GENERAL

TERMINOLOGY

1. ***Pro amico*** is free representation by an attorney *of* a client who is in a particular relationship to the client. *No* fees may be charged but disbursements may be recovered (3)

2. **Pro deo**

3. In forma pauperis – This refers to where an indigent litigant makes an application in terms of URC 40 to bring proceedings in forma pauperis in which case no charges are made by the registrar and an attorney and advocate are appointed to act for free.

2. **Party and party costs -** Costs taxable and recoverable from the party who lost a case where costs have been awarded to the successful party by the court on that basis

3. **Attorney and client costs** – Costs recoverable from your own client in terms of a prescribed tariff to cover for payment of all services rendered. This does not require a special agreement between the attorney and his client.

4. **Attorney and own client fees -** Costs as agreed between an attorney and his client which are not necessarily in accordance with a prescribed tariff but which must in any event be a reasonable fee. (3)

5. ***Costs* de *Bonis Propriis***. These are costs which a *Court* may order the attorney to pay himself either on a party and party basis or on an attorney and client basis usually as an indication of its displeasure at the attorney's conduct. (3)

6. **Costs in the cause -** This is an interim order made by a Court relating *to* costs incurred in a matter that is not finalised and means that these costs will follow the final costs order in the matter. It applies to either party and party costs or attorney and client costs.

7. **On a no charge basis for employees of a respected client -** This is similar to fees pro amico (1) and is subject to the same rules (1), in particular this may not be used as a means for touting.

7. **Contingency fees** constitute a percentage of a client's successful claim if the claim sounds in money or are fees that a chargeable at a rate higher than normal if the work is successfully concluded. This type of fee was until recently *not* permitted but has *now* been legalised by legislation if certain formalities are complied with. In terms of recent legislation in contingency fees no fee is payable if the client is not successful. (5)

AT WHAT STAGE MAY A CA WRITE THE PRACTICAL EXAMINATION PROVIDED FOR IN SECTION 14 OF THE ACT

After 6 months after registration of articles

HOW MANY CA'S MAY AN ATTORNEY HOLD UNDER ARTICLES

Three.

TRUSTS

WITH WHOM WOULD YOU A REGISTER A TRUST

The Trust will be registered with the Master of the High Court in the area in which your client resides. (1)

WHAT DOCUMENTS MUST BE LODGED WHEN REGISTERING A TRUST

1. Two copies of the Deed of Trust.
2. Letter from an Auditor.
3. Acceptance of Trust by the trustees. (3)

WHAT OTHER INFORMATION WILL YOU SUBMIT TO THE RELEVANT AUTHORITIES WHEN REGISTERING A TRUST

1. The name of the bank at which the Trust will operate its account.
2. The name and address of the person who will keep and maintain the records of the trust.
3. Occupation of the Trustees. (3)

WHAT STAMP DUTY WILL YOU PAY WHEN REGISTERING A TRUST

R100.00. (1)

WHAT IS THE ESSENTIAL CHARACTERISTIC OF A DISCRETIONARY TRUST

The Trustees have a discretion regarding the benefits that beneficiaries will receive, if at all. (2)

STAMP DUTY

HOW IS THE LEGALITY AND ENFORCEABILITY OF AN AGREEMENT INFLUENCED BY THE FACT THAT IT HAS NOT BEEN STAMPED

8.1 The legality of the agreement is not affected (1). However, the agreement cannot be enforced in a court of law until it has been stamped (1). The Stamp Duties Act provides for penalty stamps to be affixed to the document (1), in addition to the basic stamp duty, if it is not stamped within 21 days of signature (1). These penalty stamps must be cancelled by the Receiver of Revenue (1). (5)

IN WHAT WAY AND BY WHOM SHOULD REVENUE STAMPS ON A DOCUMENT BE CANCELLED

8.2 The stamps may always be cancelled by the Receiver of Revenue (1) by way of his official rubber stamp (1). It may also be cancelled by any of the parties to the agreement (1) by initialling and writing the date (1) on each individual stamp (1). (5)

FIDELITY FUND CERTIFICATE

What is a FFC? A certificate issued in terms of the provisions of the attorneys act no 53 of 1979 (s42) to any practitioner practising for his own account and remains valid until 31 December of each year. (2)

How and when is one obtained? 2 It must be applied for to the Secretary of the Law Society concerned in the prescribed form and against payment of the prescribed fee furnishing the required information as by, an attorney wishing to practise for his own account and before commencing to practise. Each practising attorney must be in possession of a valid fidelity fund certificate which must be renewed annually. (5)

What are the consequences following an attorney failing to renew his fidelity fund certificate?

a) He may not continue to practise.

b) If he does he will be committing an offence under the rules of the Law Society.

c) He may be suspended or removed from the Roll of practitioners. (3)

NOTE: Clients retain their rights against the Fidelity Fund. (Aug 2003)

PRESCRIPTION ITO OF APPORTIONMENT OF DAMAGES ACT

Section 2(6)(b) of the Apportionment of Damages Act stipulates: " The period of extinctive prescription of a claim for a contribution shall be 12 months calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal: provided that if, in the case of any joint wrongdoer, the period of extinctive prescnption in relation to any action which may be instituted against him by the Plaintiff, is governed by a law which prescribes a period of less than 12 months as the period in which legal proceedings shall be instituted against him or within which notice shall be given that proceedings will be instituted against him, the provisions of such law shall apply mutatis mutandis in relation to any action for a contribution by a joint wrongdoer, a period or periods concerned being calculated from the date of the judgment as aforesaid instead of from the date of the original cause of action".

