

DUTY / RULE	RULES/LEGISLATIVE PROVISIONS	CASE LAW
DUTY TO COURT		
Duty to act honestly	<p>Rule 3.2 Material facts must be divulged so as to not mislead the court. But only that information that is not disclosed in confidence.</p> <p>Where there is a clash, refer to Bar Council for guidance.</p> <p>Code 9.5¹ Confession of crime to counsel: Counsel will not:</p> <ol style="list-style-type: none"> 1) asserts/imply any fact which he knows to be untrue or connive to substantiate a falsehood; 2) put forward any affirmative case clashing with confession; 3) may argue that evidence adduced is insufficient for conviction; 4) may invoke any point of law advantageous to resist conviction; and 5) client may choose to retain/relieve counsel. <p>57.1 Counsel shall take all steps to avoid misleading the court on any matter of fact/question of law. Specifically, not mislead as to what is in papers.</p> <p>57.6 Request permission from attorney and client to disclose privileged info to court (where in interests of justice), if withheld, cannot submit to court that all info that would serve interests of justice has been disclosed.²</p> <p>57.9 Counsel shall not rely on any statement in evidence which he knows to be incorrect/false.</p>	<p>Kekana: inflated accounts rendered. Advocate lied under oath. Advocates, as officers of the Court, serve the interests of justice itself by acting as a bulwark against the admission of fabricated evidence.</p> <p>Not a fit & proper person - struck</p> <p>Matthys: <i>sui generis</i> to bring disciplinary proceedings to court. Court has inherent jurisdiction – association = <i>custos morum</i> for court, public & profession</p> <p>Failure to prepare, show up, misleading court, accepting clashing briefs, taking deposits and not repaying when mandate terminated, accepting instructions directly from public.</p> <p>Not a fit & proper person - struck</p> <p>Vd Berg: counsel must keep personal opinions on merits to himself. Not for counsel to pre-judge a client's case. Not required to believe the evidence of a client.</p> <p>Duty to put the facts before the court.</p> <p>Counsel should confine themselves to acting upon instructions and not investigate the truth in their client's matters.</p>

¹ See also Rule 3.4.

² But you cannot indicate that attorney/client said you may not disclose certain issues. That would be a breach of confidentiality – also see Code 57.6 and 57.7.

	<p>Receipt of fees other than through an attorney. Failed to disclose facts material to the truth of evidence. Lent name to false statements that could lead to fraud being committed.</p> <p>Not a fit & proper person - struck</p> <p>Merret: misleading the court in divorce proceedings. Court enquired whether opponents knew that divorce was enrolled. Merret gave misleading answer.</p> <p>Counsel should be honest and truthful in their dealings with each other and the Court.</p> <p>Demonstrable lack of integrity; cannot be trusted by the court – struck.</p> <p>Swain: Acting for clients with conflicting interests. Matter against one client prescribed and obtained an indemnity. Not disclosed to court in application for admission as advocate.</p> <p>The appellant's lack of truthfulness is fatal barrier to admission. If admitted, Court cannot implicitly trust/believe what it was told by counsel from the bar. Not admitted.</p> <p>Schneider: expert evidence should be provided impartially, not as a hired gun.</p> <p>Where facts are within the knowledge of a practitioner and has a material bearing on the matter, it must be disclosed to the court.³</p>
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³ But make sure that the issue is discussed with instructing attorney/client before disclosing. If barred from disclosing, may have to withdraw as counsel due to embarrassment that may be caused/conflict of interest → Code 9.6.

<p><i>Ex parte</i> - utmost bona fides; duty to disclose material facts which might influence the court</p>	<p>Code 57.4 Counsel shall in <i>ex parte</i> apps, disclose every fact (save privileged/confidential info) known to counsel that might reasonably have a material bearing on the decision the court must make</p>	<p>Logie v Priest: Duty of applicant to lay all relevant facts before Court so that it has full knowledge of all circumstances before making its order.</p> <p>Settlement arrived at = relevant. Had it been disclosed, sequestration would not have been granted/may have been postponed to after due date of first instalment. [On facts - due to qualification, it would have had no impact on outcome.]</p> <p>Hassan v Berrange: in <i>ex parte</i> applications, applicant must disclose all facts which might influence court in coming to decision. Failure to do so may be visited by subsequent setting aside of order.</p> <p>Schlesinger: wife applied <i>ex parte</i> for leave to sue for divorce by edictal citation.</p> <p>Failure to disclose pending divorce proceedings in Switzerland.</p> <p>Discretion of court to rescind/preserve order.</p> <p>Applicant's duty not to omit any reference to facts/attitude of opponent which is relevant.</p> <p>Order obtained with reckless disregard of full & true facts.</p> <p>Application to set aside granted with costs - attorney & client.</p> <ol style="list-style-type: none"> 1) disclose all material facts which might influence a Court in coming to a decision; 2) non-disclosure/suppression need not be wilful or mala fide to incur the penalty of rescission; and 3) court has discretion to set aside/preserve order
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<p>Duty to direct the court's attention to relevant and adverse authorities</p> <p><i>A judge is entitled to take counsel at their word</i> – Ulde v Min of Home Affairs</p>	<p>Code 57.5 Counsel shall disclose to a court all relevant authorities of which he is aware that might reasonably have a material bearing on the decisions (similar to duty in <i>ex parte</i> applications)</p>	<p>Ex parte Hay Management Consultants: Application for attachment of claims presently due and payable in future to confirm jurisdiction.</p> <p>Duty of counsel to direct Court's attention to relevant authority especially in <i>ex parte</i> applications & where opposite party not represented.</p> <p>Counsel & attorneys not expected to read law reports as published, expected to consult textbooks, monthly and consolidated indices and noters-up to law reports.</p> <p>Failure = misleading the court.</p> <p>Duty of counsel to keep up to date – specifically with cases reported in law reports.⁴</p> <p>Toto v Special Investigating Unit & Others: Counsel who is aware of judgments material to issues before court under duty to inform court of judgment, esp. where judgment against case.</p> <p>If judgment is against the case: argue it was <u>wrongly decided</u> or <u>distinguish</u>. Court to the decision, not counsel.</p> <p>Where counsel aware of judgment adverse to case & not bring it to court's attention = gross breach of duty.</p> <p>Udle v Minister of Home Affairs & Another (<i>counsel acted in the matter which was in contradiction!</i>): Urgent application. Counsel also counsel in conflicting judgment not presented to court.</p>
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⁴ *Copeland v Smith.*

		<p>Counsel's duty not to mislead court through ignorance or negligence.</p> <p>Deliberate misleading = serious breach of duty.</p> <p>When argument advanced and authority cited, <u>tacit representation = know of no contradictory authority.</u></p> <p>Counsel negligent if ignorant of disapproving decision of superior-court and misleading court if silent while aware of disapproving authority.</p> <p>Counsel under a duty to research the law and present an honest account thereof. May not deliberately suppress authority disfavouring his case.</p>
Duty to draw the court's attention to deviation from standard forms and orders	<p>Code 57.8 Counsel shall where a draft order is presented advise court of the deviations in the draft order where it deviates from the normal orders (or even the NOM) and offer a justification.</p>	<p>Ex parte Satbel: specific provisions as regards liquidations and rules nisi must be included in draft order (and NOM).</p> <p>Generally, all prescribed draft orders are prescribed to ensure the proper administration of justice.</p> <p>If not included = counsel's duty to alert court & offer justification.</p>
Duty to present the best argument available to the litigant	<p>Feni v Gxothiwe & Another: CC established to run farming activities. Members fell out of love. Application forcing R to sell interest to applicant. R's oppressive conduct such that A cannot establish fair value (which was required in circumstances better argument could not be made by A).</p> <p>Heads of argument = NB for proper administration of justice. Articulates best argument available to client. Must prepare heads when appearing in a Superior Court.</p> <p>In this instance, R's heads did not engage with evidence/facts. Did not deal with the case law (shocking heads).</p>	
Duty to preserve and uphold the dignity of the courts and officers of the court	<p>R v Silber: Summary committal for contempt of court in <i>facie curiae</i> important, but use with caution. An <u>insult</u> must be made <u>wilfully</u> – where <u>recusal</u> is used as a <u>cloak to insult</u> a judicial officer, summary contempt appropriate.</p>	

