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CHAPTER 1

The qualities of good trial lawyers

This chapter discusses the qualities of good trial lawyers. The term 'trial lawyer' (or sometimes 'counsel') is used in this book to refer to both the advocates' and attorneys' professions. General principles of good advocacy in the broad sense are discussed. Where appropriate, reference will be made to the specific qualities required of the advocates' or attorneys' professions. Similarly, in this book the generic term 'judge' is used to refer to judges of all courts – including magistrates and regional magistrates.

Over the years a number of qualities have been suggested as desirable for a person to be a good trial lawyer. These qualities can be summarised as follows:

1.1 Clarity and order of language;

1.2 Honesty and integrity;

1.3 Judgement;

1.4 Objectivity;

1.5 Courage;

1.6 Alertness;

1.7 Tenacity;

1.8 Sincerity;

1.9 Humanity;

1.10 Hard work; and

1.11 Professionalism.

1.1 Clarity and order of language

Communication is the life-blood of the trial lawyer's profession. Trial lawyers should be able to put their questions clearly and logically to witnesses, and when addressing the court, should ensure that they express themselves with clarity and in a logical sequence. Obscure or ambiguous questions and arguments presented disjointedly may irritate the court, and issues not clearly presented may seriously prejudice a client's case. A good rule to remember is always to keep questions and sentences short, and to speak slowly.

1.2 Honesty and integrity

Honesty and integrity are obvious attributes required of trial lawyers in their role as officers of the court and as a result of duties owed to their clients. This applies to all lawyers, not only good trial lawyers. A lawyer who does not act honestly and with integrity at all times not only gets a bad name, but also runs the risk of being struck from the roll of legal practitioners if he or she is caught. The lawyer's duty to the court, as well as the need to disclose all relevant decisions and not to mislead the court, will be discussed below (see paragraph 2.1.4).

1.3 Judgment

A good trial lawyer must have the wisdom to make appropriate tactical decisions when conducting a case. Although this should be done in consultation with the client, it is often said that the advocate is a representative and not a delegate of the client. This means that, subject to what is said below (see paragraph 2.2.6), the judgment of the trial lawyer rather than the client should be followed when conducting the case. It is submitted, however, that in the light of the modern move towards client autonomy in most professions, lawyers should keep clients well briefed concerning their strategies. Furthermore, wherever possible, lawyers should give their clients sufficient information in appropriate language so that they can be part of the decision-making process. In many instances, however, there is very little time to make judgments during the cut-and-thrust of the trial, and a good trial lawyer must have the ability to think creatively on his feet.

1.4 Objectivity

A good trial lawyer has the ability to consider the case dispassionately and objectively. It has been said that this is easier where there is a divided bar as advocates, as opposed to attorneys, have no personal ties with their clients. In such instances the advocate is able to give both the client and the court an objective opinion uncoloured by any emotional attachments (Du Cann 30). However, even where there is no divided bar, a lawyer should learn to stand back from his or her client's case in order to analyse its progress as objectively as possible. The rules of the advocates' profession specifically require that an advocate should not become personally, as opposed to professionally, associated with his or her client's interest, for example by standing bail for a client (General Council of the Bar of South Africa *Uniform Rules of Professional Ethics* rule 3.5.1).

1.5 Courage

It has been said that, 'the law is a form of civilized warfare' and the trial lawyer is 'the modern representative of the medieval champion' (Du Cann 53). Lawyers must have the courage to stand up for their client's best

interests irrespective of the degree of hostility which may be aimed at them by the public and, sometimes, the court (for example, during recusal applications) (see paragraph 3.3). Trial lawyers must also have the courage to conceal their personal sensitivities, so that they do not display undue emotions to the court or the witnesses (for example, where they or their client's case has been harmed by a witness's testimony). In short, a good trial lawyer must be a courageous actor.

1.6 Alertness

A good trial lawyer is always on the alert: alert as to how the witnesses are responding; alert as to how the bench is reacting; alert as to how the opposition is conducting the case; and even alert as to what is going on in the court room.

1.7 Tenacity

Tenacity means that, within reason, a trial lawyer with a good case will keep pursuing it no matter how much opposition he or she meets from witnesses, the bench or opponents. As a general rule a lawyer should never embark on a course of action unless he or she is ready to justify it. The lawyer should then be prepared to defend the action until all proper arguments in favour of it have been exhausted. The trial lawyer is there 'to fight, not to capitulate' (Du Cann 59). However, a lawyer should not be tenacious about a bad case, as this is likely to work against the interests of his or her client. There is no point in trying to support a cause that is insupportable.

1.8 Sincerity

Sincerity is a very important quality for a successful trial lawyer. A lawyer who wishes to succeed must also appear to wish his or her client to succeed. If a lawyer indicates, consciously or subconsciously, to the court that he or she does not believe in the client's case, the chances are that the court will also not believe in it. It has been said in respect of the advocate's profession that 'if the advocate does not appear to believe in his client's cause . . . he places his services at the disposal of his opponent' (Du Cann 60). Conversely, lawyers may not, metaphorically speaking, lay aside their advocates' or attorneys' gowns to make their clients' causes their own (see paragraph 2.1.2).

1.9 Humanity

A significant attribute of a good trial lawyer is the ability to display 'the common touch'. The ability to communicate easily and politely with people from all walks of life (advantaged and disadvantaged, rich and poor, urban and rural) is essential. Witnesses and judges are human

beings, not robots. They all have their likes and dislikes, as well as their inherent prejudices and preconceptions. But while judges are trained to disregard them, witnesses are not. However, both are more likely to respond favourably to the cause of a lawyer who treats them with understanding and courtesy – in other words with humanity – than one who does not. The same applies to their treatment of colleagues (see paragraph 2.3.4).

1.10 Hard work

Good trial lawyers are industrious and work very hard. They carefully 'claw the facts' so that they are fully aware of what has happened in the case, as well as such details as dates, names, times, exhibit numbers and so forth (see paragraph 2.5.4). Memorising facts is essential to the conducting of a successful case, because if a lawyer is not conversant with the important facts, 'all the virtues and brilliant improvisations will not help him' (Du Cann 63). The nature of trial practice, however, is such that no sooner has the trial lawyer mastered the facts of one completed case, he or she will have to forget them as a new case is commenced. The process of clawing the facts begins all over again.

1.11 Professionalism

Lawyers should at all times maintain the honour and dignity of their profession. They should in practice, as well as in their private lives, abstain from any behaviour which may tend to discredit their profession (*International Code of Ethics* rule 2). To this end they should render legal assistance with scrupulous care and diligence, including when they are assigned as counsel for an indigent person (*International Code of Ethics* rule 10).