"A" therefore has 12 months as from the 2nd July 1998 (date of judgment) to sue "B" for a contribution.

INADMISSIBILTY IN EVIDENCE OF A LETTER WRITTEN WITHOUT PREJUDICE BY ONE ATTORNEY TO ANOTHER IN LITIGAITON. WOULD A DEFAMATORY STATEMENT IN SUCH A LETTER BE A CAUSE OF ACTION FOR DEFAMATION

Statements which are made expressly (1) or impliedly (1) without prejudice in the course of bone fide negotiations for the settlement of a dispute cannot (1) be disclosed in evidence without the consent (1) of both parties. A letter written by one attorney to another with the object of settling a dispute is not admissible (1) in evidence. It is considered public policy (1) to allow people to try to settle their disputes without the fear that what they may have said will be held against them if the negotiations should break down. A statement to be privileged must form part of the negotiations,

and is not privileged merely by having been written in a letter containing the words "without prejudice" at the top.

The reply to such a letter is likewise not admissible in evidence (1). If, however, statements are made in such a letter which are not relevant to the dispute, such statements may well be admissible in evidence (1). Thus, if a letter contains a defamatory statement which is irrelevant with regard to the dispute, such statement will be actionable (1) and an acknowledgement of inability to pay debts is an act of insolvency even if it is made without prejudice. When the settlement offer contained in a letter written without prejudice is in fact accepted by the other side and the dispute is then settled on that basis both letters will become admissible in evidence (1).

PROCEDURE TO BE FOLLOWED BY COMISSIONER OF OATHS WHO ATTESTS AN AFFIDAVIT

A deponent may either swear to an affidavit or attest to it.

2. Before administering the oath or affirmation the commissioner must ask the deponent:

2.1 Whether he knows and understands the contents of the affidavit (declaration).
2.2 Whether he has any objection to taking the oath or making the affirmation.
2.3 Whether he considers the oath or affirmation binding on his conscience.

3. Once the deponent has acknowledged the aforegoing the Commissioner of Oaths must ask the deponent to say in the case of swearing "I swear that the contents of this affidavit are true so help me G-D" and in the case of an affirmation "I truly affirm the contents of this declaration".

4. Thereafter the deponent must sign the affidavit in the presence of the commissioner.

5. The commissioner must certify below the deponents signature that the latter has acknowledged that he knows and understands the contents of the affidavit, and shall in addition in writing indicate the manner, date and place of taking the oath/affirmation.

6. The COO must also sign the affidavit and print his full names, and business address below his signature.

7. The COO must also state his designation and the area for which he holds his appointment or the office held by him if he holds the appointment ex officio.

LETTER TO DEFAULTING TENANT, WHO HAS BEEN GIVEN NOTICE TO REMEDY IN TERMS OF THE AGREEMENT

Address)

(Date)

To: Shirley Naidoo (Address)

Madam,

RE: AGREEMENT OF LEASE DATED (DAY, MONTH, YEAR) (1)

By reason of your failure to remedy your breach of the abovementioned agreement (1), being, your failure to pay rent for the months of July, August, September and October 2003 (1), notwithstanding written notice to do so having been served on you on the (day, month, year), (1)

you are hereby informed that the said agreement is hereby cancelled in terms of clause (specify) thereof (1).

You are hereby required forthwith to vacate the premises occupied by you in terms of the said agreement (1).

In terms of the said agreement you are liable for rent for the months of (specify), (year) at the rate of R. . . (. . . rands) per month and in the sum of R... (rands), being rent for the current month until today's date. Kindly remit the total rent due, i.e. the sum of R. . .(rands), within X days of the date hereof (1).

If you do not vacate the said premises by noon on the (day, month, year), or if you fail to pay the said sum of R... (rands) within (specify period) from date hereof (1), action will be instituted against you for confirmation of this cancellation, ejectment from the premises and for payment of such sum (1); should action for ejectment be instituted, damages for holding over will also be claimed from you (1).

Yours faithfully,

(Signature of lessor's attorney)

LETTER TO TENANT TERMINATING LEASE, DEMANDING PAYMENT OF ARREAR RENTAL, AND INDICATING ACTION: LEASE CONTAINS FORFEITURE CLAUSE

1. On day of 192 you entered into an agreement with our client in

terms whereof you hired the abovementioned premises from him. The monthly rental being R300.00.

2. The abovementioned lease agreement contains a forfeiture clause in terms whereof our client has the election to terminate the lease agreement and demand your ejectment should you fail and/or refuse to pay the rental for a period of more than one month.

3. You have failed and/or refused to pay the rental for the abovementioned premises for the months of June, July, August and September 1992.

4. You have been given notice in terms of clause X of the lease agreement, in writing

on or about then day of by Messrs X to remedy

your aforementioned breach.

5. Notwithstanding their letter dated 21 you have failed to pay your arrear rental

for the months of June, July, August and September 1992.

Accordingly, we have been instructed to demand, as we hereby do, that you make payment of the arrear rental to these offices by not later than day of 1992 and vacate the premises by day of 1992, failing which, our client will have a Rent Interdict Summons issued against you through the Magistrate's Court. In terms of the Summons an inventory will be made of your possessions, and you will then be automatically interdicted from removing them.