	<p>Here, recusal not made at onset of trial, but on day 15. Proper route: rather to review/appeal eventual outcome.</p> <p>Distinguish: merely stupid behaviour by layman vis-à-vis experienced lawyer. Premeditated and well-prepared argument of bias – not spur of the moment.</p> <p>S v Tromp: appellant constantly charged with criminal matters long after event. Appellant accused police of malicious prosecution. Court a quo finds appellant in contempt of court due to his criticism of the police.</p> <p>Appeal court finds that contempt encompasses the administration of justice insofar as it relates to the functioning of courts. Regard must be had to the words uttered by the appellant and the context to ascertain whether the word “state” referred to the SAPS or the prosecutor. Here is related to SAPS. Contempt order set aside.</p> <p>Court confirms that counsel must make a case for a client without fear or favour. Counsel not to lie down and be ridden roughshod, but to exercise his client’s rights to assets client’s side of case.⁵</p>
Duty not to abuse the process of court	<p>Code 60: Counsel must act in a manner that promotes & advances efficacy of legal process.</p> <p>Counsel not deliberately protract litigation.</p> <p>Counsel to take all reasonable steps to arrive promptly in a court organise other commitments to prevent interference.</p> <p>Any change must be with the consent of instructing attorney and client, having been advised of reasons, and the opponent (if any) and must not materially compromise the business of the court.</p>
Applications for recusal of presiding officers	<p>SARFU: Approach for the recusal of members of Court is objective and the onus of establishing it rests upon the applicant. The question is whether a <u>reasonable, objective and informed</u> person would on correct facts <u>reasonably apprehend</u> that Judge has not/will not bring a mind open to persuasion by the evidence and the submissions of counsel.</p> <p>The reasonableness of the apprehension must be assessed in light of oath of office taken by the Judges to administer justice without fear or favour & ability to carry out oath (training & experience).</p> <p>Assumption that they can disabuse their minds of irrelevant personal beliefs/predispositions. Must take into account that they have duty to sit in any case in which they are not obliged to recuse themselves. BUT impartial Judge = fundamental prerequisite for a fair trial & Judge should not hesitate to recuse if there are reasonable grounds on the part of litigant for apprehending that Judge was not/will not be impartial.⁶</p>
Hopeless case	<p>De Lacy v SA Post Office: Counsel may not without more convey allegations/claims when there is reason to believe that the allegations are untruthful or without a factual basis.</p>

⁵ Litigation is not similar to proceedings of a young ladies’ debating society.

⁶ Also see *R v Silber* and *De Lacy v SA Post Office*.

	<p>Duty heightened where imputations of dishonesty & bias are directed at judge who enjoys presumption of impartiality.</p> <p>Conduct by counsel was bad, but did not warrant <i>de bonis propriis</i> costs order – clients clearly associated themselves with counsel's conduct.</p> <p>Motswai v Road Accident Fund:⁷ MVA claim. Lawyers pushing matter to trial where there are no triable issues and no benefit to claimant. Settled matter on trial date.</p> <p>When <u>signing pleadings</u>, counsel <u>attesting</u> that <u>pleadings scrupulously prepared</u>.</p> <p>Court a quo refused to make settlement agreement of court.</p> <p>Attorney knowingly prepared & signed pleadings containing untruths. Foundation of litigation = not true.</p> <p>Legal practitioners = <u>duty to investigate</u> whether there is in fact a claim <u>before</u> instituting action. Pleadings may not be a fabrication. May not mislead court.</p> <p>Only where a matter is not hopeless, but responsibly contestable should a matter proceed to trial.</p> <p>An opponent cannot, as in this case, also simply roll with it – especially when it's the RAF. (Duty also on opponent!)</p>
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DUTY TO CLIENTS

The cab-rank rule	<p>Rule 2.1:</p> <p>Counsel under duty to accept brief in courts where they profess to practice, unless special circumstances exist that justify refusal. Public has a right to be defended.</p> <p>Counsel may decline specialist briefs (i.e. would cause embarrassment – rule 2.6)</p> <p>Code 26:</p> <ol style="list-style-type: none"> 1) Counsel may limit areas of practice and courts in which they practice. Failing limitation, deemed to practice in all courts and fields. 2) Where counsel professes to practice in an area/field, may not refuse brief because of predispositions towards client. 3) Unless counsel believes they are not professionally competent, they must accept brief (criminal or otherwise) → professional services at the appropriate standard reasonably expected of counsel. 4) Counsel may decline brief if no fee-agreement can be reached. Reasonable fees → code 29. 5) Counsel to disclose to attorney & opponent if family member or person with close relationship is to preside over matter. <ul style="list-style-type: none"> a) In civil matter: can continue to act – unless objection → jointly request and procure recusal;
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⁷ Another example of a case where RAF being exploited to benefit of attorneys, counsel & experts.

	<p>b) In criminal matter: may not appear.⁸</p> <p>6) Counsel to disclose to attorney if opposing counsel/attorney has close personal relationship.</p> <p>7) Can refuse where:</p> <ul style="list-style-type: none"> a) counsel is SC – can refuse if SC thinks SC not necessary; b) scale & duration such that it will prejudice counsel's practice/other professional/personal commitments; and c) reasonable expectation that attorneys unlikely to pay fees due to counsel (timeously/at all).
Duty to further clients' cases fearlessly to the best of counsel's ability	<p>Rule 3.1: While acting with courtesy, counsel must fearlessly uphold the interests of a client without regard to any unpleasant consequences either to himself or to any other person.</p> <p>Counsel has privilege to assert and defend client's rights and protecting counsel's liberty/life by free and unfettered statement of every fact.</p> <p>Must use every argument & observation that can conduce above and any attempt to restrict this privilege should be jealously watched.</p> <p>Code 3.3: Legal practitioners, candidate legal practitioners and juristic entities shall treat the interests of their clients as paramount, provided that their conduct shall be subject always to:</p> <ul style="list-style-type: none"> 3.3.1 their duty to the court; 3.3.2 the interests of justice; 3.3.3 observance of the law; and 3.3.4 the maintenance of the ethical standards prescribed by this code, and any ethical standards generally recognised by the profession; <p>9.10: Legal practitioners shall not abuse their positions of influence over clients by undue pressure upon them to:</p> <ul style="list-style-type: none"> 9.10.1 plead guilty or plead guilty to a lesser charge; 9.10.2 accept a settlement of a matter.
Maintaining confidentiality and legal professional privilege (legal advice privilege and litigation privilege)	<p>Code 3.6: Legal practitioners shall maintain legal professional privilege & confidentiality regarding affairs of present/former clients/ employers, according to law.</p> <p>57.2 – 57.3: 57.2 Legal practitioner shall scrupulously preserve personal & confidential info of client communicated to counsel, unless information not</p> <p>Competition Commission of South Africa v Arcelormittal SA:⁹ Complaint that AMSA part of steel cartel. AMSA requests documents provided to Commission to enable it to reply to claims made. Commission claims privilege – docs received from admitted "cartel member".</p> <p><u><i>Litigation privilege v privilege attaching to communications between attorney and client for</i></u></p>

⁸ Must joint recusal be sought?

⁹ Special leave to appeal to SCA – no order made that could technically be appealed.

