his client timeously that he is doing so to enable his client to make alternative arrangements or to appear in person. He must withdraw at the correct moment (opportune stage) or take the risk to continue with the brief and to fulfil it.

**IF A CLIENT IN A CRIMINAL MATTER LIES TO YOU AND YOU DECIDE TO WITHDRAW MUST YOU INFORM YOUR CLIENT OF YOUR REASONS AND WHAT PROCEDURE MUST YOU FOLLOW**

You should ask the court for a brief postponement and tell the client your reasons for withdrawing. You should then ask the court for leave to withdraw without giving reasons because your reasons may clearly prejudice the credibility of your client's evidence as far as the court is concerned.

**WHAT WORK DONE IN EXPECTATION OF A FEE, GAIN OR REWARD MAY ONLY BE DONE BY AN ATTORNEY**

S 83(8) provides that only an attorney may do the following with the expectation of a fee gain or reward:

1. draw up an agreement or deed in respect of immovable property or rights in or to immovable property other than leases not exceeding 5 years
2. conditions of sale
3. brokers notes
4. will or testamentary writing
5. memorandum and articles of association or prospectus of a company
6. documents relating to the creation or dissolution of a partnership; and
7. any instrument or document required or intended for any use in civil proceedings in the Republic.

**FEES**

**WAS THERE A DUTY ON YOU TO ENSURE THAT THE COSTS DO NOT GET OUT OF PROPORTION TO THE AMOUNT OF THE CLAIM**

This is true. It is the duty of an attorney to guard against incurring costs which may be out of proportion to the amount of the claim and to obtain his client’s approval before doing so.
HOW DO YOU ADVISE A CLIENT IF COSTS CLAUSE IN AN AGREEMENT IS 4500 PLUS VAT?

At first glance the amount seems quite high and the client should negotiate with the seller’s attorney with a view to reducing it to a reasonable amount or should ask him OR her to have the fee determined by a Assessment Committee of the Law Society concerned. Full details regarding the preceding discussions should be obtained from client before an opinion is formed regarding the amount of the account.

WHAT HAPPENS IF YOU ARE OF THE OPINION THAT AN ACCOUNT OF A COLLEAGUE IS EXCESSIVELY HIGH

You should advise your client that the Law Society should be requested to assess the fee through a fee assessment committee so as to determine whether or not the fee is reasonable. There is of course nothing to prevent on negotiating with your colleague in an attempt to settle the dispute.

WHAT STEPS ARE TAKEN TO HAVE BILL TAXED OR ASSESSED IF CLIENT IS NOT HAPPY WITH YOUR BILL

a) no taxation but an assessment by a committee of the Law Society;
b) submit account to Law Society and request assessment
c) L S will appoint a committee and give notice to all parties;
d) the parties appear at the meeting and the committee afterwards submit a report and the assessment to the L S.

WHAT DO YOU DO IF YOU AND YOUR CLIENT CANNOT AGREE ON FEES

The fees must be determined by an Assessment Committee of the Law Society concerned. An account must be prepared if not yet available and should be submitted to the law society.

WHAT DO YOU DO IF AFTER YOU HAVE RENDERED AN ACCOUNT TO A CLIENT HE REFUSES TO SETTLE ON THE GROUNDS THAT YOU HAVE OVERCHARGED HIM AND HE REQUESTS YOU TO HAVE IT TAXED

First of all a proper detailed account should be prepared (not like a Bill of Costs for purposes of taxation however) with adequate detail to show how the fee is arrived at.

Then the account should be presented to the Law Society with the request to appoint an assessment (Taxing) Committee for the purposes of determining a reasonable fee for the services rendered. The attorney and client are entitled to appear before the Committee and make representations to it after which a reasonable fee is determined by the Committee to the Law Society.
MAY AN ATTORNEY IN A LITIGATION MATTER AGREE TO CHARGE A FEE ONLY IF THE PROCEEDINGS ARE SUCCESSFUL, AND THEN CHARGE A HIGHER FEE. IS AN ATTORNEY ENTITLED TO SO CALLED CONTINGENCY FEES

Prior to 23 April 1999 such an agreement was regarded as against public policy and thus unenforceable (1). However, the Contingency Fees Act No 66 of 1997 came into effect on 23 April 1999 (1), in terms of which it is possible for an attorney (and advocate) to conclude a contingency fee agreement with a client (1), subject to rather onerous conditions as set out in the Act (1):

The agreement must be in writing (1) with its form and content prescribed by the Minister of Justice (1); the client enjoys a 14 day “cooling off” period (1); the agreed fees may not be more than twice the “normal” fees of the attorney (1) and in money claims may not be more than 25% of the amount obtained by the client (1); where applicable, the agreement must be countersigned by the advocate concerned (1); the client has the right to claim a review of the agreement or the fees charged in terms thereof (1).