In the circumstances, our client hereby terminates your lease.

Yours faithfully

LETTER TO NOISY NEIGHBOUR SETTING OUT STEPS THAT WILL BE TAKEN IF NOISE CONTINUES

We have been consulted by Mr X who is the owner of . . which adjoins the property owned

by you on the western side.

We are instructed that you are operating a nightclub on the premises.

Your conducting of this business is not only a contravention of the municipal bylaws and titl conditions as they apply to your property but also constitutes a nuisance which makes i impossible for our client to enjoy the quiet, undisturbed and beneficial use of his property.

The noise which comes from your property and which is caused by the loud music played throughout the night as well as by the continuous sound of motor vehicles coming and going is unbearable and prevents our client and his wife from getting to sleep. This has affected their health to such an extent that they have both had *to* receive medical treatment.

The purpose *of* this letter is *to* advise you that unless *you* immediately cease conducting the nightclub in your property, our client will:

1. Report you conduct *to* the local authority so that it can take the appropriate steps against *you* in terms *of* the bylaws and,

2. Bring an urgent application to the High Court for an interdict restraining *you* from operating the nightclub and from continuing the activities presently conducted by you on the property

LETTER OF NOTICE TO DEBTOR WHO HAS FAILED TO PAY AN INSTALMENT ITO AN ACNOWLEDGMENT OF DEBT

SMITH & JONES

(Attorneys, Conveyancers, etc)

7th February 1996

Registered Post

Mr David Debtor

23 Hospital Street

Margate

Dear Sir

We act on behalf of Mr Justice Creditor and refer to the acknowledgment of debt signed by you on the 10th December 1995 in terms of which you acknowledged your indebtedness to our client as will more fully appear from the acknowledgment of debt.

The acknowledgement of debt provided that in the event of your failure to pay any instalment by due date our client would be obliged to give 14 days notice in writing by prepaid registered post requiring you to effect payment and in the event of your failure to make such payment our client would have the right to claim the full outstanding balance. The balance owing is the sum of R46 376,00 together with interest thereon at the rate of 18% per annum from the 1st February 1996.

The instalment of R1 000,00 which was payable by you on the 1 February 1996 has not been paid and consequently in accordance with the provisions of the acknowledgment of debt we hereby call upon you to effect payment of such instalment within 14 days from date of receipt of this letter by you. Should you fail to effect payment the aforementioned full balance will become due and payable and we have instructions to issue summons against you for the recovery thereof.

This letter is addressed to you at your domicilium citandi et executandi as provided for in the acknowledgment of debt.

Yours faithfully

DRAFT AN ACCOUNT TO PURCHASER (NOT YOUR CLIENT) FOR AMENDNG AN AGREEMENT TO PURCHASE YOU CLIENT'S MEMBERS INTEREST

To our fees taking instructions consultation with yourself Mr Naidoo and the agent obtaining particulars of CC from accounting officer and info re immovable property of CC preparing first draft photocopies for yourself and Mr Naidoo various telephone calls further discussions preparing second draft arrangements for second meeting attending meeting and signing of agreement correspondence and fax charges including postages and petties R

VAT R Total R

Can you charge interest on this amount? No, unless the agreement provides for such interest to be paid. Only interest a tempora morae can be claimed in most cases from the date of summons.

DRAFT AN ACCOUNT TO A CLIENT FOR PREPARING A SALE OF BUSINESS AGREEMENT

To fees for arranging the appointment, consultation with you and the purchaser, perusal of your memorandum with particulars about the transaction, preparing draft, copies for you and the purchaser, delivery or faxing thereof, telephone consultation with you about proposed changes to the contract, discussions with purchaser's attorney about amendments to the contract, preparation of second draft, copies thereof, delivery to yourself and to purchaser's attorney, receipt of telephonic instruction to finalise the contract, final amendments and draft final draft, telephone calls between you, the purchaser and his attorney to make arrangements for he signing of the contract, attendance at signing correspondence, other telephone calls as well as postage and sundry expenses.

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 concommitant 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 – N 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 affom himself had drawn up to another attorney for objective advice (1) or

The attorney should advise the client to consult another independent advisor to finahise 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 QUALIFIYING 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 FINAICAL 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 contine 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 [1] in terms of the rules he is obliged [1] to accept or refuse it. In circumstances where there is a right to refuse, but no obligations to do so the attorney enjoys a delectus personae regarding the client and a delectus rei regarding the work offered.

The obligation to refuse arises when there is conflict of interest [1] lack of qualification [1] by the attorney, lack of expertise [1] inability [1] of performance through overburden, conflict between confidence and disclosure, duty to a colleague or where the work offered is illegal [1] or improper.

It is not proper for an attorney to undertake and charge for work which the absence of legal qualifications [1] 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 [1] 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 [1].