CHAPTER 2

General ethical duties of trial lawyers

As previously mentioned, the term 'trial lawyer' refers to lawyers involved in trial work who practice as either advocates or attorneys. Both branches of the South African legal profession have been greatly influenced by the traditions of the English legal profession. Accordingly, considerable reliance will be placed on the General Council of the Bar of England and Wales' *Barristers' Code of Professional Etiquette* and the English Law Society's *The Guide to the Professional Conduct of Solicitors* where such rules are relevant to legal practice in South Africa. (The rules are reproduced in Avrom Sherr *Advocacy* (1993)). The rules of the South African advocates' and attorneys' professions are at times somewhat cryptic, and the English rules occasionally provide useful guidelines for amplifying their interpretation. This chapter deals with the duties of trial lawyers towards:

2.1 The court;

2.2 Clients;

2.3 Opponents;

2.4 Witnesses;

2.5 The State; and

2.6 General duties.

2.1 Trial lawyer's duty to the court

Trial lawyers in South Africa have a number of duties towards the court, and the following will be considered: (1) the duty to accept personal responsibility for their conduct; (2) the duty to refrain from expressing personal opinions; (3) the duty to disclose all relevant decisions; (4) the duty to refrain from misleading the court; (5) the duty to be courteous; (6) the duty to refrain from wasting the court's time; (7) the duty to disclose facts within the court's notional knowledge; and (8) the duty when prosecuting to act with scrupulous fairness.

2.1.1 *Personal responsibility for conduct*

An English Bar rule is that trial lawyers are personally responsible for the conduct and presentation of their cases in court. They must exercise personal judgement on the substance and purpose of statements made and questions asked. Trial lawyers are at all times individually and personally

responsible for their own conduct. This includes their professional work in and out of court (General Council of the Bar *Barristers' Code of Professional Etiquette* rules 6.10(a) and 5.3; see also Sherr 15). It is submitted that the same principles apply to trial lawyers in South Africa.

2.1.2 *Do not give personal opinions*

Another rule worth following from English legal practice is that, as a general rule, trial lawyers should not assert a personal opinion on the facts or the law. They may however do so if: (a) invited to express a personal opinion by the court; (b) they are appearing before a tribunal; or (c) it is their duty to do so (General Council of the Bar *Barristers' Code* rule 6.10(b); see also Sherr 15). Trial lawyers should always speak in their role as lawyers and not in their personal capacities. For example, in England when Lord Erskine was defending Tom Paine the following exchange took place: Erskine: 'I will now lay aside the role of the advocate and address you as a man'. Judge: 'You will do nothing of the sort. The only right and licence you have to appear in this court is as an advocate' (Richard Du Cann *The Art of the Advocate* (1980) 40).

2.1.3 *All relevant decisions to be disclosed*

The practice in both the barristers' and solicitors' professions in England is that trial lawyers must ensure that the court is informed of all relevant decisions and legislative provisions of which they are aware. This applies whether the effect is favourable or unfavourable towards their cases (General Council of the Bar *Barristers' Code* rule 6.10(c); see also Sherr 15). Thus, if one of them omits a case or provision, or makes an incorrect reference to a case or provision, it is the duty of the other to draw attention to it even if it assists the opponent's case. Lawyers may take every point, technical or otherwise, that is fairly arguable on behalf of their clients (Law Society *Guide to Professional Conduct* principle 14.1 commentary 1; see also Sherr 16). They must, however, bring any procedural irregularities to the attention of the court during the hearing, and not reserve such matters to be raised on appeal or review (General Council of the Bar *Barristers' Code* rule 6.10(c); see also Sherr 15). These principles are consistent with what should be expected of South African lawyers as officers of the court.

2.1.4 *Do not mislead the court*

Trial lawyers must assist the court in the administration of justice. They have an obligation to use only proper and lawful means to promote and protect the interests of their clients. They must not deceive or knowingly or recklessly mislead the court (see also General Council of the Bar of South Africa *Uniform Rules of Professional Ethics* rule 3.2; *International Code of Ethics* rule 6). For example, the English Law Society rules provide that lawyers should never call a witness whose evidence is, to their knowledge, untrue. This does not mean that a lawyer may not call a witness whose evidence he merely suspects to be untrue. (Law Society *Guide to Professional Conduct* principle 14.1 commentary 3; see also Sherr 17).

2.1.5 *Courtesy*

The English Bar rules state that lawyers must at all times be courteous to the court and to all those with whom they have professional dealings (General Council of the Bar *Barristers' Code* rule 5.5; see also Sherr 16). They should ensure that while conducting a case they do nothing to undermine the dignity or reputation of the court (see paragraph 3.3.6 below). It goes without saying that similar principles apply in South Africa.

2.1.6 *Do not waste the court's time*

Another English Bar rule which is relevant to South African practice is that trial lawyers must take all reasonable and practicable steps to avoid wasting the court's time. They should, when asked, inform the court of the probable length of their case. They should also inform the court of any developments which may affect the information already provided (General Council of the Bar *Barristers' Code* rule 5.11; see also Sherr 16). Lawyers should always be present in court at the appointed time. The South African Bar rule provides that an advocate should not seek to arrange a postponement of a matter to suit his or her convenience unless the client has agreed, and the lawyers on the other side have been told of the reasons (General Council of the Bar *Uniform Rules* rule 3.6.1). This is a sound principle that should be followed by all trial lawyers.

2.1.7 *Knowledge of facts assisting opponent*

Except when prosecuting, trial lawyers who know of facts or witnesses likely to assist their opponents are not obliged to inform the latter or the court about them to the detriment of their clients. However, an English Law Society rule provides that if they know that a relevant affidavit has been filed in the proceedings and is therefore notionally within the knowledge of the court, there is a duty on the lawyer concerned to inform the judicial officer of its existence (Law Society *Guide to Professional Conduct* principle 14.1 commentary 2; see Sherr 16). This principle should also apply to South African practice as it is consistent with the trial lawyer's duty as an officer of the court.

2.1.8 *The duty when prosecuting to act with scrupulous fairness*

The English Bar and Law Society have devised rules for trial lawyers who act as prosecutors which, it is submitted, also provide useful guidelines for South African prosecutors whether they are employees of the State or private practitioners instructed by the State. In all instances their duty as officers of the court comes before any other concerns. The English rules can be summarised as follows (see Sherr 17-18):

(a) Lawyers prosecuting a criminal case for the State must ensure that every material point is made which supports the prosecution (Law Society *Guide to Professional Conduct* principle 14.13; see also Sherr 17).

(b) When presenting the evidence on behalf of the State, prosecutors must do so dispassionately and with scrupulous fairness (Law Society *Guide to Professional Conduct* principle 14.13; see also Sherr 17).

(c) Prosecutors should not regard themselves as appearing for a party (General Council of the Bar *Barristers' Code on Prosecuting* rule 1.1; see also Sherr 18), but rather as acting in the interests of justice.

(d) Prosecutors should lay before the court fairly and impartially the whole of the facts which comprise the case for the prosecution and should assist the court on all matters of law applicable to the case (General Council of the Bar *Barristers' Code on Prosecuting* rule 1.1; see also Sherr 18).