In certain specific instances a common law contingency free agreement may be permissible.

EXPLAIN TO CLIENT IN COURT CASE ABOUT THE COSTS TO BE INCURRED AND WHAT HIS LIABILITY IS TO BE IN RESPECT OF THEM

The attorney should advise his client that the tariff in terms of the court rules is a party and party tariff and as such is the maximum which may be recovered from the other party if your client is successful, but that in the final result the client is liable to you for the full attorney and client account whether he is successful or not and if he is unsuccessful he will be in for the costs of the other side as well. The terms of the attorney and client account must be agreed with client at the outset. (10)

IF YOU ACT FOR A PRIVATE INDIVIDUAL IN A MATTER THAT WAS ORIGINALLY QUITE SIMPLE BUT HAS TURNED OUT TO BE COMPLEX, HOW DO YOU ENSURE THAT YOUR FEES AS WELL AS YOUR EXPENSES WILL BE ADEQUATELY COVERED

6.1 Apply your mind as the further implications of the new complexities of the matter and deliberate with counsel as to his fees.
6.2 Have a meeting with your client to discuss the issues, more particularly the financial implications -
6.3 Try to make an informed estimate of what your own fees and other disbursements are likely to be.
6.4 Discuss with client whether he wishes to continue with the matter and whether he is financially in a position to provide adequate cover up front or otherwise.
6.5 Discuss alternative solutions such as mediation, negotiating settlement or withdrawal.

WHAT ARE THE FACTORS USED IN DETERMINING A REASONABLE FEE FOR PROFESSIONAL SERVICES IN A CONTRACT DRAFTING MATTER

This is not a litigious matter, and so there is no tariff applicable. The attorney must therefore take into consideration the following factors
1. The complexity of the matter
2. The importance of the matter to client
3. The time spent in doing the work
4. The knowledge and expertise required
5. The time and place at which the work was done including consultations
6. The urgency of the matter
7. The amount of money involved
8. The seniority of the practitioner
10. The extent of work done by you and by other non qualified staff.

MAY AN ATTORNEY GIVE MORE /LESS THAN ONE THIRD ALLOWANCE ON FEES TO ANOTHER ATTORNEY

The maximum permitted allowance on fees between practitioners is 1/3. It may reduced or even dispensed with. (4)

MAY AN ATTORNEY AGREE TO CHARGE A FEE BY AGREEMENT WITH HIS CLIENT IN EXCESS OF THE PRESCRIBED TARIFF (Non-board notes)

Yes, it is permissible for an attorney to charge a fee by agreement with his client in excess of the prescribed tariff, subject to the provisos that an attorney should not over reach the client. Overreaching the client is misconduct per se. The cost must not be manufactured. One must not assist a client to recover from the debtor more than lawfully entitled. The attorney should, at the time when reaching agreement with his client regarding the fee to be charged, explain
(a) that a tariff fee exists, whether statutorily described or otherwise, for example the Magistrate Court tariff or the Supreme Court tariff or the Law Society non-litigious tariff;
(b) that the fees charged will be in excess of the tariff and by approximately how much expressed as a percentage;
(c) if it is a litigious matter, the difference between the party and party, attorney and client and attorney and own client scales of fees;
(d) the likelihood, if successful, in a litigious matter of only recovering on the party and party scale;
(e) the risk in a litigious matter of being ordered to pay the costs of the other side as well as client’s own attorney and own client cost.

The fact that the fee is agreed in advance does not necessarily close the door to the correction of excessive charges. The Transvaal Rule 86 states categorically that the Law Society shall not be precluded from determining the reasonableness of a fee agreed or purportedly agreed by member and any person liable or purportedly liable for its payment and may order the member to refund any excess paid beyond what is found on taxation or assessment. Where the attorney is acting pro deo or pro amico, naturally there will be no fee charged. Where the attorney is doing the legal aid work he is not permitted to deviate from the legal aid tariff.

TOUTING
WHAT FACTORS SHOULD AN ATTORNEY KEEP IN MIND WHEN MARKETING HIS SERVICES BY MEANS OF BROCHURE

An attorney may display brochures relating to his services in his waiting room. Such brochures must not be misleading, contain vulgar or inappropriate material, nor claim superiority, testimonials and/or endorsements. Brochures may be sent to existing or former clients or to prospective clients requesting a brochure.