There is seldom a duty [1] to take on work. The occasion may however arise when there is a duty [1] to assist an established and regular client [1] in the case of emergency. Such a client may well be prejudiced [1] 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 [1] available. This can easily happen in small towns. (p.75)

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. (3)

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 determing 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 SUCCESFUL, 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
9. The extent of perusal, and consideration of any document.
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 andlor 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 YAUGHT 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 business' 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 APARMENT 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 DEFEDANDANT

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 subpoenad 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 tobe 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 uncontentious 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 ACOUNT 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 FOOLWING 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 INFORMAION 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 HAPPENDS 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 AIIF 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

FAMILY LAW

RIGHTS OF SPOUSES MARRIED IN COP TO DEAL WITH ASSETS IN THE JOINT ESTATE

Both spouses have equal powers with regard to the disposal of assets of the join estate, the contracting of debts which lie against the joint estate and the management of the joint estate. Any one of them may perform any juristic act with regard to the join estate without the consent of the other subject to certain exceptions - see Section 14 and 15(1) of the Act.

A number of acts can only be done by one spouse with the written consent of the other, namely
(1) Alienation, burdening of or giving a real right in immovable property of the join estate;
(2) Alienation, cession or pledge of shares, insurance policies, mortgage bonds fixed deposits or any similar assets or any investment by the other spouse il a financial institution, forming part of the joint estate;
(3) Alienation or pledge of any jewellery, coins, stamps, paintings or any other asset of the joint estate held mainly as investments;

(4) Withdrawal of money held in the name of the other spouse in any bank or Post Office Savings Bank;

(5) As a credit receiver entering into a credit agreement as defined in the Credit Agreements Act no 75 of 1980;

(6) As a purchaser enter into a contract as defined in the Alienation of Land Act (ie where the purchase price is paid by instalments);

(7) Binding himself/herself as surety.

Except with a Suretyship all the other consents may be given by ratification. No consent is required if it is in the ordinary course of the profession.

A number of other acts may only be done with the consent (also verbally) of the other spouse, namely 1. alienation of furniture or other effects of the common household forming part of the joint

estate; 2. receiving money due to the other spouse by way of earnings, pension, etc by virtue of the profession or business of the other spouse, or damages for loss of income, or inheritance, etc; 3. donating to another person an asset of value forming part of the joint estate.

VARIOUES TYPES OF MATRIMONIAL REGIMES IN SOUTH AFRICA

Example 1

Candidates have a wide scope as to how to answer this question. The candidate should however know that couples can marry (a) in community of property, (b) out of community of property by virtue of an Antenuptial Contract with the exclusion of the Accrual System and (c), out of Community of Property with the inclusion of the Accrual System with an explanation in respect of each system. They should also know that in marriages where the accrual system applies provision should be made for a base starting figure of the party's assets that certain assets can be excluded from the accrual. The candidate should also be able to give well-motivated advice as to which regime should be followed and provided the advice is well-motivated and well set-out, candidates should be given good marks. It would seem that in the example quoted in the question that it would be most advisable for the parties to marry with the accrual system and for the husband's farm to be excluded from the accrual and that the base figure of the parties assets should thereafter be NIL in respect of each of them. The candidates should be given marks for- clear and concise use of language.

Example 2

Facts: Married OCOP (no mention of accrual), received inheritance which wife claims. Advise

The reference to the date is important as it happened after 1 November 1984 when the Matrimonial Property Act came into force.

I would advise the client, that although the Accrual System applies in respect of his marriage out of community of property because it was not expressly excluded (see section 2 of the Matrimonial Property Act 88 of 1984) nevertheless inheritances legacies or donations or assets which are acquired from inheritances, legacies or donations do not form part of the accrual of his estate unless otherwise agreed in the Antenuptial Contract. As the Antenuptial Contract which was concluded is silent, the inheritance is excluded

HOW DO YOU COMPEL SOMEONE TO PAY MAINTENANCE IN TERMS OF A DIVORCE SETTLEMENT

The ex wife should lay a charge with the Maintenance Officer connected to the

— Magistrate's Court in which are of jurisdiction she and the children are resident. A

certified copy of the court order and agreement of settlement together with an affidavit by the ex-wife setting out the amounts of the arrears must be lodged. This leads to criminal prosecution against the husband i.t.o. Maintenance Act. An alternative is for the ex-wife to issue a writ of Execution for the arrears out of the High Court. (5)

HOW DOES A DIVORCEE GO ABOUT GETTING AN INCREASE IN MAINTENANCE FOR HER AND HER CHILDREN

- Maintenance is the responsibility of both parents.

- Maintenance is determined on the basis of the circumstances the prevail at the time that the parties divorced.
- In order to obtain an increase in the maintenance, the ex-wife must be able to show a change in the circumstances which prevailed at the time of the divorce.
- The ex-wife must make application to the Maintenance Court for a variation of the maintenance order.
- The High Court hasjurisdiction to vary the order but there is risk involving costs. (5)

CAN HER EX-SPOUSE JUSTIFY STOPPING PAYMENT OF MAINTENANCE BECAUSE HIS RIGHTS OF ACCESS ARE BEING FRUSTRATED

No, he cannot refuse to pay maintenance because of his ex wife's unlawful conduct regarding access. He may not take the law into his own hands and act contrary to the provision of an existing court order. He should apply to court for relief. (3)

MAY A DIVORCED MAN WITHOLD PAYMENT OF MAINTENANCE IF HE IS NOT ALLOWED TO EXERCISE HIS RIGHTS OF ACCESS TO THEIR CHILD BY HIS EX WIFE AND MAY A CUSTODIAN MOTHER REFUSE ACCESS TO THE CHILD BY THE FATHER WHEN MAINTENANCE PAYMENTS IN TERMS OF A COURT ORDER ARE NOT MADE