(e) Prosecutors should mention all relevant facts and reveal any mitigating circumstances (Law Society *Guide to Professional Conduct* principle 14.13 commentary 1; see also Sherr 17).

(f) Prosecutors should not attempt to obtain a conviction by all means at their disposal where such means do not give the court the full information concerning the facts (General Council of the Bar *Barristers' Code on Prosecuting* rule 1.1; see also Sherr 18).

(g) Prosecutors should inform the court of its sentencing powers if invited to do so, whenever it appears to be under a misapprehension about those powers (Law Society *Guide to Professional Conduct* principle 14.13 commentary 1; see also Sherr 17).

In general, the duties of prosecutors towards the courts can be summarised as an obligation of honesty and directness. This supersedes all other obligations. In an adversarial system where the findings of fact are based almost entirely on the opposing views put by counsel, with the judge playing a primarily passive role, the courts are highly dependent upon the integrity of the lawyers who appear before them. The need for integrity is absolute. The courts expect complete honesty concerning such matters as the reasons for an adjournment, times of delivery of notices or letters, apologies for the trial lawyer's own lateness of arrival, and so forth (Sherr 24).

2.2 Trial lawyer's duty to the client

Trial lawyers' duties to their clients include: (1) the duty to fearlessly uphold the interests of their clients; (2) the duty not to breach client confidentiality; (3) the duty to speak on behalf of clients and to ensure that the prosecution discharges its onus; (4) the duty not to assist the prosecution case; (5) the duty to respect the client's privileged information; (6) the duty to choose an appropriate method of presenting the case; and (7) the duty not to fabricate defences. Conversely, there is no duty to enquire into the truth of the client's instructions, and the client has the right to insist on pleading not-guilty against the advice of counsel. There is also a duty on lawyers not to put their right to compensation above the interests of their clients or the interests of justice. Each of the seven duties mentioned will be briefly considered:

2.2.1 *Duty to fearlessly uphold the interests of the client*

Trial lawyers have a duty to uphold the interests of their clients without regard to any unpleasant consequences to themselves or any other persons. The South African Bar rules provide that advocates have the same privileges as the client in asserting and defending the client's rights and liberty by rendering every argument that can be legitimately advanced (General Council of the Bar *Uniform Rules* rule 3.1). They may take every point, technical or otherwise, that is fairly arguable on behalf of their clients. The same principles apply to all trial lawyers.

2.2.2 *Duty not to breach client confidentiality*

As a general rule, trial lawyers may not divulge to the court, or any other person, information confided to them by their clients (General Council of the Bar *Uniform Rules* rule 3.2; *International Code of Ethics* rule 14). It is submitted however that, as the confidence belongs to the client, such a disclosure could be made if the client, with full knowledge and appreciation of the consequences of the disclosure, consents thereto.

2.2.3 *Duty to speak on behalf of clients and to ensure prosecution discharges onus*

The English Law Society rules provide that trial lawyers who appear in court for the defence in criminal cases are under a duty to say on behalf of their clients what the latter should properly say for themselves if they possessed the requisite skill and knowledge. Furthermore, lawyers for the defence have a duty to ensure that the prosecution discharges the onus placed upon it to prove the guilt of the accused beyond reasonable doubt (Law Society *Guide to Professional Conduct* principle 14.14; see also Sherr 18). It is submitted that the same principles apply in South Africa.

2.2.4 *No duty to assist prosecution*

The English Law Society rules also provide that, unlike prosecutors, defence lawyers are not obliged to disclose facts to the prosecutors or the court which will assist the prosecution case by proving the guilt of the accused. Defence lawyers must however reveal all relevant cases and statutory provisions – including those against their contentions (English Law Society *Guide to Professional Conduct* principle 14.14 commentary 1; see also Sherr 18-19). These principles are consistent with the role of South African trial lawyers as officers of the court.

2.2.5 *Client privilege and the duty not knowingly to mislead the court*

As a general rule in civil cases the client's privilege precludes a defence lawyer from making disclosures of privileged material without the client's consent (Law Society *Guide to Professional Conduct* principle 14.15 commentary1; see also Sherr 23). The English Law Society rules provide that

in criminal cases defence lawyers may not, without their client's consent, disclose facts known to them concerning their client's character or antecedents. (Law Society *Guide to Professional Conduct* principle 14.14 commentary1; see also Sherr 19). However, they must not knowingly put forward or let their client put forward false information with the intention to mislead the court. Likewise, defence lawyers must not indicate their agreement with information that the prosecution puts forward which they know to be false (English Law Society *Guide to Professional Conduct* principle 14.14 commentary 2; Sherr 19). These principles help to amplify the general rule of the South African General Council of the Bar concerning not misleading the court (General Council of the Bar *Uniform Rules* rule 3.2), and should be followed by all trial lawyers.

2.2.6 *Trial lawyer's right to choose appropriate method of presenting case*

The English Law Society rules concerning civil matters provide that trial lawyers have the implied right to present their client's case at the trial or hearing in such a way as they consider appropriate. Thus, if the client's express instructions do not permit lawyers to present the case in a manner which they consider to be the most appropriate, they may withdraw from the case after seeking the approval of the court (English Law Society *Guide to Professional Conduct* principle 14.15 commentary 2; see also Sherr 23). Such withdrawal, however, must be done for good cause, and, where possible, in such a manner that the client's interests are not adversely affected (*International Code of Ethics* rule 11). Modern views concerning client autonomy, however, would seem to indicate that a lawyer should give the client an idea of the options available concerning a particular course of conduct, and seek to get the client's approval for the method chosen. In criminal cases in South Africa, however, the accused has a right to testify in his defence, even if his lawyer's advice is not to testify. Should the client insist on testifying against his lawyer's advice, this would not be a ground justifying withdrawal by the lawyer. (See *R v Matonsi* 1958 (2) SA 450 (A)).

2.2.7 *Duty not to fabricate defences*

The English Law Society's rules state that in criminal cases where clients instruct their lawyers that they are not guilty, defence lawyers must put the defence before the court, even if the clients decide not to give evidence themselves. Whilst defence lawyers may present any technical defences available to their clients, they must never fabricate defences on the facts (English Law Society *Guide to Professional Conduct* principle 14.14 commentary 3; see also Sherr 19). The same principles apply to South African lawyers (see paragraph 3.1.4).

2.2.8 *No duty to enquire into truth of client's instructions*

The English Law Society's rules also provide that generally there is no duty on trial lawyers to enquire as to whether their clients are telling the truth

or not. However, where the instructions or other information are such as to cause the lawyers to doubt the reliability of the same they must, where practicable, check the truth of what their clients tell them to the extent that such statements will be relied upon by the court. (English Law Society *Guide to Professional Conduct* principle 14.14 commentary 4; see also Sherr 19).