	<p>privileged & disclosure required by law.</p> <p>57.3 Legal practitioner shall not waive privilege in respect of privileged information; decision to waive professional privilege = client (not legal practitioner).</p> <p>57.6: Legal practitioner shall, if interests of justice require disclosure to court information covered by professional privilege, seek permission to make disclosure, and if permission is withheld, the legal practitioner shall scrupulously avoid any insinuation in any remarks made to a court or tribunal that all information that would serve the interests of justice has been disclosed.</p> <p>57.7: Legal practitioner shall not, in the event of being obliged to withdraw from representing a client in any proceedings, offer an explanation that would disclose the client's confidential or privileged information.</p> <p>57.10 Legal practitioner shall <u>not make use</u> of any <u>privileged</u> information of the <u>opposing party</u> that has <u>accidentally</u> or <u>unlawfully</u> come into possession of legal practitioner, and shall notify opposing party's legal representatives.</p> <p>However, if such information subsequently becomes available to legal practitioner through <u>lawful</u> means, not prohibited from using it.</p>	<p><u>purpose of obtaining & giving legal advice</u> Litigation privilege protects communications between litigant/legal advisor & third parties, if such communications are made for the purpose of pending or contemplated litigation. It applies typically to witness statements prepared at a litigant's instance for this purpose. The privilege belongs to the litigant, not the witness, and may be waived only by the litigant.</p> <p>Requirements – lit. privilege: document obtained/brought into existence for purpose of submission to legal advisor for legal advice; litigation was pending/contemplated as likely.</p> <p>Purpose of document not to be ascertained by reference to its author - purpose determined by reference to 'person or authority under whose direction, whether particular or general, it was produced or brought into existence'.</p> <p>Intention of person procuring document = relevant for ascertaining purpose.</p> <p>Maasdorp & Barker v S I R: SARS requested documents in attorneys' possession. Tax payer says disclose but not those docs subject to privilege.</p> <p>This privilege afforded to litigants devised by courts & based on public policy. Part of common law. <u>Essential for proper administration of justice.</u> <u>Litigant to take legal adviser fully into his confidence; full disclosure without fear of betrayal.</u></p> <p>Litigant cannot be compelled to give evidence against himself, - legal adviser will not without</p>
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	<p>consent give evidence against litigant of disclosures made in consultation.</p> <p>Sacrosanct and inviolate. Cannot refuse to hand over documents which client would be obliged to hand to SARS.</p> <p>Taxpayer cannot, by employing an attorney to do things for him which someone else could have done, claim privilege.</p> <p>R v Davies: Attorney = agent of the client. If client is compellable to give up possession, then attorney is. If client is not, attorney is not.</p> <p>Policy consideration: if attorney were not compellable when client was, client's obligation to produce can always be <u>evaded</u> by placing deed with attorney. Such a quibble <u>cannot be tolerated by any practical system of law.</u></p> <p>S v Kearney: <u>Test for confession:</u> Was inducement such that there was any fair risk of a false confession?</p> <p>Professional communications by client to attorney = privileged if confidential in character & for purpose of obtaining legal advice.</p> <p>Confession made in capacity as a liquidator in estate; he was by then a former liquidator, a private individual, a potential witness, and <u>not</u> a client.</p> <p>R v Fouche: Friend assisting with matter without fidelity fund certificate. Accepted payment for assistance.</p> <p>Attorney shall not give evidence against person by whom he has been</p>
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		<p>professionally employed or consulted, without consent.</p> <p>Communication must be confidential for the purpose of obtaining legal assistance.</p> <p>R v Cox and Railton¹⁰</p>
Conflict of interest between clients	<p>Rule 5.5¹¹</p> <p>Having acted in a matter for one party, counsel cannot accept a brief for the appeal for the opposing party (same proceedings!).</p> <p>Code 3.5</p> <p>Legal practitioners, candidate legal practitioners and juristic entities shall refrain from doing anything in a manner prohibited by law or by the code of conduct which places or could place them in a position in which a client's interests conflict with their own or those of other clients;</p> <p>58.4 – 58.6</p> <p>58.4 Legal practitioner shall not be obliged to accept brief if previously accepted brief to advise another interested party about the matter. Legal practitioner must refuse such a brief if any confidential information having any bearing on the matter had been received with the earlier brief/reasonable belief might exist that client in the earlier brief might be prejudiced by such acceptance.</p> <p>58.5 Legal practitioner may accept brief to argue case for party despite having earlier given opinion on the issues to opposing party, provided that:</p> <p>58.5.1 no information had been received by legal practitioner</p>	<p>S v Hollenbach: Father and son accused persons. Attorney acting for both.</p> <p>Conflicting versions put to the accused with the knowledge that the version cannot be correct. Son said he did it. Father says he did it.</p> <p>Ex Parte Swain: (<i>conflict of interest and waiver signed – car accident.</i>) Vital importance that when court seeks assurance from counsel that certain set of facts exists, court can rely implicitly on assurance</p> <p>Proper administration of justice cannot survive if profession was not scrupulous of truth in dealings with each other & court. The applicant has demonstrated that he is unable to measure up to the required standard.¹²</p>

¹⁰ Deals with the exception to the general rule attaching to communications governed by legal professional privilege.

¹¹ Also see Code 58.6.

¹² “*I have no doubt whatsoever that his persistence in acting for Wulfes when there was the clearest indication of a conflict of interest between Wulfes and his other client, Pretorius, was improper and was most detrimental to Wulfes*”.

	<p>for purpose of giving opinion about which reasonable belief might exist that client in earlier brief might be prejudiced by acceptance of later brief; <u>and</u></p> <p>58.5.2 attorneys for both parties/unrepresented party agree to offer of later brief before an acceptance.</p> <p>58.6 Legal practitioner may not accept brief on appeal if legal practitioner has accepted brief for the opposing party at any stage of the proceedings.</p>	
<p>Conflict of interest between counsel and clients and presiding officer/opponents</p>	<p>Rule 3.5 Counsel should not become personally involved with clients (i.e. paying bail/public movement)</p> <p>4.30 Improper for counsel to appear before a statutory court, board, tribunal of which counsel is a permanent, acting/temporary member – in exceptional circs, can ask for BC's¹³ permission.</p> <p>Code 9.6 A legal practitioner shall, when a client gives conflicting instructions, or attempts to retract earlier instructions, withdraw from the matter if continuing to act for the client would cause unavoidable embarrassment to the legal practitioner.</p> <p>26.6-26.9 Counsel shall, once alerted that court is to be presided over by family member/other person with close personal relationship, disclose that fact to the instructing attorney and opposing counsel.</p> <p>26.7 Counsel shall, once counsel alerted to the fact that family member/other person with close personal relationship is opposing counsel/attorney in opposing party's attorney's firm, notify the <i>instructing attorney</i> of relationship.</p> <p>26.8 Counsel may continue to act in any <u>civil proceedings</u> despite family member/other person with close personal relationship presiding over the matter, <u>provided that none of the parties</u> raises an objection. Whenever an objection is raised counsel must either withdraw, <u>or</u> the parties must jointly request and procure the recusal of the presiding officer.</p> <p>26.9 Counsel shall <u>not</u> in a <u>criminal trial</u> appear before a court presided over by family member/other person with close personal relationship.¹⁴</p> <p>58.1-58.3</p>	

¹³ BC = Bar Council.

¹⁴ Should joint recusal be requested?

	<p>58.1 A legal practitioner shall guard against becoming personally, as distinct from professionally, associated with the interests of the client.</p> <p>58.2 A legal practitioner shall not stand bail for the client.</p> <p>58.3 Legal practitioner shall not accept brief to appear before any court (etc.) if legal practitioner is contemporaneously member of that court (etc.) whether by election/appointment, whether membership = permanent/temporary/acting capacity.</p> <p>58.7-58.12</p> <p>58.7 Legal practitioner who has presided at enquiry into company laws shall not accept brief to act in any capacity for any interested party in subsequent proceedings related <i>in any way</i> to subject matter of enquiry.</p> <p>58.8 Legal practitioner who has accepted brief from a liquidator/trustee of insolvent estate shall not <i>at any time</i> accept brief to act in any capacity for any interested party in subsequent proceedings in the liquidation/insolvency.</p> <p>58.9 Legal practitioner shall not accept brief if relationship, including family relationship, with client/opposing party which compromises/reasonably be expected to compromise, legal practitioner's independence.</p> <p>58.10 Legal practitioner shall not accept brief where position/office previously held with client/with opposing party compromises/reasonably be expected to compromise independence.</p> <p>58.11 Legal practitioner shall not accept a brief on behalf of a provincial/municipal council of which counsel is a member.</p> <p>58.12 Counsel who was previously an attorney acting for client in matter should not accept brief in same matter where counsel's former capacity, the extent of control & direction exercised as an attorney/ established relationship as attorney with the client likely to compromise expectation that counsel's advice will be independent.</p>
Counsel's independence in conducting matters	<p>Code 3.9</p> <p>Legal practitioners shall retain independence necessary to give unbiased advice.</p> <p>9.9</p> <p>Legal practitioner shall, in giving any advice about prospects of success in matter, give true account of opinion and shall not pander to client's whims or desires. However, in any matter in which opinion is <i>adverse</i> to the prospects of success, legal practitioner may</p> <p>R v Matonsi: Accused alleges that counsel prevented accused from testifying.</p> <p>Accused wanted to testify, counsel advises that it would be unwise.</p> <p>Once client has placed his case in hands of counsel, counsel controls it. Counsel must decide whether a witness, including client, is to be called or not.</p>