WHAT RESTRICTIONS EXIST IN RESPECT OF AN ATTORNEY WHO A. WRITES AN ARTICLE IN A LOCAL NEWSPAPER B. APPEARS ON TELEVISION

a) Newspapers
The consent of the Law Society need not be sought. The attorney must however be qualified to write on the topic. The attorney and his firm may be identified.

(b) On television
The attorney and his firm may be identified. Clients of the firm may not be identified. The attorney must not enter into correspondence with listeners with a view of attracting or inviting instructions.

CAN YOU ENTERTAIN PROSPECTIVE CLIENTS ON A YACHT AND MARKET YOUR PRACTICE TO YOUR FATHER’S FRIENDS

An attorney, in the normal course meets many people who could become valuable clients or whose businesses could become clients. An attorney entertaining these people should avoid creating the impression that he is doing so to tout his business. The attorney should also not try to solicit work from people who he should reasonably believe already have an attorney. If the scale of entertainment is beyond what an attorney can afford is obviously aimed at soliciting work and that it is not permissible – it is a matter of degree. The conduct envisaged in the question would amount to touting.

WHY IS TOUTING UNPROFESSIONAL

It detracts from the dignity of the profession. It could lead to dishonesty. It gives an unfair advantage to the unscrupulous

CAN YOU AGREE TO REDUCE BOND REGISTRATION FEES FOR A BIG FINANCIAL INSTITUTION

Attorneys may legitimately negotiate fees with clients provided such negotiation does not constitute either overreaching or touting. Owing to the volume of work a reduction in charges may be justified and may be appropriate.

MAY YOU ACT PRO AMICO FOR THE STAFF OF A FINANCIAL INSTITUTION IN DIVORCE MATTER
Acting pro amico for staff members in general who by implication are unknown to the attorney would not be permitted. This would constitute some form of indirect touting.

**MAY YOU MAKE AVAILABLE YOUR HOLIDAY APARTMENT TO THE SENIOR MANAGEMENT OF A CLIENT FREE OF CHARGE**

This would constitute indirect touting and so making an apartment available free of charge is unacceptable.

**MAY YOU PAY AN ESTATE THE COMMISSION DUE PRIOR TO TRANSFER OF IMMOVABLE PROPERTY**

An attorney may well be regarded as touting by making such payment. However, if it is a genuine transaction the payment is made at the attorney’s risk. It must be done out of his own funds. The deposit may not be utilized for this purpose.

**WHAT IF A COMPETING ATTORNEY ON A FINANCIAL INSTITUTION’S PANEL PROPOSING REDUCING CHARGES LOWER THAN YOUR IN ORDER TO GAIN WORK**

Clearly the intention of the new attorney in reducing fees is to attract more work and is not based on the attorney’s financial structure which would permit reduction in fees. This could be construed as touting and such conduct is consequently improper.

**GENERAL**

**IS IT UNPROFESSIONAL NOT TO REPLY TO LETTERS FROM CLIENTS**

YES

**MAY AN ATTORNEY INTERVIEW A CIVIL WITNESS IF HE HAS BEEN SUBPOENAD BY THE OTHER SIDE**

An attorney may interview a witness who has been subpoenaed by the other side if he believes that person has relevant information which can help his client's case. It is not necessary to obtain the other attorney’s consent but the other attorney should be notified of the consultation.

**MAY AN ATTORNEY CONSULT/INTERVIEW WITH A STATE WITNESS IN A CRIMINAL TRIAL**

An attorney may not interview a state witness. He may however get permission/authority from the presiding magistrate to do so but if the latter refuses there is no further relief.

**MAY AN ATTORNEY CONSULT WITH A WITNESS WHO IS APPEARING FOR THE DEFENDANT**

An attorney may consult with such a witness. It is common courtesy to advise the Defendants attorney if your intention to do so. The latter may not refuse permission and may not be present during the consultation.(3)

Would answer be different if witness had already been subpoenaed by the defendant’s attorney? NO
MAY AN ATTORNEY CONSULT WITH A HIS/HER OWN CLIENT IN A CIVIL CASE WHILE HE IS BEING CROSS-EXAMINED

Once your client is under cross examination you may not consult with him at all. The reason for this is obvious namely that you may advise him how to answer question or how to rectify evidence already given.

During evidence in chief you may consult the witness but in respect of matters he already testified about.