2.2.9 *Client insisting on pleading guilty against advice of counsel*

The English Law Society's rules state that where accused persons tell their lawyers that they did not commit the offence with which they are charged, but insist on pleading guilty for reasons of their own, defence lawyers should use their best endeavours to persuade them to plead not guilty. If clients persist in their guilty plea, against the advice of counsel, the latter may continue to represent them (English Law Society *Guide to Professional Conduct* principle 14.15 commentary 2; see also Sherr 23). However, they may do so only after they have advised the client what the consequences will be. The lawyer must also advise the client that what can be submitted in mitigation can only be on the basis that the client is guilty. Thus, it cannot be suggested in mitigation that the facts are such that the elements of the offence have not been established (English Law Society *Guide to Professional Conduct* principle 14.15 commentary 7; see also Sherr 20). Similar rules apply to the English Bar (General Council of the Bar *Barristers' Code* rule 2.5; see also Sherr 21). It is doubtful whether this rule will be followed in South Africa – it is submitted that if there is doubt about the client's guilt, his lawyer should insist on a not-guilty plea being entered, or be entitled to withdraw from the case should the client not consent to the not-guilty plea.

2.2.10 *Duty not to put right to compensation above interests of clients or justice*

Lawyers should never put their right to compensation for services above the interests of their clients and the administration of justice (*International Code of Ethics* rule 17). The lawyer's right to demand payment of a deposit or out of pocket expenses and commitments, failing payment of which they may withdraw from the case or refuse to handle it, should never be exercised at a moment at which the client may be unable to find other assistance in time to prevent irreparable damage being done to the case (*International Code of Ethics* rule 17). These rules apply equally in South Africa.

2.3 Trial lawyer's duty to opponents

The duties of trial lawyers to their opponents include (1) the mentioning of authorities to be used in court; (2) the duty not to unnecessarily embarrass an opponent; (3) the duty to draw attention to cases or provisions overlooked by opponents; (4) the duty to show courtesy and respect towards

colleagues; (5) the duty not to inconvenience or harass opponents; (6) the duty, when prosecuting, to provide evidence assisting the defence; (7) the duty to avoid personality conflicts with opponents; (8) the duty to obtain the consent of opponents before placing further material before the court; and (9) certain duties concerning the giving of notice when interviewing witnesses on the other side.

2.3.1 *Mentioning of authorities to be used in court*

It is a sensible practice for lawyers to tell their opponents of the authorities on which they intend to rely to prevent the chance of the court being misled by a failure to cite all relevant authorities (see paragraph 2.1.3).

2.3.2 *Duty not to unnecessarily embarrass an opponent*

As a matter of professional courtesy, trial lawyers should not unnecessarily embarrass their opponents, for example, by not giving them notice of legal points not evident from the papers which may take them unawares, or by taking surprise exceptions, or technical or other procedural points which may embarrass them if they are not notified in advance. Such practices not only undermine the reputations of colleagues, but also that of the practising profession – something that all practitioners are bound to uphold (see paragraph 1.12).

2.3.3 *Omission of case or provision by opponent*

As has been previously mentioned, if a trial lawyer knows that an opponent has omitted a case or legislative provision or makes an incorrect reference to a case or provision, it is the duty of the trial lawyer to draw attention to it even if it assists the opponent's case (see paragraph 2.1.3).

2.3.4 *Courtesy and respect towards colleagues*

A trial lawyer's behaviour towards opponents should not be any different from his or her behaviour towards the court. Opponents are entitled to courtesy and respect on the same basis as the court (H Daniels *Morris Technique in Litigation* 4ed (1993) 154). Lawyers who treat opponents with rudeness and a lack of courtesy are unlikely to gain their respect and cannot themselves expect to be treated politely. In either case such attitudes will do little to advance the cause of their clients or indeed their own careers. They are likely to receive little co-operation from their colleagues and, while they may hold the upper hand when displaying such attitudes, at some future stage they may be in a much weaker position, and may well have to rely on the good offices of their opponents to advance their client's best interests.

2.3.5 *Duty not to inconvenience or harass opponents*

It is submitted that it would be unprofessional to deliberately inconvenience or harass an opposing counsel, for example, by deliberately delaying

the service of a notice until a time chosen so that its expiry will fall most inconveniently to the opponent, such as public holiday periods that are interspersed with work days when the opponent may be away. (See also Lewis *Legal Ethics: A Guide to Professional Conduct for South African Attorneys* (1982) 135.)

2.3.6 *Duty when prosecuting to provide evidence assisting the defence*

Prosecuting lawyers are under a duty to ensure that all relevant evidence is either presented by the prosecution or made available to the defence. In *Shabalala v Attorney-General of Transvaal* 1995 (2) SACR 761 (CC) the Constitutional Court held the following:

(a) There is no blanket docket privilege over all the documents in the police file.

(b) Ordinarily an accused person should be entitled to have access to documents in the police docket which are exculpatory (or which are *prima facie* likely to be helpful to the defence) unless, in very rare cases, the State is able to show that such access is not justified for the purposes of a fair trial.

(c) Ordinarily the right to a fair trial would include access to the statements of witnesses (whether or not the State intends to call such witnesses), and such of the contents of a police docket as are relevant in order to enable accused persons to properly exercise their rights. The prosecution may, in certain circumstances, be able to justify the denial of such access on the grounds that it is not justified for the purposes of a fair trial.

(d) The State is entitled to resist a claim by the accused for access to any particular document in the police docket on the grounds that such access is not justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial, or on the ground that it 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 of State secrets, or on the grounds that there was a reasonable risk that such disclosure might lead to the intimidation of witnesses, or otherwise prejudice the proper ends of justice.

(e) Even where the State has satisfied the court that the denial of access to the relevant documents is justified on the grounds set out in paragraph (d) above, it does not follow that access to such statements, either then or subsequently, must necessarily be denied to the accused. The court still retains a discretion. It should balance the degree of risk involved in attracting the potential prejudicial consequences for the proper ends of justice referred to in paragraph (d) above (if such access is permitted), against the degree of risk that a fair trial may not ensue for the accused if such access is denied. Such a ruling by the court will be regarded as an interlocutory order subject to further amendment,

review or recall in the light of circumstances disclosed by the further course of the trial.

These principles apply to all trial lawyers and have partly been included in the rules of the General Council of the Bar (General Council of the Bar *Uniform Rules* rule 4.3.2).

2.3.7 *Duty to avoid personality conflicts with opponents*

Clients, not the trial lawyers, are the litigants and ill feelings between clients should not influence counsel. Personality conflicts between opposing lawyers should be avoided. Thus the General Council of the Bar has a rule that makes it improper to allude to the personal history, personal peculiarities or idiosyncrasies of counsel on the other side (General Council of the Bar *Uniform Rules* rule 4.12).

2.3.8 *Duty to obtain opponent's consent before placing further material before the court*

The General Council of the Bar's rules provide that it would be 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 opposing counsel. The latter's consent should not be unreasonably withheld, particularly when it will assist the court to come to a correct judgment. If consent is unreasonably withheld the proper course is to request the court to receive the further material, or where appropriate, to make an application to re-open the case (General Council of the Bar *Uniform Rules* rule 4.13).