	<p>upon client's insistence place before court client's case for court to decide and the legal practitioner shall advance that case as best as the circumstances allow.¹⁵</p> <p>22.3.1 The interpretation of Part IV of this code shall be effected purposively and aimed to give the fullest effect to the fundamental principles that shape, guide and express the essence of profession of advocacy: independence; agents of the rule of law; resisting undue influence; specialised services available to all persons.¹⁶</p> <p>25.3 Counsel shall upon acceptance of brief exercise personal judgment over all aspects of brief & shall not be dictated how matter is to be conducted. If decisions made/advice given not acceptable to instructing attorney/client, counsel must offer to surrender the brief, and if the instructing attorney elects to accept the surrender, counsel must forthwith withdraw.¹⁷</p>	<p>But must make it clear to client that if client insists on giving evidence, counsel can withdraw.</p>
<p>Admissions and undertakings made and settlement concluded by counsel on behalf of clients</p>	<p>Code 25.6 Counsel shall not bring about a binding settlement of any matter without an express and specific mandate by the instructing attorney as to the terms and conditions of an agreement of settlement</p>	<p>S v Maweke: Admissions made by counsel obo client must be fully & accurately recorded, unequivocal and unambiguous.</p> <p>Counsel made admission of common purpose but not clear what common purpose was: killing/proving deceased is a witch.</p> <p>De Wet v Western Bank Ltd: Statements made by counsel to court taken as binding agreement.</p>

¹⁵ As long as it is not a completely hopeless case – see *De Lacy v SA Post Office & Motswai v RAF*. Duty to argue client's case without fear – Rule 3.1 & Code 3.3, also see *Feni v Gxothiwe*.

¹⁶ Cab rank rule – Rule 2.1 and Code 26.

¹⁷ See in this regard *R v Matonsi*.

		<p>Hawks v Hawks: Advocate giving undertaking on behalf of client <u>without mandate</u>, in <u>absence</u> of attorney and client, <u>contrary to client's best interests</u>, and <u>contrary to mandate</u> to <u>oppose</u> interdict sought.</p> <p>Attended court alone without client/attorney!</p> <p>Undertaking: not to effect transfer of the immovable property pending resolution of matter.</p> <p>No compromise will be binding if it flies in face of client's instructions = failure of justice. Cannot bind client.</p> <p>Note: no interdict was granted – only p/p based on compromise. If an order was granted, could ask to be released based on order granted in error.¹⁸</p>
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REFERRAL RULE

Prohibition against receiving instructions directly from the public	<p>LPA S 34(2)(a)(i) Counsel may render legal services in expectation of fee, commission, gain/reward as contemplated in this Act/any other applicable law upon receipt of brief from attorney.</p> <p>Rule 5.1.1 May only render services for reward when <i>briefed</i>.</p> <p>Code 27 27.1 Counsel undertakes to perform services in court-craft & knowledge of law only upon the offer and acceptance of brief.</p> <p>27.2 Counsel shall accept brief only from attorney - not directly from any other person/entity for either litigious/non-litigious</p>	<p>De Freitas v Society of Advocates of Natal: Courts = inherent disciplinary powers over practitioners: misconduct or unprofessional conduct.</p> <p>Morally reprehensible conduct. Guilty person = clearly unfit to become/remain member of profession.</p> <p>Referral ensures & preserves independence.</p> <p>Clients not protected where money paid to advocates – no separate trust account.</p> <p>Counsel acted unprofessionally & improperly by taking direct briefs = subject to appropriate sanction by the Court.</p>
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¹⁸ See Uniform Rule 42 (of the High Court Rules) and the common law grounds for rescission based on error.

	<p>work of any kind, save that counsel may accept a brief -</p> <p>27.2.1 from justice centre;</p> <p>27.2.2 to perform professional services on brief from an attorney or legal practitioner in another country without the intervention of a RSA attorney;</p> <p>27.3 Counsel who act as arbitrators/umpires shall do so only on receipt of brief from parties' attorneys/on receipt of instructions from arbitration body.</p> <p>27.4 Counsel shall receive fees charged only from or through the instructing attorney who briefed, except where such attorney = insolvent/any other reason unable to pay → counsel may receive the fees due from another source in discharge of the indebtedness of the attorney with leave from the Provincial Council.</p> <p>28.1</p> <p>Counsel shall <i>ordinarily</i> accept a brief given in writing/by email, but in circumstances of <i>urgency</i> counsel may accept an <i>oral brief</i> but must <i>insist on receipt</i>, as soon as practicable, of <i>written/mailed brief</i>, failing which counsel shall in writing or by email confirm the terms of the oral brief.¹⁹</p>	<p>General Council of the Bar of SA v Van der Spuy: It is not part of counsel's work to receive instructions directly from client.</p> <p>Work performed by counsel on instructions received directly from client is not done in ordinary course of counsel's profession.</p> <p>When receiving instructions directly from client counsel performs attorney's work for a fee.</p>
Counsel should not perform work within the exclusive ambit of the functions of attorneys	<p>Code 23.2.1 - 23.2.19</p> <p>23.2 There is no closed list of subject matter about which brief may be accepted by counsel provided brief does not require counsel to undertake work properly that of attorney. In particular, counsel may accept a brief:</p> <ul style="list-style-type: none"> • to give legal advice orally/written opinion; • to prepare documents required for use in court/arbitration etc.; 	<p>General Council of the Bar of SA v Rösemann: Counsel signing summonses (in Mag Court) obo clients & attorneys.</p> <p>Prohibition on counsel performing work exclusively for attorneys.</p>

¹⁹ Duty then shifted to counsel.

	<ul style="list-style-type: none"> • to argue applications/ appeals; • to move unopposed matters; • to appear in trial/arbitration etc.; • to negotiate on behalf of a client/ settle matters, • to argue matter on taxation; • to make representations to the NPA whether to criminally charge person; • to undertake criminal prosecution; • to preside as arbitrator/ chair of a disciplinary enquiry etc; • to act as an expert or as a referee; • to act as mediator/ facilitator/adjudicator; • to conduct investigation & furnish report with recommendations re facts & recommendations re future action; • to act as a <i>curator ad litem</i>; • to make representations to a statutory/voluntary body/state official; • to act as commissioner in any enquiry. 	
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RULES GOVERNING CONSULTATIONS, WITNESSES AND CROSS-EXAMINATION²⁰

<p>Consultation to take place in counsel's chambers and in the presence of instructing attorney (and exceptions to the general rule)</p>	<p>Rule 4.1²¹</p> <p>4.1.1 Clients to be interviewed in presence of attorney/clerk (save pro deo & dock defences)</p> <p>4.1.2 Consultations to take place at chambers/counsel's home</p> <p>4.1.3.1 May consult at attorneys' offices if it's situated in a centre other that where counsel practices; or</p> <p>4.1.3.2 the bulk of the documentation or persons/special circs make consultation elsewhere practicable, WITH BC's CONSENT.</p> <p>Code 25.7</p> <p>Counsel shall ordinarily consult with instructing attorneys, clients and witnesses at counsel's chambers.</p> <p>25.8</p> <p>In circumstances which reasonably indicate that consultations cannot conveniently be held at chambers, counsel may exercise discretion to consult at other appropriate place, which places include counsel's home/offices of instructing attorney/offices of client, provided that counsel in so doing guards against</p>
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²⁰ Hereinafter “xx”.

²¹ Content given to Rules 4.1.3.1 and 4.1.3.2 in Code 25.8.1 to 25.8.5.