The right of a non-custodian parent's child to access to his minor child and his obligation to pay maintenance are two separate matters. If the non-custodian father does not fulfill his maintenance obligation the custodian mother must approach the appropriate court for an order compelling him to do so and cannot unilaterally withhold or refuse rights of access in an attempt to enforce arrear maintenance payments. If rights of access are withheld the non-custodian parent must approach the court for the necessary order. (10)

OBLIGATIONS OF AN UNMARRIED FATHER TO HIS ILLEGITIMATE CHILD

There is a common law obligation on the parents of a child to support the child in accordance with their respective financial means. This obligation is a joint obligation. The question as to whether or not the parents of the child are or were married is irrelevant. Both parents have an obligation to the child. Accordingly the father of an illegitimate child is legally obliged to contribute to the maintenance of his illegitimate child. The father is not relieved of this obligation if the mother does not seek to enforce it. The obligation will only cease if the child is adopted or when it becomes self-supporting. (10)

INSOLVENCY

WHAT DOCUMENTS MUST BE PREPARED TO ENSURE THAT A CLAIM IS PROPERLY PROVED IN AN INSOVENT COMPANY AND WHAT PROCEDURE SHOULD BE FOLLOWED TO ENSURE THAT THE CLAIM IS PROVED ON THE STRENGTH OF THE DOCUMENTS PREPARED

a) A resolution by your client.

b) A special power of attorney in favour of the person who will appear before the Master to prove the claim.

c) An affidavit in proof of the claim in statutory form.

d) A statement of account showing the monthly totals and a short description of the purchases and payments made for the full period of trading or for the past 12 months whichever is the shorter period / other proof of the documentary claim

See Section 44 of the Insolvency Act.(5)

2.2 All of the above documents must be lodged with the Master of the High Court (or the Magistrate) who will conduct the first and second meetings of creditors at least 24 hours before the meeting and the creditor must ensure that the person nominated in the Power of Attorney appears at the meeting of creditors to formally prove the claim. The candidate should know that there are normally two meetings of creditors and that special meetings thereafter at which claims can be proved can only be convened with the Master's consent and that the creditor concerned will have to pay the cost of convening a special meeting.(5)

WHAT IS PROCEDURE FROM COMPLETING THE CLAIM FORMS TO THE POINT WHEN RECEIVE A DIVIDEND

"We confirm that the claim forms have now been submitted to the Liquidator who will see to it that the claim will be proved at the next meeting of creditors.

After the second meeting of creditors, and provided no special meetings are held, the liquidator has to draw his account and submit same to the Master of the Supreme Court who will inspect same, prepare a list of queries or approve the account and allow the liquidator to advertise the fact that the account will be confirmed. Thereafter the liquidator will make a distribution in terms of the account and will pay dividends to the proved creditors insofar as they have not been paid earlier."

POSITION OF WIFE MARRIED OCOP TO A MAN WHOSE ESTATE HAS BEEN RECENTLY SEQUESTRATED

Example 1

Dear

Further to our consultation I must inform you that your husband's sequestration may have a bearing on your assets and estate.

Section 24 of the Insolvency Act provides that where an insolvent is in possession of any property, such property may be claimed by the insolvent's trustee and this property is deemed to be the property of the insolvent and may be disposed of for the purpose of settling claims against the insolvent estate.

Your husband's trustee may also claim assets which are in your possession and the onus would be upon you to establish your ownership therein.

If your husband is in possession of any of your assets you should take immediate steps to take charge thereof. In regard to assets in your possession you must collect or obtain proof that you have acquired them with your funds.

Should your husband's trustee demand your assets you will have to claim their release by way of an affidavit in which you must establish your ownership therein. In this affidavit you will have to prove your ownership by production of proof of acquisition and payment by you

Should the trustee refuse to release your assets you will have to bring an application in the High Court for an order ordering the trustee to release the goods to you.

Should you need assistance in preparing the affidavit required please contact me

Yours faithfully

Example 2

Letter to client who is married ocop to H whose estate has just been sequestrated and who fears that this may influence her assets

Dear Mrs Solvent,

I would like to inform you that as a result of the insolvency of your husband legal consequences in regard to your estate do ensue.

S24 of the Insolvency Act (No 24 of 1936) provides that where an insolvent person is in possession of any property, such property may be claimed by the insolvent's trustee and in this instance the property be deemed to the property of the insolvent and could therefore be disposed of to assist in settling his debt,

If your husband is in possession of any of your assets you would have to take steps to recover those assets. You would have to lodge a claim normally by way of an affidavit with the trustee for release of your property. It would be advisable to give proof as far as possible of the grounds for your claim.

If the trustee refuses to release the goods, it would be necessary to obtain a court order in order to obtain this redress. If this step becomes necessary I will advise you further at a later stage of what such action entails.

Yours faithfully

NOTICE WHICH SHOULD BE PUBLISHED IN THE NEWSPAPER ITO S34 OF THE INSOLVENCY ACT IN REGARD TO SALE OF BUSINESS

Example 1

Section 34 of the Insolvency Act

Notice is hereby given in terms of Section 34(1) (1) Of the Insolvency act No 24 of 1936 that David Campese (1) intends to sell his business Rugby Supply Company, 23 Pacific Road, Port Elizabeth (1) to Rob Andrew (1) after a period of 30 days from the last publication hereof. (1)

Dated at Port Elizabeth this 10th day of March. 1996

Smith & Jones

Attorneys for the Seller

12 Seaside Road

Port Elizabeth

Example 2

Section 34 of The Insolvency Act 1936 as amended:

Notice is hereby given in terms of Section 34(1) of the Insolvency Act No 24/1 936 that XYZ intends to sell his business known as carried on at to ABC after a period of 30 days from the date of last publication of this notice.