2.3.9 *Duties when interviewing witnesses on the other side in criminal matters*

In *Shabalala v Attorney-General of Transvaal* (*supra*), the Constitutional Court set out the law regarding the interviewing of State witnesses by the defence as follows:

(a) The rule of practice that an accused or his or her legal representative may not consult with witnesses for the State without the permission of the prosecuting authority, in all cases and regardless of the circumstances, is not consistent with the Constitution.

(b) An accused person has a right to consult a State witness without prior permission of the prosecuting authority in circumstances where his or her right to a fair trial would be impaired, if, on the special facts of a particular case, the accused cannot properly obtain a fair trial without such consultation.

(c) The accused or his or her legal representative should in such circumstances approach the Director of Public Prosecutions, or an official authorised by the Director of Public Prosecutions, for consent to hold such a consultation. If such consent is granted, the Director of Public Prosecutions or such official shall be entitled to be present at such

consultation and to record what transpires during the consultation. If the consent of the Director of Public Prosecutions is refused, the accused shall be entitled to approach the court for permission to consult the relevant witness.

(d) The right to consult in terms of paragraph (b) above does not entitle an accused person to compel such consultation with a State witness:

(i) if such witness declines to be so consulted; or

(ii) if it is established on behalf of the State that it has reasonable grounds to believe such consultation might lead to the intimidation of the witness, or a tampering with his evidence, or that it might lead to the disclosure of State secrets or the identity of informers or that it might otherwise prejudice the proper ends of justice.

(e) Even in the circumstances referred to in paragraph (d)(ii) above, the court may, in the circumstances of a particular case, exercise a discretion to permit such consultation in the interests of justice subject to suitable safeguards.

The rules of the General Council of the Bar provide that, before interviewing potential State witnesses, it is the duty of defence lawyers to ascertain from such witnesses, the police or the prosecutor, whether or not such witnesses are in fact witnesses for the prosecution. Witnesses for the prosecution include persons from whom the police or prosecutor have taken statements, before or after the accused was arrested or charged, or who have been called by the prosecution to testify during the trial, or from whom the police or prosecutor have taken a statement but have decided not to call to testify during the trial (General Council of the Bar *Uniform Rules* rule 4.3.2). This approach should be followed by all trial lawyers.

2.3.10 *Duties when interviewing witnesses on the other side in civil matters*

The General Council of the Bar has laid down rules for lawyers in civil matters who wish to interview an opponent's witnesses, or witnesses likely to be called by their opponents. Where they wish to interview such witnesses before they have testified, they are required to give the other side timeous notice of their intentions. This should be done after ascertaining whether the other side is calling the witness or has arranged to take a statement from him or her. The other side may not prevent the litigant's lawyer from interviewing the former's witness if it is necessary to assist the litigant with his or her case. Furthermore, the other side is not entitled to attend or be represented at such an interview. Where, however, the witness has already testified, but the litigation has not yet been determined, such witness may not be interviewed in the absence of the other side's legal representative, unless the latter has been given timeous notice and has declined to attend the interview (General Council of the Bar *Uniform Rules* rule 4.3.1).

2.3.11 *Duties when interviewing a judicial officer*

The General Council of the Bar rules point out that it is undesirable, save in exceptional circumstances, for counsel in a contested case, in the absence of his or her opponent and without the latter's consent, to seek to interview the judicial officer who is hearing or is about to hear the case (General Council of the Bar *Uniform Rules* rule 4.10). The other side should be notified of the intention of the lawyer wishing to conduct the interview.

2.4 Trial lawyer's duty to witnesses

Trial lawyers owe a number of duties to witnesses: (1) the duty of courtesy; (2) the duty not to harass or badger witnesses; (3) the duty not to make unsubstantiated attacks on a witness's character; (4) the duty to keep defamatory statements within the qualified privilege; (5) the duty not to wantonly or recklessly accuse a witness of a crime; (6) the duty not unnecessarily to take an affidavit from a witness; (7) the duty not to interview witnesses already sworn in; and (8) the duty to consult with one's own witnesses before trial.

2.4.1 *Duty of courtesy*

As a general rule trial lawyers should, as far as possible, be courteous to witnesses at all times: 'Witnesses must be treated with courtesy and respect. They are doing a public duty in coming to court' (per Snyman J in *S v Azo* 1974 (1) SA 808 (T) at 810-811). It is more likely that counsel will get the information he or she requires from a witness if a polite and co-operative relationship is developed with the witness concerned. An argumentative attitude is likely to elicit much less information and to irritate the court.

2.4.2 *Duty not to harass or badger witnesses*

Trial lawyers should refrain from harassing, badgering or bullying witnesses. Not only is such conduct unlikely to ensure co-operation from the witness, but it is also likely to irritate the court. Few witnesses are likely to be badgered into making admissions they do not want to make. It is better to expose inconsistencies in a witness's evidence through polite, carefully structured questioning, and to draw attention to the results in argument.

2.4.3 *Duty during cross-examination not to make unsubstantiated attacks on the character of a witness*

The General Council of the Bar rules state that questions which affect the credibility of a witness by attacking his or her character, but are not otherwise relevant to the enquiry, should not be put unless counsel has reasonable grounds for believing that the imputations conveyed by the questions are well-founded or true (General Council of the Bar *Uniform*

Rules rule 3.3.1). The rules go on to state that it is the duty of counsel 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 or her own judgment both as to the substance and form of the question put (General Council of the Bar *Uniform Rules* rule 3.3.5). In cases where an advocate is instructed by an attorney who informs him or her that the imputation is well-founded or true, without merely instructing counsel to put the question, the advocate is entitled *prima facie* to regard such instructions as reasonable grounds for so thinking and may put the question accordingly (General Council of the Bar *Uniform Rules* rule 3.3.2). An advocate may not accept the statement of anyone other than the instructing attorney. Where the statement is made by a person other than an instructing attorney, counsel must ascertain, as far as is practicable, that there are satisfactory reasons for the statement (General Council of the Bar *Uniform Rules* rule 3.3.3). Other trial lawyers should do likewise.

2.4.4 *Duty during cross-examination to keep defamatory statements within qualified privilege*

It is submitted that it would be unethical and an abuse of the court process for a lawyer to put questions simply to insult or annoy the witness: 'No cross-examiner is entitled to insult a witness or to treat him in a manner in which these witnesses were treated, without there being a very good reason for it' (per Snyman J in *S v Azo supra* at 810-811). A trial lawyer's defence of qualified privilege against an action for defamation arising from cross-examination only extends to statements which are (a) pertinent or germane to the issue, and (b) which have some foundation in the evidence or circumstances surrounding the trial (*Moolman v Slovo* 1964 (1) SA 760 (W) at 762; *Pogrund v Yutar* 1967 (2) SA 564 (A) at 570). The approach of the General Council of the Bar is that such questions, whether or not the imputations 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. If the imputation conveyed by the question relates to matters so remote in time, or is of such a character that it would not affect the credibility of the witness, the question should not be put (General Council of the Bar *Uniform Rules* rule 3.3.4).