	<p>compromising counsel's independent status, which circumstances may include:</p> <p>25.8.1 where the large volume of documents to be scrutinised cannot usefully be accommodated in or transported to or from counsel's chambers;</p> <p>25.8.2 where the great number of witnesses to be interviewed make it more convenient to meet at the place where they can be conveniently assembled;</p> <p>25.8.3 where the consultations are to be held after hours or on weekends;</p> <p>25.8.4 where the persons to be interviewed are located in places distant from counsel's chambers;</p> <p>25.8.5 where counsel is to appear in proceedings occurring in a place other than counsel's home centre.</p>	
Interviewing witnesses of opponent	<p>55.1 – 55.5</p> <p>55.1 Legal practitioner shall ordinarily interview clients and witnesses in the presence of the instructing attorney or other representative of the instructing attorney (where an instructing attorney has been appointed).</p> <p>55.2 Legal practitioner who is an advocate as contemplated in section 34(2)(a)(i) of the Act may interview a witness in the absence of the instructing attorney or other representative of the instructing attorney in the following instances;</p> <p>55.2.1 when the matter is undertaken on brief from Legal Aid South Africa or a law clinic;</p> <p>55.2.2 when there is a need to interview a witness and the instructing attorney cannot reasonably attend;</p> <p>55.2.3 when the legal practitioner is at court or before the tribunal with the client and the instructing attorney is absent;</p> <p>55.2.4 when the instructing attorney gives permission.</p> <p>55.3 Legal practitioner shall ordinarily interview witnesses whose credibility might be in issue <u>separately</u> from other witnesses.</p> <p>55.4 Unless legal practitioner intends to present evidence by way of affidavit to a court or a tribunal, the written statements made by witnesses in an interview with legal practitioner/written statements made by witnesses that are given to legal practitioner by instructing attorney (where applicable) <u>may not be obtained on affidavit.</u></p> <p>55.5 Once a legal practitioner has called a witness to testify, the legal practitioner shall not again interview that witness until after xx and re-examination, if any, have been completed, unless circumstances arise that make such an interview necessary. When a proper case for such a necessary interview exists, the legal practitioner shall prior to any interview inform the opposing legal practitioner of such need and unless the opposing legal practitioner consents, no such interview shall be held unless the court or tribunal grants permission to do so.</p>	<p>Civil cases Rule 4.3.1</p> <p>May at any time interview any person who is believed to have</p> <p>Shabalala v Att-Gnl: The blanket rule prohibiting accused from consulting with State</p>

	<p>information that will assist, also any person subpoenaed by opponent:</p> <p><u>During litigation but before testified:</u> must advise opponent that will interview (opponent not entitled to attend interview);</p> <p><u>During litigation & after testified:</u> opponent must attend the interview, unless declined to be present.</p> <p><u>Objection to either does not preclude interview.</u></p> <p>Code 55.6-55.8</p> <p>55.6 Legal practitioner shall not be prevented from interviewing any person, at any time before or during any trial, from whom it is believed useful information may be obtained, and in particular, it shall not be a reason to prevent such an interview that the opposing party has:</p> <p>55.6.1 subpoenaed or contemplates subpoenaing that person;</p> <p>55.6.2 already interviewed or has arranged to interview that person.</p> <p>55.7 Whenever, after the commencement of a case, a legal practitioner has reason to suspect that a person with whom an interview is then sought may have been in touch with the opposing party with a view to testifying, the legal practitioner shall, either before or at the outset of an interview, or if the suspicion arises only during the interview, once the suspicion arises, ascertain if that person has been in touch with the opposing party and whether such person has been subpoenaed or is likely to be subpoenaed by the opposing party or has already been interviewed or an interview has been arranged with the opposing party, and if informed that any of these steps have</p>	<p>witness without permission of the prosecutor in all cases & regardless of circumstances = too wide & not protected by s 33. Claim to consult State witnesses without prior permission can only be justified in circumstances where right of accused to fair trial would in the special circumstances of the case be impaired if the defence is denied opportunity to have consultation.</p> <p>Must show the special circumstances.</p> <p>Prosecution must show that a reasonable person would hold the belief that the witness will be intimidated/prejudice to its case.</p> <p>Court has discretion.</p>
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	<p>been taken by the opposing party, the legal practitioner shall at once notify the opposing party of the intention to interview that person, and shall not commence or continue with an interview until such notification has been received by the opposing party, and thereafter the interview may take place in the absence of any representative of the opposing party.</p> <p>55.8 Whenever legal practitioner arranges to interview person who has already testified for the opposing party, <u>before</u> such interview may be conducted, legal practitioner must invite opposing party to attend interview, on reasonable notice. However, <u>regardless of the presence or absence of the opposing party, the interview may be conducted as arranged in the notification.</u></p> <p><u>Criminal cases Rule 4.3.2</u> No interview with a person whom counsel knows to be a witness for prosecution²² UNLESS: Att-Gnl/prosecutor/court's permission and subject to conditions (person has given a statement to SAPS/testified).</p> <p><u>Code of Conduct 55.9-55.11</u> 55.9 A legal practitioner shall, except as provided hereafter, when conducting criminal defences, take reasonable steps to prevent inadvertent contact with any person who is, or is likely to be, a state witness, for as long as that person is or is likely to be a state witness, and whenever the legal practitioner proposes to interview any person he or she shall ascertain whether such person is a state</p>
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²² Any person who gave a statement to SAPS or any person who has already given evidence.

	<p>witness before conducting the interview.</p> <p>55.10 A legal practitioner may interview a state witness if the prosecution consents, or, failing such consent, if a court grants permission to do so, and if permission is subject to conditions, in strict accordance with those conditions.</p> <p>55.11 For the purposes of these rules of conduct, a state witness in relation to a particular charge includes anyone from whom a statement has been taken by the South African Police Service about a crime or alleged crime, regardless of whether the prosecution is committed to calling such person or not, and anyone who has already testified for the state.</p>	
<p>Interviewing witnesses during trial</p>	<p><i>General prohibition against interviewing witnesses who are under xx as well as between xx and re-examination:</i></p> <p>Rule 4.2.2</p> <p>Improper to interview witness in xx, unless circ exists that make interview necessary → inform opponent!²³</p> <p>Code 55.5</p> <p>Once a legal practitioner has called a witness to testify, the legal practitioner shall not again interview witness until after xx and re-examination, if any, have been completed, unless circumstances make interview necessary. When proper case for necessary interview exists, legal practitioner shall prior to any interview inform opposing legal practitioner of need & unless opposing legal practitioner consents, <u>no such interview shall be held unless the court grants permission to do so.</u></p> <p><i>Interviewing witnesses after they have been sworn in (that is in chief):</i></p> <p>Rule 4.2.1</p> <p>Generally undesirable to interview witness after being sworn in.</p> <p>Code 55.5 (generally prohibited) - see above</p>	
<p>Undesirability of counsel depositing to affidavits and becoming witnesses in cases</p>	<p>Rule 4.5</p> <p>Must avoid depositing to affidavits/give evidence where appearing in such matter.</p> <p>BC's permission required when depositing or testifying while acting as counsel.</p>	<p>Carolus v Saambou Bank Limited: Independence & objectivity of counsel compromised where counsel identifies with the issues by also being a witness.</p> <p>Proper & desirable practice to require practitioners to maintain</p>

²³ Consent must be obtained.

		arm's length association with merits of cases.
Cross-examination	<p>Rule 3.3 Q's attacking character not relevant to case ought not to be asked unless reasonable grounds for thinking the imputation is well-founded exist.</p> <p><u>Instructing attorney</u>: can accept <i>prima facie</i> that imputation is true/well founded and can put the Q to witness</p> <p><u>Non-attorney</u>: cannot ask Q unless ascertained that satisfactory reasons for imputation exists.</p> <p>ALWAYS only to affect the credibility of the witness – if remote – do not ask Q!</p> <p>Guard against becoming a channel to insult, annoy – exercise own judgment.</p> <p>3.4 Counsel cannot wantonly or recklessly attribute to another person the crime with which client is charged or raise suspicion that someone else did it.</p> <p>Code 56.1 – 56.6 56.1 Witness to be xx with due regard to right to dignity.</p> <p>56.2 Guard against being influenced to become channel for the infliction of gratuitous embarrassment, insult or annoyance of a witness. Retain personal control over what is asked/put in xx by exercising personal judgment about the propriety of all and any imputations.</p> <p>56.3 Do not put allegations to witness where no reasonable expectation that admissible evidence is available.</p> <p>56.4 Legal practitioner shall not impugn the character of a</p>	<p>President of RSA v SARFU (<i>duty to challenge evidence in xx</i>): Essential, where intend to suggest a witness is not speaking truth on a point, to direct the witness attention to the fact by questions put in xx showing imputation is intended to be made & afford witness opportunity, while in witness box, to explain & defend his character.</p> <p>If a point in dispute is left unchallenged in xx, party calling witness entitled to assume that the unchallenged witness's testimony is accepted as correct.</p> <p>Essential to fair play and fair dealing with witnesses.</p> <p>Precise nature of imputation must be clear to witness so that it can be met & destroyed, esp where imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also <i>how</i> it is to be challenged.</p> <p>This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.</p> <p>S v Gidi: Prosecutor was intimidating, insulting and vindictive towards first accused in his xx. The accused was not afforded a proper opportunity to answer the accusations and questions put to him by the prosecutor. Accused was constantly interrupted and silenced by a flood of words</p>