SHOULD YOU INVESTIGATE THE FINANCIAL POSITION OF A DEFENDANT BEFORE INSTITUTING SUMMONS

I was under no obligation to investigate the financial position of the defendant to establish whether it would be worth the effort to incur costs to recover the amount Owing. I had no instructions to do so and there was no obvious way of doing so easily. I did explain to the client however that if the defendant is unable to pay the costs he would nevertheless be liable for my account based on the tariff as discussed and agreed with him.

CAN AN ATTORNEY JOIN A PARTNERSHIP AND CONTINUE PRACTICING

There is nothing to prevent an attorney from being involved in any lawful business apart from his practice. He may therefore be a partner in another business and may also be a director of companies.

CAN AN ATTORNEY BECOME A MEMBER OF A CC OPERATING FROM ADJOINING PREMISES WHICH DEALS WITH LABOUR DISPUTES

The attorney may become a member of the CC because it is not dealing with reserved work and is not sharing facilities with the attorneys practice.

ARE YOU OBLIGED TO DRAW THE COURTS ATTENTION TO CASES THAT ARE NOT IN YOUR FAVOUR

Attorney is an officer of court. In fulfilment to duty to client, attorney must not in any circumstances neglect duty to Court. Duty is to inform Court of adverse authority (in High Court, falls on Counsel, in lower Court on attorney appearing or Counsel although, even where Counsel appears, duty may indirectly fall on attorney). Duty most likely to arise in ex parte or unopposed matters. Arguments must never be misleading whether directed to facts or the law. Duty of reasonable competence, equip with knowledge of anything bearing on the matter.

Insofar as authorities may be against case, bound to be brought to knowledge of Court., particularly in ex parte or unopposed. In Matters opposed by Counsel or attorney it is usual to leave mention of adverse authority to opponent. If manifestly adverse and cogent, failure by other to mention, duty to offer authority to Court or in general more suitably to inform opponent allowing latter to place before Court.
Apparent in-road upon general rules is that no duty on practitioner engaged on client’s behalf in the litigious or disputatious to assist adversary, not designed in assistance of adversary, but duty which practitioner owes the Court. Assistance to adversary is incidental.

**CAN YOU ISSUE SUMMONS EVEN THOUGH YOU ARE CONVINCED THAT YOUR CLIENT DOES NOT HAVE A GOOD CASE**

An attorney is not the judge of his client's case but there is an obligation on an attorney to advise his client properly about the merits and demerits of his case. If despite advice to the contrary the client insists on proceeding the attorney may carry out the instruction unless the attorney is of the view that to carry on would be an abuse of the court and the legal process. It would also not be right to carry on with the case if the attorney has no faith in it. It would be advisable for the attorney to advise the client in writing that the client is proceeding despite the attorney’s advice not to do so.

**MAY AN ATTORNEY GIVE EVIDENCE IN A CASE WHERE HE IS ACTING AS THE ATTORNEY**

Yes, an attorney may give evidence for his client in a court case in which he is acting as an attorney provided the evidence is formal in nature or not part of the main stream of disputed fact. Where the evidence will be contentious, the attorney ought not to give evidence. If it appears from the beginning that the attorney will have to be a witness and that his credibility may be an issue, he ought not to represent any litigant in the case.

In the case of Elgin Engineering Company v Hillview Ortor Transport 1961(4) SA 450 (D) at 454, Wessels J said that in circumstances where his credibility may be an issue, it would appear to be undesirable for an attorney who is to be an important witness in any matter to act as the attorney of record.

Naturally, in giving evidence on behalf of his client, the attorney would have to arrange for a colleague or counsel to lead his evidence.

**WHAT HAPPENS DURING A TRIAL IF IT BECOMES CLEAR THAT YOU ARE GOING TO HAVE TO GIVE EVIDENCE**

It is inadvisable for an attorney who is acting in a matter to give evidence in the case. If this situation arises the attorney should withdraw and arrange for another attorney to act. The position may be different where the attorney's evidence is to be given on formal and uncontroversial matters. If however the attorney's evidence relates to the actual disputes between the parties he must withdraw.

**MAY A CROSS ON A TRUST CHEQUE BE CANCELLED**

The crossing may be cancelled but the cheque may not be made payable to bearer.