2.4.5 *Duty not to wantonly or recklessly accuse the witness of a crime*

The General Council of the Bar rules provide that an advocate defending a client on a criminal charge is not entitled to wantonly or recklessly attribute to another person the crime with which his or her client is charged. The advocate may not do so 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 (General Council of the Bar *Uniform Rules* rule 3.4). The same principle should apply to all trial lawyers.

2.4.6 *Duty not to interview witnesses who have been sworn in*

The General Council of the Bar rules state that it is generally undesirable to interview any witness after he or she has been sworn in or has made a solemn declaration to tell the truth (General Council of the Bar *Uniform Rules* rule 4.2.1). Furthermore, it would be improper to interview a witness who is under cross-examination, unless circumstances make such an interview necessary. Where such circumstances exist, a lawyer who desires to hold the interview must inform his or her opponent before doing so (General Council of the Bar *Uniform Rules* rule 4.2.2). It is also generally improper for an advocate to interview a witness after cross-examination is completed and before re-examination (General Council of the Bar *Uniform Rules* rule 4.2.3). 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 (General Council of the Bar *Uniform Rules* rule 4.2.4).

2.4.7 *Duty not to take an affidavit from a witness unless it is to be handed in as evidence*

The General Council of the Bar rules provide that affidavits should not usually be obtained by lawyers from prospective witnesses, except in cases in which their evidence is intended to be presented by means of the production of the affidavits deposed to by them (General Council of the Bar *Uniform Rules* rule 4.4).

2.4.8 *Duty to consult with one's own witness before trial*

There is a duty on all trial lawyers to consult with their witnesses before trial, not with a view to 'schooling' them, but simply to prepare them for the ordeal of testifying in court. For example, it is helpful to explain to the witness the procedure concerning evidence-in-chief, cross-examination and re-examination, as well as how he or she should dress for court and address the court. The lawyer should also take them through the evidence without rehearsing them. Morris suggests that lawyers should prepare their witnesses for cross-examination as follows (Daniels (ed) *Morris Technique in Litigation* 4ed (1993) at 135):

> '[I]t is permissible to prepare the witness in the general sense for cross-examination somewhat in the following terms: "Listen to the question before you answer. If you do not understand it, say so. If you don't know any answer, don't guess, just say that you don't know. Don't worry about what the man has in mind when he asks his question, just give a direct answer. Answer as shortly as possible and don't make speeches."'

2.5 Lawyer's duty to the State

It is submitted that lawyers owe a duty to the State to assist: (1) as prosecutors; and (2) by appearing in legal aid matters when called upon.

2.5.1 *Duty to assist the State as prosecutors when called upon*

It is submitted that when asked to assist the State in the administration of justice as a prosecutor, lawyers should be prepared to do so as part of their function as officers of the court (see paragraph 2.1). In the case of the advocates' profession the same rules as those for refusing a 'cab rank' brief should apply if counsel wishes to decline a brief as prosecutor (see paragraph 3.2). Although attorneys are not bound by the 'cab rank' rule, there is an expectation that they should also assist in strengthening the administration of justice where they have the necessary skills to do so. The rules governing the duties of trial lawyers who act as prosecutors have already been canvassed (see paragraph 2.1.8).

2.5.2 *Duty to assist the State by appearing in legal aid matters when called upon*

It is a strong tradition of the advocates' profession that its members should undertake to do *pro deo* work when called upon to do so by their bar councils or the courts (General Council of the Bar *Uniform Rules* rule 6.1). *Pro deo* work has now been subsumed under the legal aid scheme, and there is now a duty on all trial lawyers to do legal aid work when called upon to do so by their bar councils or the courts (General Council of the Bar *Uniform Rules* rule 6.3.1). Although the 'cab rank' rule does not apply to attorneys, they are expected to assist in cases 'assigned by a competent body' (International Bar Association *International Code of Ethics* rule 17), which, it is submitted, could be interpreted to include the Legal Aid Board.

2.6 General duties of trial lawyers

Trial lawyers also have a number of general duties that impact on the court, their clients and may affect their own professional reputations: (1) the duty to act ethically at all times; (2) the duty not to expose themselves to litigation; (3) the duty to prepare thoroughly for every case; (4) the duty not to give evidence or make affidavits in cases in which they are appearing; (5) the duty not to take on too many cases; (6) the duty to be properly dressed; and (7) the duty to introduce themselves to the court.

2.6.1 *Duty to act ethically at all times*

There is a duty on lawyers to act ethically at all times in order to maintain their integrity and reputation in the eyes of clients, the courts and colleagues. Integrity and reputation are two of a lawyer's most priceless assets.

2.6.2 *Duty not to expose themselves to litigation*

As officers of the courts, lawyers should always conduct themselves so that they are not needlessly exposed to personal litigation. The threat of litigation may play havoc with a lawyer's practice and may also have a

damaging effect on his or her reputation. While it is true that it may be difficult to sue an advocate for negligently conducting a trial (see also *Rondel v Worsley* [1969] 1 AC 191 (HL); *Saif Ali v Sydney Mitchell & Co* [1980] 198 (HL); JR Midgely *Lawyers' Professional Liability* (1992) at 34-39), there may still be liability arising out of initial advice, undertakings or questions of costs (Sherr 25).

2.6.3 *Duty not to give evidence or make affidavits in cases in which they are appearing*

The General Council of the Bar rules provide that advocates should avoid, as far as is possible, putting themselves in any position where they may have to make statements or give evidence in relation to matters which are in dispute in cases where they are appearing (General Council of the Bar *Uniform Rules* rule 4.5.1). This is a rule that should be followed by other trial lawyers. The rule would not apply to evidence of a purely formal or non-contentious nature.

2.6.4 *Duty to prepare thoroughly for every case*

Thorough preparation may be time-consuming and stressful while it is being done, but it reduces the stress considerably when the trial date arrives. An under-prepared lawyer is at a major disadvantage during any trial and the knowledge that all kinds of uncertainties may arise can considerably increase the stress levels experienced by counsel operating under such conditions. The fact that a trial lawyer is always thoroughly prepared is likely to enhance a counsel's reputation in the eyes of clients, the courts and colleagues.

2.6.5 *Duty not to take on too many cases*

There is a duty on trial lawyers not to take on more cases than they will be able to handle (Du Cann 36-37). A lawyer who takes on too many cases runs the risk of carrying out inadequate preparation, with subsequent prejudice to his or her clients. In some instances the lawyer may not even be able to appear in the cases because of double bookings. Not only is such conduct unethical, but it will also do great damage to the trial lawyer's reputation.

2.6.6 *Duty to be properly dressed*

When appearing in court a trial lawyer should wear clothes that are suitable to be worn under the gown for a court appearance. There is nothing more embarrassing for a trial lawyer than to be told by the judicial officer that he or she cannot 'see' counsel (see paragraph 4.1).