	<p>witness unless good grounds exist:</p> <p>56.4.1 instructing attorney informs legal practitioner that attorney = satisfied that imputation = well-founded & true. However, a mere instruction to put an imputation shall be inadequate;</p> <p>56.4.2 source of imputation is statement of any person other than the instructing attorney, and legal practitioner ascertains reliable information/reasons to believe statement = well-founded/true.</p> <p>56.5 Regardless of whether imputations about witness are well-founded/true, legal practitioner shall not put imputations to witness unless answers = reasonably believed to be material to the credibility/material to any issue in the case.</p> <p>56.6 In crim proceedings, legal practitioner shall not recklessly attribute to/accuse witness or other person of the crime with which the client is being tried. Such attribution/accusation may be made only if facts adduced in evidence & circumstances which evidence suggest, afford reasonable basis from which rational inferences may be drawn to justify at least a reasonable suspicion that crime might have been committed by witness/other person.</p>	<p>from the prosecutor which amounted to the haranguing, badgering and hectoring of the accused to which it was impossible to reply.</p> <p>Although xx must be thorough, complete and effective, xx of an accused should always be impartial.</p> <p>Not biased or prejudiced. Never seek to conceal/withhold evidence/facts known to prosecutor which may favour accused in his defence/of mitigating nature.</p> <p>Purpose of xx & duty of a prosecutor: assist court in its enquiry into the true facts of the case & proper administration of justice.</p> <p>Prosecutor should not put to accused/imply in questions, an assertion adverse to an accused which he knows is false.</p> <p>Proper xx does not permit gratuitous intimidation. A prosecutor should not bully accused by insulting, browbeating, adopting overbearing attitude which admits of no contradiction by accused of what is put to him.</p> <p>A prosecutor should not ridicule an accused/taunt/or offend sensibilities/provoke to anger/play upon emotions to place at an unfair disadvantage and incapacitate from answering questions to the best ability</p> <p>Bullying interrogation not directed at an enquiry into the true facts, but calculated to intimidate an accused into fearful or hopeless concessions/admissions which may be untrue/prevent an accused from having an opportunity to give an explanation of some</p>
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		<p>circumstance which may be exonerating/mitigating.</p> <p>An accused must be given a fair chance to answer Q put to him. His answer must not be interrupted from the bar. The next Q must not be put before the previous one has been fully answered.</p> <p>Q's should be in a form understandable to the witness so that he may answer them properly. Avoid multiple q's.</p> <p>S v Azov: Witness to be extended ordinary courtesy one extends to decent people. Witnesses assist court in arriving at truth & carrying out administration of justice.</p> <p>X-examiner not entitled to insult/treat witness rudely without very good reason. Witnesses must be treated with courtesy & respect.</p> <p>Witness may be attacked, but lay a foundation to the satisfaction of the presiding officer that there are grounds for attacking the witness.</p> <p>Witness to be extended same courtesy to man in civilised society.</p> <p>S v W: Q re intercourse = collateral issue, relevant solely to credibility & not directly in issue in charge.</p>
Duty of prosecutor to disclose prior inconsistent statements	Rule 4.3.2(f)(ii)	S v Radebe: serious inconsistencies → prosecutor under duty to disclose to court & to make statement available to opponent for xx (unless good reasons exist not to).

RULES GOVERNING COUNSEL'S FEES	
Contingency fee agreements	<p>Rule 7.10</p> <p>Comply with provisions of CFA Act.</p> <p>Att, client and counsel to sign (compliance with ss 2 & 3 of CFA).</p> <p>Stipulate higher/normal rate – not more than 100% more.</p> <p>Fees must remain proportional to endeavour & services rendered.</p> <p>Client's refusal to accept advise – fees remain payable up to date of withdrawal.</p> <p>Ascertain from previous counsel with CFA whether paid – secure fees.</p> <p>Code 32</p> <p>Counsel shall not agree to charge on results or agree to reduce or waive fees if a positive result is not achieved, except in a matter taken on contingency in terms of the Contingency Fees Act 66 of 1997 and/or save as contemplated in section 92 of the Act.</p> <p>Counsel shall not agree to charge a fee as allowed on taxation except in a matter undertaken on contingency, or as permitted in terms of section 92 of the Act.</p>
<i>Pro bono</i> and <i>pro amico</i> briefs	<p>Rule 7.3</p> <p>Where no fees charged – inform court and BC.</p> <p>May claim success fee: estimate of relief that may be obtained; estimate of eventual chances of success/failure; estimate of work involved & complexity; % success fee above normal fee.</p> <p>Specify normal fee and %.</p> <p>BC may review and set aside.</p> <p>Code 31</p> <p>Counsel who accept <i>pro bono</i> briefs shall not, after acceptance, seek to charge a fee except as may be permissible under section 92 of the Act.</p> <p>Counsel who appear in proceedings <i>pro bono</i> shall disclose that fact to all interested parties and to the court.</p>
Champertous agreements	PWC v National Potato Co-op: If anyone, in good faith, gave financial assistance to a poor suitor & helped to prosecute an action in return for a reasonable recompense/interest, the agreement must not be unlawful or void.

	<p>The fact that a litigant has entered into an unlawful agreement with 3rd party to provide funds to finance litigation is extraneous to dispute between litigant and other party = irrelevant to the issues arising in the dispute, whatever the cause of action.</p> <p>The illegality of champertous agreement between plaintiff and legal representatives not a defence to the action.</p> <p>Court has inherent jurisdiction to prevent abuse of court process.</p>	
Costs <i>de bonis propriis</i> and orders disentitling counsel to charge fees	<p>Pelser v DPP, Tvl: application for permanent stay of crim prosecution.</p> <p>Ill-conceived application. Accused may not apply for permanent stay of prosecution on grounds that he is likely to be prejudiced by external factors (here pronouncements in civil matters). Argument assumes that trial court will commit irregularity by allowing itself to be unduly influenced by such factors.</p> <p>Applicant's attempt = delaying the criminal trial; abuse of court process. Clearly a baseless application – counsel not allowed fees.</p> <p>January v Standard Bank of SA: General principle at common law: party who litigates in representative capacity (such as a trustee) cannot be ordered to pay the costs <i>de bonis propriis</i> <u>unless</u> guilty of improper conduct.</p> <p>Party may be ordered to pay costs where want of bona fides/acted with gross negligence/flagrant disregard of the rules.</p> <p>Negligence in serious degree: mark of the court's displeasure. Attorney/counsel - officer of the court & owes appropriate level of professionalism and courtesy.</p> <p>Instructions to counsel: manifestly false.</p> <p>Litigant engaging services of attorney & counsel entitled to expect prosecution with due diligence and due regard to applicable rule. Litigants entitled to expect every effort to be taken to ensure cases properly prepared and presented.²⁴ Duty of legal representatives to clients.</p>	
Fee agreements, reasonableness of counsel's fees, marking briefs and furnishing fee accounts	<p>Rule 7.1</p> <p>Reasonable fees must be charged (irrespective of client's ability to pay).</p> <p>No agreement between counsel & attorney justifies excessive fees.</p> <p>Factors:</p> <ol style="list-style-type: none"> 1) time & labour required; 2) novelty & difficulty; 3) skill required to properly conduct case; 	<p>Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas: value of work done must be considered. Time actually spent is not only/telling consideration to take into account.</p> <p>CoCT v Arun: Not correct to tax a party and party bill on both preparation for argument & preparing heads. Modern trend:</p>

²⁴ Without fear.

	<p>4) customary charges by counsel in comparable standing & similar matter;</p> <p>5) amount involved in issue;</p> <p>6) importance to client.</p> <p>At earliest time agree fee to be charged/basis at computing fees. May include proviso for unforeseeable circs.²⁵</p> <p>7.2 Marking fee – done by counsel if not done by attorney. May not change after 1 month. May not be marked “as allowed for on taxation”</p> <p>7.4 Records must be kept showing record of fees earned; briefing attorneys; detail to identify work done. Detail of outstanding fees & time. Bank statements must be available.</p> <p>7.7 Overdue fees: 60 days to pay. Non-payment to be reported to Council (inform once paid). Remove from non-payment list only once fees to all bars have been made.</p> <p>May not compromise w non-payer (save with consent).</p> <p>Waiving of fees only with permission of BC.</p> <p>No obligation to accept brief from non-payer. Interest may be levied.²⁶</p> <p>7.8 No agreement to await fees until payment made by client may be entered into.</p> <p>Code 29 – 35 <i>See code itself</i></p>	<p>Charge fees based on time actually expended - acceptable & in interest of transparency.</p> <p>Marking a fee:</p> <ol style="list-style-type: none"> 1) importance of matter; 2) financial value to parties; 3) complexity of issues raised and/or required to be canvassed; 4) nature of the matter, 5) issues in dispute; 6) volume of record; 7) work actually done by counsel; 8) rate at which charged 9) comparison between rate charged & BC's fee parameters; 10) assessment as to reasonableness of counsel's fees
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²⁵ Where regularly deal with attorney, no need to agree specific fee structure – knows fee structure.