**WHAT MUST AN ATTORNEY BEAR IN MIND WHEN CROSS-EXAMINING A WITNESS**

1. Do not intimidate or terrorise a witness by shouting, threatening or fighting with him
2. Examine a witness in a chatty manner
3. Don’t make a fool of a witness about something he/she cannot help
4. Don’t interrupt a witness
5. Don’t mislead a witness
6. Don’t get into a argument with a witness about possible inferences that may be made from his evidence
7. You may strengthen the evidence of a unreliable witness
8. Applicability is of primary importance when the witness’ character is under review. A factual basis should be established.

WRITE A LETTER TO A FORMER CLIENT WHO HAS TERMINATED YOUR SERVICES BUT WHOSE ACCOUNT YOU HAVE NOT YET DEBITED UP TO DATE AND WHO STILL OWES YOU MONEY ADVISING HIM OF WHAT MUST HAPPEN BEFORE YOU CAN HAND OVER THE FILE

We refer to your fax of yesterday when you advised that our mandate is terminated and requested us to transfer our file in the matter to attorneys Grant & Partners.

We are not in a position to do so forthwith as we have not yet debited your account for services rendered to you. Until such time as the account has been drawn by us and settled by you, we are not obliged to transfer the content of the file.

We shall let you have an estimate of our fees and disbursements within the next day or two. If you find same acceptable, we require payment thereof immediately. On receipt of payment we shall let you have the file. If you do not find same acceptable we will have to arrange for taxation thereof and until that has happened we will retain your file. We are however prepared at your expense to make photostats of the entire file for your use in view of the urgency of the matter.

What happens if after it is clear what he owes you the demands immediate delivery of the file and his attorney unconditionally undertakes to pay your account after it is finalized?

Yes, unless you have reason to believe that such an undertaking may not be honoured or that this may cause undue delay in payment. Under normal circumstances the file should be released. Considerations of urgency such as an early trial date, hardship and prejudice to the client are also relevant. It is however advisable not to seek or accept undertakings by colleagues owing to the consequences which result from non-compliance.

Example 2

Seeing that it is only a short while before the hearing, the attorney should try his utmost to let the client have the contents of the file. If it is impossible to reach a satisfactory arrangement regarding the fees quickly and client refuses to pay anything, the attorney may exercise his right of retention over certain documents in his possession. However, if a satisfactory arrangement can be reached regarding security for payment of the fees, the whole contents of the file should be made available to client. (4)

DO YOU HAVE AN OBLIGATION TO HAND OVER ANY OF THE EFOOLWING DOCUMENTS BEFORE THE ACCOUNT HAS BEEN FULLY PAID.

a. Application to city council - No. Drafted by attorney . (2)
b. Deed of transfer obtained in another transaction. Yes. Not drafted by attorney and result of another transaction. (2)
c. Mortgage Bond - Yes. Ditto. (2)
d. Letters to neighbours - No. Drafted by attorney. (2)
e. Letters addressed to you from objectors, city council and town planner. Yes. Not drafted by attorney.  
(2)
f. Site plan drawn by the architect you appointed and whose account was settled by client. Yes. Ditto.  
(2)
g. The special power of attorney that you drafted and which was signed by your client. No. Drafted by attorney.  
(2)

RIGHT OF RENTENTION UNTIL CLIENT PAYS HIS ACCOUNT IN FULL

The attorney has a right of retention ex contractu on all documents that are the product of his work, skill and knowledge.

IF YOU ARE NOT SURE WHETHER SOME STEP IS ETHICALLY PERMISSIBLE HOW DO YOU ABOUR GETTING ANSWER

Do the necessary research eg read Lewis on Ethics and any relevant cases. Guidance could also be obtained from the Law Societies or from colleagues.  
(3)

WHAT WILL HAPPEN IF YOU FAIL TO PAY YOUR MEMBERSHIP TO THE LAW SOCEITY OF WHICH YOU ARE A MEMBER

S42(3) of the Attorneys Act states that the secretary of the relevant Law Society will not issue you with a certificate to enable you to practise.  
(2)

FOR WHAT PURPOSE WAS THE ATTORNEY’S FIDELITY FUND ESTABLISHED

The Fund was established to reimburse persons who suffer pecuniary loss as a result of theft by an attorney or a candidate attorney or other person in his employ (S26).  
(3)

WHY WOULD YOU ADVISE YOUR CLIENT TO DRAW UP A WILL

So that he can dispose of his property as he chooses and so that the administration process can start immediately and without delay. Other valid points would be so that the testator can appoint who he would like as administrator/executor/guardian etc and that he can make special bequests, disinherit intestate heirs, do financial planning etc.  
(3)