2.6.7 *Duty to introduce oneself to the court*

A trial lawyer appearing before a judge or magistrate for the first time should introduce himself or herself to the presiding officer before their first appearance before the person concerned (see paragraph 4.3).

CHAPTER 3

Conflicts of interest, the 'cab rank' rule and applications for recusal of judicial officers

This chapter will deal with the ethical issues facing trial lawyers when they must deal with:

3.1 Conflicts of interest;

3.2 The 'cab rank' rule applicable to the advocates' profession; and

3.3 Applications for the recusal of judicial officers.

3.1 Conflicts of interest

In this section the following aspects will be dealt with: (1) the conflict between the trial lawyer's duty to the court and duty to the client; (2) the client confessing guilt to the lawyer; (3) confession of guilt by client being no bar to defence by trial lawyer; (4) confession of guilt imposing strict limitations on the conduct of the case; (5) grounds of objection after a confession of guilt is made; (6) how far a trial lawyer may go in attacking prosecution evidence after a confession of guilt is made; and (7) statements not indicating a clear confession.

3.1.1 *Conflict between the duty to the court and duty to the client*

A major area of conflict of interest faced by trial lawyers is where their role as an officer of the court conflicts with their duty to the client. Where such a conflict exists the question is: whose interests prevail? The answer must be that the duty to the court takes precedence, because a trial lawyer may only protect or advance the interests of his or her client to the extent that it is consistent with counsel's function as an officer of the court. The principles applied by the General Council of the Bar of South Africa's *Uniform Rules of Professional Ethics* are similar to those applied by the General Council of the Bar of England and Wales *Barristers' Code of Professional Etiquette*. These principles provide useful guidelines for all trial lawyers.

3.1.2 *Client confessing guilt to lawyer*

The English Bar rules state that, in considering the duty of a lawyer employed to defend an accused person who makes a clear confession to him

or her concerning the offence charged, the following should be borne in mind (General Council of the Bar *Barristers' Code* rule 3.1; see also Avrom Sherr *Advocacy* 21):

(a) Every punishable crime is a breach of common or statute law committed by a person of sound mind and understanding.

(b) The issue in a criminal trial is always whether the accused is guilty of the offence charged, never whether he or she is innocent.

(c) The burden of proof rests on the prosecution.

It is submitted that similar principles apply to criminal cases in South Africa.

3.1.3 *Confession of guilt by client no bar to defence by lawyer*

The South African Bar's *Uniform Rules* provide that every person who is charged before the court has a right to the services of counsel in the presentation of his or her defence (General Council of the Bar *Uniform Rules* rule 2.1). The English Bar's *Barristers' Code* states that the mere fact that an accused person has confessed to counsel that he or she committed the offence charged is no bar to an advocate appearing in his or her defence. Such a confession does not release a lawyer from his or her duty to do all that can be done for the client without deliberately misleading the court (General Council of the Bar *Barristers' Code* rule 3.2; see also Sherr 21). This principle applies to all trial lawyers.

3.1.4 *Confession of guilt imposes strict limitations on the conduct of case*

A confession of guilt by a client imposes very strict limitations on the conduct of the defence. The South African Bar rules state that where a client makes a confession to his or her counsel either before or during criminal proceedings, counsel should explain to the client that he or she may only continue with the case on the following basis (General Council of the Bar *Uniform Rules* rule 4.11):

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

(b) Counsel 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.

(c) Counsel may not set up an affirmative case which he or she knows to be inconsistent with the confession.

The client may then decide whether he or she wishes counsel to appear on the above basis or whether he or she wishes to withdraw their instructions.

The above principles provide useful ethical guidelines for all practising trial lawyers.

3.1.5 *Grounds of objection after confession of guilt*

The English Bar rules provide that an advocate to whom a confession of guilt has been made may, by way of using principles of legal procedure to relieve the accused of criminal liability, object to such matters as (General Council of the Bar *Barristers' Code* rule 3.4; see also Sherr 22):

(a) the competency of the court;

(b) the form of the indictment;

(c) the sufficiency of the evidence; and

(d) the admissibility of any evidence.

He or she may, however, not suggest that someone else committed the offence charged, or call any evidence which the advocate knows or ought to know to be false having regard to the confession, for example, evidence in support of a false alibi (General Council of the Bar *Barristers' Code* rule 3.4; see also Sherr 22). These principles apply to all trial lawyers.

3.1.6 *Limits of how far a trial lawyer may go in attacking prosecution evidence after confession of guilt*

The question arises as to how far a trial lawyer to whom a confession of guilt has been made may go in attacking the evidence for the prosecution in his or her cross-examination, or during the closing argument for the defence. The English Bar rules state that such a lawyer is entitled to test the evidence given by each witness, and to argue that the evidence taken as a whole is insufficient to prove that the accused is guilty of the offence charged (General Council of the Bar *Barristers' Code* rule 3.5; see also Sherr 22). The Bar rules in both South Africa and England provide that an advocate may not go beyond this by making a case inconsistent with the client's confession (see General Council of the Bar *Uniform Rules* rule 4.11; General Council of the Bar *Barristers' Code* rule 3.4; see also Sherr 22), for example, by putting a version to a witness which he or she knows is false. These principles should be applied by other trial lawyers.

3.1.7 *Statements not indicating a clear confession*

The instances in paragraphs 3.1.2 to 3.1.6 apply where there is a clear confession to counsel by the accused. The English Bar rules provide that they do not apply to cases where (General Council of the Bar *Barristers' Code* rule 3.6; see also Sherr 22):

(a) a series of inconsistent statements are made to the advocate by the accused before or during the proceedings; or

(b) statements are made by the accused which point almost irresistibly to the conclusion that the defendant is guilty but which do not amount to a clear confession.

In England, in respect of solicitors, it has been suggested that: 'The insistence of the client in pleading not guilty in the face of compelling evidence to the contrary would not be a reason for declining to act unless it adversely affected confidence or the solicitor/client relationship' (Hugh Bryce and Richard Grimes *Professional Skills for Lawyers* (1994)). These instances raise difficult questions and must be dealt with very carefully to ensure that the client's interests are not jeopardised. South African trial lawyers should exercise similar caution.

3.2 'Cab rank' rule applicable to the advocates' profession

The 'cab rank' rule (that is, that an advocate is obliged to accept a brief unless he or she has some good reason for refusing to do so) applies to lawyers practising on their own in the profession of advocates (General Council of the Bar *Uniform Rules* rule 2.1). It does not apply to attorneys who are governed by the *International Code of Ethics* which states: 'Lawyers shall at any time be free to refuse to handle a case, unless it is assigned by a competent body' (*International Code of Ethics* rule 10). The following aspects of the 'cab rank' rule will be dealt with: (1) when an advocate is obliged to accept a brief; (2) when an advocate may not refuse a brief; (3) the reason for the 'cab rank' rule; (4) why an advocate should not assume the role of judge; and (5) when an advocate may refuse a brief.