DATED at this day of 2000.

ERG

Attorneys for the Parties

Address

MAY ONE SUMMARILY CANCEL A LEASE IF THE TENANT WHO IS A PRIVATE INDIVIDUAL IS SEQUESTRATED

The provisions of Section 37 of the Insolvency Act apply. The lease contract does not terminate automatically at sequestration but the curator of the of the insolvent insolvent lessee may terminate the lease by notice to the lessor.

WHAT IS THE DESIRABILITY OF PROVING A CLAIM AGAINST A HOPELESSLY INSOLVENT ESTATE

The issue here is the question whether there is a danger of a contribution your client may be required to pay at the end of the day. A contribution is payable when there are not enough funds in the estate to defray the necessary costs of liquidation and realisation of assets in which event a contribution becomes payable by those (concurrent) creditors which proved claims, on a pro rata basis.

CONTRACT

EXPLAIN THE DIFFERENCE BETWEEN AN OPTION AND A RIGHT OF FIRST REFUSAL

With an option the person who takes up the option is entitled to, before the option term expires, exercise the option in which instance a contract comes into existence and the person giving the option is bound by it. In the instance of a right of first refusal, the person giving the right to the other person, is not under an obligation to sell the "thing" that is the subject of that right, but should he do so he is obliged to first offer the thing to the person who has received the right. [3]

WHAT DO YOU UNDERSTAND BY THE EXPRESSIONS: 1. AN OPTION TO PURCHASE 2. A RIGHT OF PRE-EMPTION

3.1 An option is a unilateral document granted by the owner of a property to a person giving a right to purchase the property within a specified time and at a fixed price. The seller is bound by the option document but the holder of the option becomes a party to the document and becomes legally bound only when he exercises the option and gives notice in writing that he exercises the option.

3.2 A right of pre-emption is also granted to a person by the owner but cannot be exercised by that person. Only in the event that the owner decides to sell the property is he required in the first place to offer it to the person who hold the right of pre-emption. The holder of the pre-emption must within a specified period decide whether he wishes to exercise the right of pre-emption.

LETTER TO CLIENT ADVISING HIM TO EXERCISE AN OPTION THAT IT GOING TO LAPSE WITHIN 2 DAYS

The letter should contain the following points:

1. That the option should be exercised in writing.

2. That it rnust signed by your client as holder of the option.

3. If the option is exercised by delivery through the post, the option will be, regarded as having been exercised on the day the exercising of the option was posted, if this is corresponds with the wording of the option.

4. Where an option, for instance, states that the exercising thereof must take reach the giver of the option before or on a specific date, the posting thereof on that date will not suffice.

5. The exercising of the option must in reality reach and come to the intention of the giver thereof before the expiry date.

IF A COMPANY OWNS A PROPERTY WHAT ARE THE WAYS OF THE SELLING THE PROPERTY

1. Conventional sale and transfer of the property.

2. Sale of Mr Smith's shares and loan account if any in the Company. (3)

The sale of shares and loan account will obviously save the purchaser transfer duty.

Does the method pf payment constitute an obstacle to any of these transactions?

Yes, Section 38 of the Companies Act prohibits a company from directly or indirectly whether by means of a loan, guarantee the provision of security or otherwise providing any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person or of or for any shares of the company.(6)

Is there any legal method of overcoming this problem? The Close Corporations Act does not have a provision similar to that of Section 38(1). Accordingly the company is to be converted to a close corporation. Once the company is so converted, there is no prohibition against the registration of a bond by the close corporation over its property to assist with the acquisition of the seller's members interest in the close corporation to the purchaser.

CANCELLATION OF AN AGREEMENT WITH NO LEX COMMISORIA

The Seller may indeed cancel an agreement in these circumstances. All that needs to be de is that the Seller has to acquire a right to cancel by giving notice to the Purchaser placing him in mora. The notice must contain details of the breach and the Purchaser must be give reasonable time within which to perform, failing which the contract may then be cancelled giving notice of cancellation.

FIRST LETTER

We act on behalf of our client Mr Seller who instructed us to communicate with you about agreement of sale entered into between yourself and our client on 30 June 2000.

In terms of clause 2 of the agreement you were obliged to deliver a guarantee to our client for the sum of R250 000 within 30 days from the date of the agreement, You have failed to do so.

Our instructions are to demand from, as we hereby, do, delivery of the required guarantee within a period of 30 days from the date of receipt of this letter (other permutations are also possible) failing which our client will cancel the agreement and hold you liable for damages he may suffer as a result of your breach of contract.

SECOND LETTER

We refer to your letter dated.....

You have failed to perform in terms of our client's demand and in the circumstances the contract under reference is hereby cancelled.

WHAT DO YOU DO IN A CONTRACT OF LEASE IF SOME OF THE PROSPECTIVE TENANTS MAY NOT BE ABLE TO FULFILL THEIR OBLIGATION IN TERMS OF THE CONTRACTS

The candidate should know that the lessor requires one or other form of security to protect his interests.