WHAT BASIC INFORMATION DO YOU NEED TO ACQUIRE WHEN YOU ARE BRIEFED BY A CLIENT

a. Client’s identity.
b. Client’s competence to instruct.
c. The authorisation of proxies if applicable.
d. Client’s knowledge and scope of instruction.  
(4)

MAY AN ATTORNEY DEFEND AN ACCUSED PERSON WHO ADMITS THAT HE IS GUILTY

It is not unethical to defend a person who the attorney knows or believes to be guilty. The attorney’s duty is not to determine guilt but merely to do the best for the client. The onus is on the state to prove guilt beyond a reasonable doubt. It is for the court to judge the matter.
However, the attorney may not mislead the court or allow the client to give evidence which the attorney knows to be untrue. The attorney may however test the state witnesses by cross-examination in regard to matters of identification, and credibility.

**IF A CLIENT ADMITS TO YOU THAT HE HAS COMMITTED A CRIME ARE YOU ENTITLED TO REVEAL THIS TO THE POLICE IF THEY INQUIRE**

No.

However, if he is subsequently charged with that offence and you defend him you may not put it to any witness that your client’s case is that he did not commit the offence and you may not lead your client’s evidence to that effect or call any witnesses to testify to that effect.

**WHAT HAPPENS IF A VALUED CLIENT SENDS YOU A SIGNED AFFIDAVIT AND ASKS YOU TO ATTEST IT**

You should insist that he comes to you and signs in your presence or you go to his office and have him sign in front of you. In either instance the document must be properly attested, the reasons for this is that the regulations in terms of the Commissioners of Oaths and Justices of the Peace Act provide that signature must be in the presence of the Commissioner and so as to avoid the possibility of fraud. In addition, the solemnity of the oath procedure would otherwise be destroyed.

**CAN AN ATTORNEY IN A FIRM COMMISSION AN AFFIDAVIT DRAFTED BY ONE OF HIS PARTNERS, AND WOULD IT MATTER IF THE AFFIDAVIT WAS FOR REGISTRATION IN THE DEEDS REGISTRY**

A Commissioner of Oaths shall not administer an oath or affirm an Affidavit in respect of the matter in which he or she has an interest. An Attorney ought to regard self as having an interest in all matter which he, or his firm, handles professionally. This includes everything requiring attestation by a Commissioner. A document prepared in his office or in which his firm is the Attorneys of Record should be attested by a Commissioner independent of that firm. Certain Affidavits/Declaration mentioned in schedule to the Regulations are excluded from the prohibition namely certain requirements for the Deeds Registries and other Government/Provincial offices.

**WHAT HAPPENS IF YOU LET A CLIENT’S MVA CLAIM PRESCRIBE**

You must be absolutely honest with your client and the facts and particularly the fact that the claim has prescribed must be told to your client immediately you become aware thereof. You should refer the client to another attorney to deal with the underlying claim. You should advise your client to seek independent advice in respect of a possible claim against you and if necessary you should assist him in obtaining such advice. You should, however, not admit liability as this may affect your professional indemnity insurance. You should also report the matter to your insurer at once. You should also Inform the AllIF of any claim..

**WHAT HAPPENS IF YOU ARE INSTRUCTED TO ISSUE SUMMONS ON THE BASIS OF A DEED OF SALE WHICH HAS PRESCRIBED? CAN YOU CONTINUE**

It is proper to issue summons provided the client has been fully informed of the risks of an adverse order for costs if the defendant raises prescription as a special plea. Any payment may be received and judgment by default may be taken. The prescription Act provides that a court may not mero moto take account of prescription. (5)
MENTION FIVE DUTIES THAT AN ATTORNEY SHOULD FULFILL IN ORDER TO COMPLY WITH THIS STATEMENT "A PRACTITIONER MUST AVOID ALL CONFLICT WHICH IF KNOWN COULD DAMAGE HIS REPUTATION AS AN HONOURABLE LAWYER AND HONOURABLE CITIZEN"

1. A duty to be true and faithful to the State
2. Duty to apply and uphold justice.
3. Duty of honesty and fairness
4. Duty not to bamboozle the client with the levying of fees or to assist somebody else to do so.
5. Duty to be courteous at all times, specifically to clients and deponets.
6. Duty not to overcharge or overreach client
7. Suitable attitude towards authority.
8. Duty to deliver the best service possible to your client
9. Duty to avoid avarice
10. Duty to maintain the honour and integrity of the legal profession in general and the attorneys' profession in particular.
11. Duty to exercise the professional existence within the frame of good citizenship