South African Legal Practice Council~~National Forum on the Legal Profession~~

Code of Conduct

made under the authority of section 36(1)~~97(1)(b)~~ of the Legal Practice Act, 28 of 2014

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PART I

Definitions

1. In this code, unless the context otherwise indicates:

1.1 "**the Act**" means the Legal Practice Act, 28 of 2014;

Commented [A1]: [Carter]: See 1.29. Is it really necessary to repeat so many of the definitions that are the same as in the Act? I will cross out all definitions which are included in the Act if there is no need to repeat them in the Code.

~~1.2 "advocate" means a legal practitioner who is admitted and enrolled as such under the Act;~~

~~1.3 "attorney" means a legal practitioner who is admitted and enrolled as such under the Act;~~

~~1.4~~1.2 "**branch office**" means an office at or from which the firm practises, but which is not a main office;

~~1.5 "candidate attorney" means a person undergoing practical vocational training with a view to being admitted and enrolled as an attorney;~~

~~1.6 "candidate legal practitioner" means a person undergoing practical vocational training, either as a candidate attorney or as a pupil;~~

~~1.7~~1.3 "**code of conduct**" or "**code**" means this code setting out rules and standards relating to ethics, conduct and practice for legal practitioners, candidate legal practitioners and juristic entities and its enforcement through the Council and its structures;

Commented [A2]: [Carter]: Although the code is defined in the Act, this definition should stay, but without the unnecessary wording that I have crossed out.

~~1.8 "conveyancer" means any practising attorney who is admitted and enrolled to practice as a conveyancer in terms of the Act;~~

~~1.9 "Council" means the South African Legal Practice Council established in terms of section 4 of the Act;~~

~~1.10 "court" means any court in the Republic as defined in section 166 of the Constitution of the Republic;~~

~~1.11 "disciplinary body" means~~

~~1.12.0 an investigating committee;~~

~~1.13.0 a disciplinary committee; or~~

~~1.14.0 an appeal tribunal;~~

as the case may be;

1.16 "Fidelity Fund Certificate" means the certificate referred to in section 85 of the Act;

1.17 "**firm**" means -

1.17.1 a partnership of attorneys;

1.17.2 an attorney practising for his or her own account; or

1.17.3 a juristic entity

who or which in each case conducts the practice of an attorney;

1.18 "Fund" means the Legal Practitioners' Fidelity Fund referred to in Section 53 of the Act;

1.19 "High Court" means the High Court of South Africa established by section 6 of the Superior Courts Act, 10 of 2013 or, if the context indicates otherwise, the Division thereof having jurisdiction;

1.20 "**juristic entity**" means a commercial juristic entity established to conduct a legal practice as an attorney, as contemplated in section 34(7) of the Act and a limited liability legal practice as contemplated in section 34(9) of the Act;

1.21 "**legal practitioner**" means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 respectively of the Act;

1.22 "**main office**" means the premises at and from which the practice of a firm is as a whole administered and controlled, including such premises in two or more buildings situated in sufficiently close proximity to one another to allow the administration of that practice as a single composite entity, and includes premises declared or determined as such in terms of accounting rules 540.2 or 540.5 as the case may be;

1.23 "Minister" means the Minister of Justice and Constitutional Development;

1.24 "notary" means any practising attorney who is admitted and enrolled to practise as a notary in terms of this Act;

1.25 "**PCSA**" means a Provincial Council sub-committee, established under section 23(7) of the Act, comprising only advocates to deal with matters relating exclusively to the advocates' profession;

Commented [A3]: [EMS]: See Comments later relating to PCSA

1.26 1.9 "**principal place of practice**" means the place at which the main office of a firm is situated, notwithstanding that any member of the firm may habitually or temporarily practise at or from a branch office; provided that the principal place of practice of a member of the firm who is a member of more than one firm, or who is the proprietor of one firm and a member of another firm or other firms, shall be deemed to be the place of the main office of that firm which has its main office closest to his residential address;

1.27 1.10 "**private practice**" means the practice of a legal practitioner who places legal services at the disposal of the public for reward and is actively engaged in the profession either as an attorney or as an advocate, or the practice of a legal practitioner as contemplated in sections 34(5)(c), (d) or (e) or section 34(6)(b), (c) or (d), and "**practise**" has a corresponding meaning; and for purposes of this definition -

1.27.1 1.10.1 attorneys referred to in sections 34(5)(c), (d) and (e) of the Act will be regarded as being attorneys in private practice;

1.27.2 1.10.2 advocates referred to in sections 34(6)(b), (c) and (d) will be regarded as being advocates in private practice;

Commented [A4]: [Carter]: On the basis of the inclusio unius rule, should these two sub-paras not say that all attorneys referred to in 34(5) and all advocates referred to in 34(6) will be regarded as being in private practice?

~~1.28 "pupil" means a person undergoing practical vocational training with a view to being admitted and enrolled as an advocate;~~

~~1.29 "Republic" means the Republic of South Africa;~~

~~1.30 "roll" means the roll of legal practitioners referred to in section 30(3) of the Act;~~

~~1.31 "rules" means the rules made in terms of the Act;~~

~~1.32 "trust account practice" means a practice conducted by -~~

~~1.32.1 one or more attorneys who are; or~~

~~1.32.2 an advocate referred to in section 34(2)(b) of the Act who is,~~

~~in terms of the Act, required to hold a Fidelity Fund certificate.~~

1.33 1.1 Words or expressions referred to in this code which are not defined shall bear the respective meanings assigned to them by section 1 of the Act.