²⁶ Where interest is levied, the provisions of the NCA will apply – becomes an incidental credit agreement. Have due regard to, *inter alia*, ss 129 & 130 of the NCA.

COUNSEL'S QUALIFIED PRIVILEGE AND FREEDOM OF SPEECH IN COURT

Rule 3.3

3.3.1 Questions which affect the credibility of a witness by attacking his character, but are not otherwise relevant to the actual enquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well founded or true.

3.3.2 An advocate who is instructed by his attorney that in his opinion the imputation is well founded or true, and is not merely instructed to put the question, is entitled *prima facie* to regard such instructions as reasonable grounds for so thinking and to put the question accordingly.

3.3.3 An advocate should not accept as conclusive the statement of any person other than the attorney instructing him that the imputation is well-founded or true, without ascertaining, so far as is practicable in the circumstances, that such person can give satisfactory reasons for his statement.

3.3.4 Such questions, whether or not the imputations they convey are wellfounded, should only be put if, in the opinion of the xx, the answers would or might materially affect the credibility of the witness; and if the imputation conveyed by the question relates to matters so remote in time or of such a character that it would not affect the credibility of the witness, the question should not be put.

3.3.5 In all cases it is the duty of the advocate to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person and to exercise his own judgment both as to the substance and form of the question put.

3.4

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

4.12

Counsel should not allow ill-feelings existing between clients to influence conduct/demeanor in a matter.

Personalities between counsel should be avoided. Do not allude to personal history between counsel.

Code 3.14

Counsel shall behave towards their colleagues, whether in private practice or otherwise, including any legal practitioner from a foreign jurisdiction, and towards members of the public, with integrity, fairness and respect and without unfair discrimination, and shall avoid any behaviour which is insulting or demeaning.

9.7.1

A legal practitioner shall in the composition of pleadings and of affidavits rely upon the facts given by instructing attorney/client

Joubert & Others v Venter:

Counsel = qualified privilege in conduct of legal proceedings. Where counsel prepares pleadings, examines or xx, counsel's statements
 "(a) *must be pertinent or germane to the issue, and*
 (b) *have some foundation in the evidence or circumstances surrounding the trial.*"

Advocates must serve litigants without resorting to slander and abuse beyond what the interests of the case require. Where defamatory statements are made, it must be made "*in the interests of client, pertinent to the matter in issue, even though it be false, provided that he can produce some probable (or credible) foundation for the defamatory allegation which he has made*".

Counsel afforded stronger protection where acting on instructions of attorney - not getting information directly from client & accepts attorney sifted & proof forthcoming. Counsel must prove that the defamatory statements were **relevant** or **germane** to issue in proceedings.

Subjective belief in truth not required for qualified privilege. Public policy requires counsel to place client's case before court: freedom in drawing pleadings. Hamper of freedom = hampering administration of justice; contrary to public policy.

Findlay v Knight: Irrelevancy & improper personal motive (e.g. malice or spite) = facts from which *animus iniuriandi* can be inferred. Where facts don't exist *animus iniuriandi* if:

<p>and in so doing shall not gratuitously disparage, defame or otherwise use invective language.</p>	<ol style="list-style-type: none"> 1) knows charges are false (or simply doesn't care if the charges are true or not); or 2) knows/ought reasonably to have known/no evidence of the charge.
<p>56.2 A legal practitioner shall guard against being influenced by any person to become a channel for the infliction of gratuitous embarrassment, insult or annoyance of a witness, and shall retain personal control over what is asked or put in xx by exercising personal judgment about the propriety of all and any imputations.</p>	<p>Court to consider in every case whether, in the circumstances of the particular case, freedom has been transgressed.</p>
<p>56.4 A legal practitioner shall not impugn the character of a witness unless he or she has good grounds to do so. In this regard, good grounds are deemed to be present if:</p> <p>56.4.1 the instructing attorney (if one is appointed) informs the legal practitioner that the attorney is satisfied that the imputation is well-founded and true. However, a mere instruction to put an imputation shall be inadequate;</p> <p>56.4.2 the source of the imputation is the statement of any person other than the instructing attorney, and the legal practitioner ascertains from that person, or any other source, reliable information or reasons to believe that the statement is well-founded or true.</p>	<p>Purpose of defamatory contentions NB: was it made for legitimate & honest purpose of laying the claim or charge before the court?</p>
<p>56.6 A legal practitioner shall not, in the conduct of a criminal defence, recklessly attribute to, or accuse, a witness or other person of the crime with which the client is being tried. Such an attribution or accusation may be made only if the facts adduced, or to be adduced, in evidence, and the circumstances which the evidence suggest, afford a reasonable basis from which rational inferences may be drawn to justify at least a reasonable suspicion that the crime might have been committed by that witness or other person</p>	<p>Basner v Trigger: Considerable liberty allowed to party who presents his case. Malice must not be attributed merely because counsel does not think his submissions are well founded/are pitched too high for reasonable acceptance. Even far-fetched and fantastic contentions cannot provide evidence that advanced from improper motive. Matters stated in argument: relevancy mostly decisive as to whether there is intrinsic evidence of malice.</p>
	<p>Gluckman v Schneider: Attorney enquiring from witness whether previously convicted. Attorney acting on instructions.</p> <p>Reasonable grounds, unless clear that knew/ought to have known that instructions without foundation. No duty on attorney to satisfy whether instructions true/false unless doubted genuineness. Negligence or recklessness will not destroy the privilege in the absence of malice – unless grossly negligent to point where cannot reasonably believe imputation.</p>

COURT AND PROFESSIONAL ETIQUETTE

Rule 4.14

Appropriate clothes to be worn under gown.

Arrange introductions with registrar before first appearance.

Junior counsel at back row. Senior counsel in front rows.

4.27

Counsel must robe in all courts → due to change in legislation also robe in lower courts.

Code 36

Counsel shall dress appropriately when rendering services to or on behalf of a client.

61.3-61.12

61.3 A legal practitioner shall not comment publicly nor publish any opinions about matters which are before a court or other tribunal in which the litigation process is incomplete, except for the purposes of guiding public understanding of the issues that have arisen or may arise in the course of such proceedings.

61.4 A legal practitioner may publicly express opinions about any question of law or prospective law provided that the opinion is not likely to be construed as prejudging an actual case before the courts or any tribunal at that time. Legal practitioners shall, upon a first appearance before a judicial officer, approach the registrar of the judicial officer (if the judicial officer is a judge), or the equivalent official in any other court, before the hearing in order to present themselves to the judicial officer; the rule is applicable to acting judges as well, and any prior professional or personal acquaintance with the acting judge is irrelevant.

61.5 At the trial court roll call, in the motion courts and in the divorce courts, legal practitioners shall seat themselves from the front row with regard to seniority.

61.6 Legal practitioners shall deal with the judicial officer, court staff and all other persons in court with civility and respect.

61.7 A legal practitioner shall, on the completion of his or her matter, remain in the courtroom until the legal practitioner in the next matter has risen, or if the legal practitioner is the last legal practitioner in court, until the court has risen.

61.8 A legal practitioner shall not, when briefed in an opposed matter, approach a judicial officer in the absence of the opposing legal practitioner, unless the opposing legal practitioner has expressly agreed thereto.

61.9 Legal practitioners shall not allow any ill-feeling between litigants or legal practitioners to interfere with the civil and professional conduct of the matter.

61.10 Legal practitioners shall not indulge in personal remarks about opposing legal practitioners or witnesses, whether in court or out of court, and shall not allow any antipathy that might exist between the legal practitioner and the opposing legal practitioners personally to intrude upon the conduct of the matter.

61.11 After a hearing when judgment is awaited, a legal practitioner shall not place before, or try to send to, a judicial officer any further material of whatever nature, except by agreement among representatives of all parties; provided that, if consent is unreasonably withheld, the placing of such further material may, in an appropriate case, be the subject matter of an application to re-open the hearing to receive it or, if the further material consists only of references to authorities which might offer assistance to deciding a question, a legal practitioner may address a request in writing to the judge's registrar or equivalent court official to approach the judicial officer with an invitation to receive the references.²⁷

61.12 A legal practitioner shall not deliberately seek to catch an opposing legal practitioner off-guard. Accordingly –

²⁷ Remains duty on counsel to alert court to relevant material – even if it came out after reservation of judgment. If no explanatory note is provided, can send to judge's registrar – always ensure to copy opponent in on correspondence.