3.2.1 *Advocate obliged to accept brief*

Counsel is under an obligation to accept a brief in the courts in which he or she professes to practise, at a proper professional fee, unless there are special circumstances which justify his or her refusal to accept a particular brief. Furthermore, subject to the 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 or her services (General Council of the Bar *Uniform Rules* rule 2.1). The phrase 'cab rank' was coined by Lord MacMillan (he used the words 'on the cab rank for hire': see Du Cann *The Art of the Advocate* (1980) at 34) and means that an advocate is obliged to accept a brief unless he or she has some good reason for refusing to do so. The reason for the rule is that every person is entitled to be represented in a court of law.

3.2.2 *When counsel may not refuse a brief*

An advocate may not refuse a brief simply because he or she:

(a) does not think much of the client's chances of success;

(b) does not think much of the client as a person; or

(c) thinks that the facts of the case are unsavoury (Du Cann at 34).

3.2.3 *Reason for 'cab rank' rule*

Marshall Hall, the famous English advocate, explained the reason for the cab rank rule as follows: 'Barristers are public servants and may be called

on just as a doctor may be called on to operate on a man suffering from a loathsome complaint' (Du Cann 34).

The South African Bar states the reason as 'every person who is charged before the court has a right to the services of counsel in the presentation of his [or her] defence . . . Any action which is designed to interfere with the performance of this duty [to accept a brief] is an interference with the course of justice' (General Council of the Bar *Uniform Rules* rule 2.1).

3.2.4 *Counsel not to assume role of judge*

It can be argued that an advocate who refuses to defend an accused person because he or she feels that the person does not have a good case, or is guilty, assumes the role of a judge. Such an assumption undermines the fundamental and constitutional principle of presumption of innocence to which an accused is entitled (see the Constitution of the Republic of South Africa Act, 108 of 1996, s 35(3)(h)). The duty is on the court, not the advocate, to make the decision on the guilt or otherwise of the accused.

3.2.5 *When counsel may refuse a brief*

Despite the 'cab rank' rule, an advocate may refuse a brief where there are special circumstances which justify his or her refusal to accept a particular brief. The South African Bar rule does not mention what these circumstances are, except to mention that advocates may decline specialist briefs where they consider themselves not competent to accept the brief (General Council of the Bar *Uniform Rules* rule 2.1). It has been suggested that counsel may refuse a brief for any number of good reasons including the following (Du Cann at 35):

(a) the client cannot afford the fee;

(b) the advocate may have been consulted by the other side;

(c) the advocate may have confidential information about the other side;

(d) the advocate may know one of the witnesses involved;

(e) the taking of the brief may clash with some office or appointment the advocate holds and his or her duties as an advocate;

(f) the advocate does not have the necessary skill or experience to conduct the case competently on behalf of the client; and

(g) the advocate has too much work and can see in advance that he or she will not be able to carry out the brief.

3.3 Recusal of judicial officers

Trial lawyers faced with the prospect of having to ask a judicial officer to recuse him- or herself must consider the following:

3.3.1 The need for utmost tact;

3.3.2 How to apply for a recusal based on kinship or previous connection with the case;

3.3.3 How to apply for a recusal based on bias;

3.3.4 The factors to consider when applying for recusal;

3.3.5 The duty to avoid premature assessment of the need for recusal; and

3.3.6 The consequences of the abuse of the right to apply for recusal.

3.3.1 *The need for utmost tact*

Trial lawyers who find themselves faced with having to request the recusal of a judicial officer should always use the utmost tact when doing so (Daniels *Morris's Technique in Litigation* 4ed (1993) at 64). Judicial officers are only human, and do not like to be told in open court that they may not be able to make a fair or unbiased decision because of some reason they themselves have not brought to the attention of the interested parties. They are nevertheless expected to retain their objectivity when considering an application for recusal.

3.3.2 *Recusal based on kinship or previous connection with decision*

Where the application is based on the judicial officer being (a) related to somebody, or (b) because of some previous connection with a decision in the same proceedings, the application will not be difficult as the court will usually oblige. It is advisable for the lawyer to point out such a relationship or connection to the judge or magistrate in chambers before raising the issue in open court.

3.3.3 *Recusal based on bias*

Applications for recusal on grounds of bias can be very difficult, and the trial lawyer must take care to avoid words, 'which may reflect adversely upon the actual impartiality of the court and which may thus be contemptuous' (Daniels *Morris's Technique in Litigation* 4ed). Submissions founded on fact and made in moderate language are protected. However, exaggerated, reckless or incautious language may result in the applicant being held in contempt of court (see *R v Silber* 1952 (2) SA 475 (A)). Once again it is advisable to advise the bench beforehand about the pending application, in order to give the judicial officer an opportunity to withdraw from the case on his or her own initiative.

[*See the report on the application by the State for the recusal of the judge in the Wouter Basson criminal trial: Annexure A.*]

3.3.4 *Factors to consider when applying for recusal*

The former Appellate Division, now the Supreme Court of Appeal, has mentioned the following as important factors affecting applications for recusal (per Schreiner JA in *R v Silber supra*):

(a) The repetition of protestations of deep respect will not make the submissions more convincing if the effect of the words is to undermine the honour and dignity of the court.

(b) As a matter of professional courtesy, the judicial officer who is being asked to recuse himself or herself should be informed in advance that such an application will be made. This is usually done informally by asking the judicial officer to receive both counsel in chambers where the person wishing to make the application indicates tactfully the fact and the grounds of the application. The officer concerned then has time to consider the request and where appropriate, to arrange for someone else to hear the case.

(c) Where a lawyer moves for recusal, the other counsel should remain completely neutral because it is essentially a matter between the first lawyer and the bench. The lawyer on the other side should not become involved and should state that he or she will abide by the court's ruling.

3.3.5 *Avoiding premature assessment of need for recusal*

Every trial lawyer at some stage may feel that the court has formed an opinion adverse to his or her client, particularly if the court gives this impression, or counsel identifies too closely with the client. It has been suggested that this can be overcome by doing the following (Daniels *Morris's Technique in Litigation* 4ed at 64-65):

(a) Lawyers should always preserve the degree of independence and detachment necessary to allow them to remain objective.

(b) Lawyers should not act prematurely when deciding to apply for recusal in case the court's opinion is merely the expression of transient contemporaneous feelings.

(c) Lawyers should make sure that they are right before making an application for recusal, and that it is the only reasonably practical step to take.

3.3.6 *Consequences of abuse of the right to apply for recusal*

If a trial lawyer abuses the right to request a judicial officer to recuse himself or herself, 'and if under the cloak of an application for recusal, the applicant is in truth insulting the court wilfully, summary committal [for contempt of court] may be appropriate' (per Schreiner JA in *R v Silber supra*). Advocates should never use their position to undermine the dignity and reputation of the court.