There are several possibilities but the most logical one here is the question of cession of shares or member's interests and loan account to the lessor, cession of book debts and also the personal security deeds that have to be given by members of the CC. Should the candidate discuss one or other form of security, it may be correct if it is practicable

BUSINESS ENTITIES

WHAT DOCUMENTS MUST BE LODGED WITH THE REGISTRAR OF COMPANIES TOGETHER WITH THE MEMORANDUM AND ARTICLES TO ENABLE ONE TO REGISTER A NEW PRIVATE COMPANY AND TO ISSUE A CERTIFICATE TO COMMENCE BUSINESS

(1) The Memorandum and Articles of Association of the Company in triplicate, two copies of which should he notarially certified.

The Memorandum of Association contains the objects of the company and the details of its share capital. The Articles of Association of the Company are in essence an agreement between the shareholders as to how the Company should be run.

(2) The Form CM22 reflecting the registered address of the Company (2)

(3) A Form CM29 reflecting details of the directors of the Company (2)

(4) A Form CM31 being the consent of the Auditors to act as such (2)

(5) A Form CM46 being an application for the Certificate to Commence Business (2)

(6) A Form CM47 being a statement by each Director as to the adequacy or otherwise of the capital of the Company (2)

(7) A Form CM5 in terms of which the Company's name was reserved. Prior to the lodgement of the documents the name of the Company should be reserved and proof should be lodged with the Registrar of Companies that this has been done (2)

DRAFT POWER OF ATTORNEY MENTIONING EVERY ACTION THAT YOU WILL TAKE AS PART OF YOUR MANDATE WHICH IS TO ATTEND TO THE REGISTRATION OF A PRIVATE

COMPANY AND OBTAIN A CERTIFICATE TO COMMENCE BUSINESS. NAME HAS ALREADY BEEN RESERVED

To on my behalf as my attorney and agent (2) subscribe for one share in a company to be registered with a name XYZ (Proprietary) Limited (2) and to on my behalf sign the following documents required for the registration of the company and to obtain a certificate to commence business for it (1)

1. The Memorandum and Articles of Association (1)
2. The Application for a certificate to Commence Business (CM46) (1)
3. The Notice stating the registered office (CM22) (1)
4. The consent to act as Director (CM27) (1)
5. The return of Director and Auditor (CM29) (1)
6. The statement re the adequacy of capital (CM47) (1)

To lodge the above documents with the Registrar of Companies for registration (1)

To make any amendments thereto which may be required by the Registrar (1) and to uplift the Certificate of Incorporation and Memorandum and Articles of Association once registration has been effected (1) and generally to do everything that may be necessary on my behalf to effect registration of the company and to obtain a certificate to commence business therefore (1)

HOW IS A MEMBERS INTEREST IN A CLOSE CORPORATION TRANSFERRED FROM ONE PERSON TO ANOTHER

An Amending Founding Statement (CK2 form) (1) is signed by the members who resign (1) and by the new m (1), which form must reflect the holding by the new members of their interest in the close corporation (1). The Amending Founding Statement is then lodged for registration with the Registrar of Close Corporations (1). No revenue stamps are required.

HOW DO YOU GIVE EFFECT TO THE SALE OF AN INTEREST IN A CC AND APPOINT A NEW ACCOUNTING OFFICER ASSUMING RESOLUTION AND AGREEMENT HAVE BEEN PREPARED

You would file an Amended Founding Statement (CK2) form reflecting -

(a) The change in the members interest;

(b) The change in the accounting officer.

The amended Founding Statement (CK2) form must be signed by both the outgoing and incoming member, The form is lodged with the Registrar of Close Corporations who registers it.

WHAT ARE THE FOUR ESSENTALS OF A PARTNERSHIP

There are four characteristics or criteria of a partnership contract:

1. That each of the partners bring something into the partnership or bind themselves to bring something into it, whether it be money, labour or skill.

2. That the business should be carried on for the joint benefit of the partners.

3. That the object of the partnership should be to make a profit.

4. That the contract between the partners should be legitimate

LETTER TO CLIENT ADVISING HIM TO USE A CLOSE CORPORATION IN PREFERENCE TO A PRIVATE COMPANY AND ALSO WHY CLIENT SHOULD NOT USE A PARTNERSHIP

CC v PRIVATE COMPANY

Cost of procedure

Simplicity to arrange

Easier to establish

Membership restricted to 10

Share capital is not necessary for a CC. Only a members' interest in money or property or services must be established.

Ease of future management and administration. Management and control of a CC is usually simpler

Less outside administration in future

Less expense in future administration

Easy to make contributions in kind and value

Simplicity of changing membership interest or agreement

No annual audit is required resulting in a saving.

The CC may extend security to allow a member to obtain an interest subject ot certain provisions

More privacy is possible in that any association agreement is not open to inspection by outsiders.

In general the CC and its members are not subject to strict restrictions and stipulations as is the case with a company and its directors. The CC however remains a legal person.

(14)

WHY NOT A PARTNERSHIP?

All of the above (1 - 8) are relevant to a greater or lesser degree

The following are essential elements and to the extent that they are not mentioned the possible maximum marks must be reduced:

(a) Separate personality which means
- possible non personal liability
- continued existence after death of member
- something about insolvency/liquidation

(b) Partnership may not provide for sharing of profits only as against different classes of shares

CAN ANOTHER CC PURCHASE AN INTEREST AND LOAN ACCOUNT IN A CC

The essence is that a members' interest cannot be held by another CC (section 29 of the act).