61.12.1 whenever a legal practitioner has prepared heads of argument, other than when compelled to do so in terms of the rules of conduct of court, he or she shall not later than the time when the heads are presented to a court also give the opposing legal practitioner an identical set of such heads;

61.12.2 whenever a legal practitioner gives a bundle of authorities to the court, he or she shall also give at least a list containing the authorities to the opposing legal practitioner;

61.12.3 whenever a legal practitioner makes use of a transcript of proceedings, he or she shall give the opposing legal practitioner a copy no later than the first time that reference is made to the transcript;

61.12.4 whenever a legal practitioner is intent on taking a point of law not evident from the papers, independently of any rule of court that might apply, he or she shall notify the opposing legal practitioner in good time to avoid that opposing legal practitioner being taken unawares; and

61.12.5 whenever a legal practitioner intends presenting the court with an unreported judgment, he or she shall, in advance of the hearing, notify and give a copy of the judgment to the opposing legal practitioner in good time to avoid the latter being taken unawares.

DUTY TO OBEY RULES OF THE PROFESSION

Rule 1.3

All members must know the rules in relationship with attorneys & clients. New members must introduce themselves to bar members at chambers.

Society of Advocates of SA v Cigler: Breach of Rules may be relevant whether a fit & proper person to practise as counsel. Must respect the rules & act accordingly.

Breach in rules may cause an injustice/unfair trial. Courts thus assist in upholding rules.

Code 2

The provisions of Part II of the code shall apply to, and be observed by, all legal practitioners. If legal practitioners are at any time in doubt about the meaning or applicability of any part of this code they may apply for a ruling from the Legal Practice Council.

Taking a brief belonging to other counsel.

21.1

Misconduct includes (without limiting the generality of these rules) a breach of the Act or of the code or of any of the rules, or a failure to comply with the Act or the code or any rule with which there is a duty to comply

Charging excessive fees: not only a breach of the provisions of the Rules but a matter of serious concern.

54.1

Unless otherwise stated or unless the context dictates otherwise, Part VI of this code applies to all legal practitioners in relation to appearances in any court in which they have the right of appearance.

APPLICATIONS FOR ADMISSION AND ENROLMENT AS AN ADVOCATE

LPA S 24(1) and (2)

(1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.

(2) The High Court must admit to practise and authorise to be enrolled as a legal practitioner, upon application, satisfies the court that he or she- (a) is duly qualified as set out in section 26; (b) is a- (i) South African citizen; or (ii) permanent resident in the Republic; (c) is a fit and proper person to be so admitted; and (d) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules.

Ex parte Goosen: S 115 – vested rights.

Fit & proper = factual position confirmed by court.

S 26(1)

A person qualifies to be admitted and enrolled as a legal practitioner, if that person has- (a) satisfied all the requirements

Ex parte Swain (conflict of interest and waiver signed – car accident): It is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given.

for the LLB degree obtained at any university registered in the Republic, after pursuing for that degree- (i) a course of study of not less than four years; or (ii) a course of study of not less than five years if the LLB degree is preceded by a bachelor's degree other than the LLB degree, as determined in the rules of the university in question and approved by the Council; or (b) subject to section 24(2)(b), satisfied all the requirements for a law degree obtained in a foreign country, which is equivalent to the LLB degree and recognised by the South African Qualifications Authority established by the National Qualifications Framework Act, 2008 (Act 67 of 2008); and (c) undergone all the practical vocational training requirements as a candidate legal practitioner prescribed by the Minister, including- (i) community service as contemplated in section 29, and (ii) a legal practice management course for candidate legal practitioners who intend to practise as attorneys or as advocates referred to in section 34 (2)(b); and (d) passed a competency-based examination or assessment for candidate legal practitioners as may be determined in the rules.

Rule 17

See rules itself

Proper administration of justice cannot survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court. The applicant has demonstrated that he is unable to measure up to the required standard.

Northern Cape Society v Mziako: Can't claim ignorance of the duty to disclose previous convictions even though Act is silent on it. Criminal convictions play an important role in determining whether a person is a fit and proper person to be admitted to practise as an advocate.

Two previous applications made and withdrawn when LPC asked about criminal convictions.

Ex Parte Cassim: The profession of barrister and attorney requires the utmost good faith from practitioners and from all aspirant practitioners and there can be no doubt that the convictions were relevant. Anyone entering upon these professions must surely know that **all material facts must be placed before the Court.**²⁸

Here the applicant had a long list of previous convictions involving dishonesty to his name.

Applicant engaged in forum shopping with the sole aim that he might find a court that is not made aware of his record of criminal convictions and be successfully admitted as advocate. He did not voluntarily

²⁸ The application in this regard remains an *ex parte* application – utmost good faith is required and all factors which might influence the court's decision is to be disclosed to court: refer to *Schlesinger supra*.

disclose to the courts where he made his aborted applications for admissions as an advocate and that he had a record of previous convictions. It is only when the record of his previous convictions was discovered that he withdrew his applications.

Hayes v The Bar Council:
Onus on applicant: fit & proper person to be admitted. Decided as objective Q of fact, not as matter of discretion.

Utmost good faith, reliability & integrity required.
Courts places complete trust in counsel. Court must be satisfied that counsel will do nothing that may bring Court/profession into disrepute.

Advice: careful & impartial.
Requires capacity for taking detached view of cases - in a conflict situation must retain ability to control own feelings and not let it intrude into or colour judgment & reactions.

Chequered history; not frank with court.

APPLICATIONS TO STRIKE OFF AND CONCEPT OF "FIT AND PROPER" PERSON TO PRACTISE

LPA S 31(1)

Subject to any other law, no person other than a practising legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward-

- (a) appear in any court of law (etc.); or
- (b) draw up or execute any documents in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.

S 43

Despite the provisions of this Chapter, if upon considering a complaint, a disciplinary body is satisfied that a legal practitioner has misappropriated trust monies or is guilty of other serious misconduct, it must inform the Council thereof with the view to the Council instituting urgent legal proceedings in the High Court to suspend the legal practitioner from practice and to obtain alternative interim relief.

S 44

(1) The provisions of this Act do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity.

(2) Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity or in connection with any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge.

GCB v Geach:²⁹ Accepted multiple briefs to conduct trials on the same day against the RAF and charged full trial fee for all.

Once counsel exhibits dishonesty - inferred that dishonesty will recur & ought ordinarily to be barred from practice. In exceptional circumstances would this inference not need to be drawn and striking off not need to follow. The exception could be expressed in the distinction of a '*character defect*' as against a '*moral lapse*'.

Repayment orders can only be made of counsel over whom the court has inherent power – thus not against struck off counsel, only suspended counsel.

Fine v Society of Advocates of SA: Court must decide:

- 1) whether advocate is a fit and proper person to continue to practise [balance of probabilities];
- 2) if not, whether to suspend or name to be struck from the roll [discretion – not easily interfered with on appeal].

Court must be able to rely with any confidence upon integrity.

Johannesburg Society of Advocates v Edeling: Readmission after being struck off the roll: genuine, complete and permanent reformation.

²⁹ The judgment is informative of a court's approach on orders granted in terms of which court has a discretion and when an appeal court will interfere with such order granted (similar approach followed as regards costs orders – see *DPP v Henry*: a court will only interfere where the court *a quo* misdirected itself, or where the discretion was exercised irregularly, or where there are no grounds on which a court, acting reasonably could have made that particular order. Just because the appeal court may have made another order does not constitute justification for interfering with the court *a quo*'s exercise of its discretion).

	<p>Defect of character/attitude which led to striking no longer exists.</p> <p>Applicant must identify defect of character/attitude & act in accordance with appreciation. Until & unless there is cognitive appreciation, difficult to see defect cured. Onus to show fit & proper with this as basis. Advocate required to be completely honest, truthful and reliable.</p>
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ⁱ These notes were prepared in preparation for the ethics bar exams and are not meant to replace and/or supplement the reading material/curriculum provided by the GCB. It is merely an aid to assist with considering the material and may be incomplete and/or contain inadvertent errors. Any reliance placed on these notes are at the pupil's peril.