CAN YOU HAVE EIGHT MEMBERS OF A CC COMPRISING INTER ALIA A TRUST AND PRIVATE COMPANY

The fact that eight participants are involved, poses no problem, but what may cause problems it the fact that the trust referred to in the question may be an inter vivos trust that may not hold an interest in a CC or private company. See in this regard S29(1) of the Close Corporations Act 69 of 1984 that stipulates that only natural persons and not body corporates (artificial persons) or trustees of an inter vivos trust may hold an interest in a CC.

What should a client do who is sole member of CC which only has as its assets immovable property and a loan account

3.1 There are 2 possibilities:

a) sell the property; or

b) sell the members' interest and loan account.

Option (b) appears to be the best:

aa) it is less expensive (no transfer duty and transfer fees) for the purchaser and your client may thus negotiate a better purchase price;

bb) it is more expedient and less time consuming if it is a cash transaction.

OPTIONS FOR A CONTRACT TO PURCHASE PROPERTIES WHERE STILL NEED TO GET FINANCE AND REZONING

More than one possibility exists. A person may either draft a deed of sale that is sub to the suspensive provisions for the procurement of the rights within a certain period and to make provision for the extension of the period to enable the buyer to organise his business or an option that is valid fir a certain period may he utilised. It. is then the buyer's decision whether he is going to exercise the option or not. [5]

WHAT HAPPENS IF MEMBERS OF A CC SIGN A CC CHEQUE WITHOUT THE CC'S FULL PARTICULARS BEING RECORDED THEREON

In terms of the provisions of the Close corporations Act the full registered name and number as well as the abbreviation "CC" must appear on the cheque (Sec 22 read with Sec 63 of the Close Corporations Act 69/84).

If these particulars do not appear on the cheque the signatories who signed are personally liable Ex facie the cheque the CC is not liable. However liability could be imputed to it.on the basis of an estoppel.

SECURITY

SURETYHIP

BASICS OF A DEED OF SURETYSHIP

The letter/opinion should contain the following

The document is defective the following respects.

1.1 Mary Smith is married in community of property and is not assisted by her husband nor does he consent to her binding the joint estate [1]

1.2 Pete Jones, the co-secutiry has not signed the Suretyship as intended and there is no clause that binds the party who signs alone [2]

1.3 The identity of the creditor is incomplete in that the registration number is not given [1]

1.4 The document has not been stamped [1]

2. Although the document contains all the essential elements of a Suretyship i.e. identity of debtor [2] identity of surety [1] and identity of creditor [1] the undertaking to fulfil the obligations of a 3rd party (tenant) [1] the Deed of Suretyship is invalid and therefore not enforceable [4]

WHAT HAPPENS IF A JOINT SURETYSHIP HAS BEEN SIGNED BY ONLY ONE OF THE SURETIES AND NOT STAMPED

We refer to our recent discussion when you instructed us to advise you on your chances of success in an action against Mr X based on the deed of suretyship signed by him in favour of yourself.

It was obviously the intention that Mr X and Mr Y should bind themselves jointly and severally as sureties as manifested in the wording of the deed. Therefore the failure by one of the sureties to sign the document will render it invalid in terms of the provisions of section 6 of Act no 50 of 1956. In our opinion you will not succeed against Mr X.

We also note that the document has never been stamped although this has now become academic in view of the fact that the deed is invalid.

Yours faithfully

Example 2

The fact that B had not signed the deed of surety nullifies it in terms of the provisions of section 6 of Act 50 of 1956. There is therefore no action against any of them. It is obvious that the intention was that all of them should be bound as surety and as co-principal debtors.

YOUR CLIENT HAS RESERVATIONS ABOUT A FORM OF SECURITY. ADVISE HIS AS TO OTHER POSSIBILITIES

The possibilities are:

a) A further surety who may have the means to add to the security;

b) A notarial bond over movable property;

c) A bond over immovable property belonging to one of the sureties or a possible further surety;

d) cession of book debts;

e) A pledge of other forms of security like shares;

f) A cession of an insurance policy.

DRAFT LETTER TO CLIENT WHEN LESSEE REFUSES TO SIGN NEW SECURITY

We refer to our discussions some time ago when you instructed us to procure further security in respect of the Lessee's obligations in terms of the lease.

Unfortunately we did not have much success.

After some investigation we realised that the only possibility to pursue was a cession of the lessee's book debts as additional security. We drafted a cession and submitted same to the lessee. In return we received a letter from the lessee's attorney who advised that the lessee refused to sign the cession. No reasons yiere given. In the circumstances we advise that the matter cannot be taken any further as the lessee is under no legal obligation to sign the document. We suggest that you monitor the situation carefully and ensure that the lessee does not fall behind with its payments.

We enclose our account and thank you for your instructions.

WHAT OPTIONS ARE THERE TO PROTECT PARTIES WHERE YOUR CLIENT HAS BORROWED MONEY FROM FRIEND WITHOUT SECURITY TO PAY FOR HIS MORTGAGE

There are two possibilities

(a) Admission of debt; or

(b) A loan agreement

The preferred option is a loan agreement as this will bring about a saving in stamp duty

•as opposed to the stamp duty required for a admission of debt