PART II

Code of Conduct: general provisions

2. The provisions of Part II of the code shall apply to, and be observed by, all legal practitioners, candidate legal practitioners and juristic entities including, where the context requires, legal practitioners who are not in private practice.

3. Legal practitioners, candidate legal practitioners and juristic entities shall -

3.1 maintain the highest standards of honesty and integrity;

3.2 uphold the Constitution of the Republic and the principles and values enshrined in the Constitutiontherein, and without limiting the generality of these principles and values, shall not, in the course of his or her or its practice or business activities, discriminate against any person on any grounds prohibited in the Constitution;

Commented [A5]: [Carter]: Are we going to adopt a plain English policy , and avoid "therein", "heretofore" etc? If so, this can cange to "enshrined in the Constitution".

3.3 treat the interests of their clients as paramount, provided that their conduct shall be subject always to:

3.3.1 their duty to the court;

3.3.2 the interests of justice;

3.3.3 the observation of the law; and

3.3.4 the maintenance of the ethical standards prescribed by this code, any other code of ethics applicable to them and any ethical standards generally recognised by the profession;

3.4 honour any undertaking given by them in the course of their business or practice, unless prohibited by law;

3.5 refrain from doing anything in a manner prohibited by law or by the code of conduct of the profession which places or could place them in a position in which a client's interests conflict with their own or those of other clients;

Commented [A6]: [Jali]: It is not clear on what it seeks to entrench clarify it contextually. Its in 3 parts dissect it. Make it instructive

3.6 maintain legal practitioner/client privilege and confidentiality regarding the affairs of present or former clients or employers, according to law;

Commented [A7]: [Jali]: May cause chaos to the administration of justice and to the operations of Legal Aid and other like institutions. As it stands it is not realistic to the operations any any law firm as some matters are given to CA or Pas in the office to attend

3.7 respect the freedom of clients to be represented by a legal practitioner of their choice;

3.8 account faithfully, accurately and timeously for any of their clients' money which comes into their possession, keep such money separate from their own money, and retain such money for only as ~~so~~ long only as is strictly necessary;

3.9 retain the independence necessary to enable them to give their clients or employers unbiased advice;

3.10 advise their clients at the earliest possible opportunity on the likely success of such clients' cases and not generate unnecessary work, nor involve their clients in unnecessary expense;

Commented [A8]: [Jali]: Will this not limit the development of jurisprudence. Phrase the clause in a way that allows for development o f jurisprudence

3.11 use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner;

3.12 be entitled to a reasonable fee for their work, provided that no member shall fail or refuse to carry out, or continue, a mandate on the ground of non-payment of fees and disbursements (or the provision of advance cover therefor) if demand for such payment or provision is made at an unreasonable time or in an unreasonable manner;

Commented [A9]: [Qunta]: This appears to compel legal practitioners to continue work without payment of fees and seems unfair. What would an unreasonable time or manner refer to? I suggest either deletion or further dicusssion.

3.13 remain reasonably abreast of developments in the law and legal practice in the fields in which they practise;

3.14 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;

3.15 refrain from doing anything which could or might bring the legal profession into disrepute;

3.16 unless exempted therefrom, pay promptly to the Council or any organ of the Council, or to the Fund, all amounts which are legally due or payable in respect of fees, charges, levies, subscriptions, penalties, fines or any other amounts of whatsoever nature levied on legal practitioners, candidate legal practitioners or juristic entities in terms of any powers arising under the Act or the rules;

3.17 comply with the provisions of this code and any other code applicable to them and with those of the rules with which it is their duty to comply.

PART III

Conduct of Attorneys

4.1 Unless otherwise stated or unless the context indicates otherwise, Part III of this code applies only to attorneys, candidate attorneys and juristic entities who are in private practice (all of whom, for purposes of this code, and unless the context otherwise requires, being referred to as "attorneys"). If Part III of this code conflicts with the provisions of Part II then the provisions of Part II will prevail and take precedence over the provisions of Part III.

Approaches and publicity

4.2 For purposes of Part III of this code:

4.2.1 "publicity" shall include any direct or indirect reference to an attorney or firm, published or disseminated by any written, pictorial or oral means, in any medium (including electronic and social media), irrespective of whether such publicity or reference:

4.2.1.1 is made in connection with any sponsorship, patronage, welfare activity, other similar benevolent purpose or support in any cause; or

4.2.1.2 is made, or is paid for, at the instance, or with the knowledge or consent, of the attorney or firm; or

4.2.1.3 appears, or is contained, in any editorial, advertorial or advertisement

and "publicise" has a corresponding meaning.

4.3 Attorneys shall ensure that all written and oral approaches (including letterheads) to clients, or potential clients, and all publicity, including the offering of services by publicity, made or published by or on behalf of an attorney:

4.3.1 are made in a manner which does not bring the attorneys' profession into disrepute;

4.3.2 are not offensive, inappropriate or made for the purpose of procuring work in respect of which another attorney has already received instructions;

4.3.3 do not misrepresent the nature of the service offered;

4.3.4 accord in every respect with the requirements of this rule;

Commented [A10]: [Qunta]: The latter part of this sentence could mean that a firm of attorneys could not approach a company that already has a panel of attorneys. Is this the intention? If so, would it not be unreasonably restrictive? Agree with first part of sentence.

4.3.5 do not misrepresent, disparage, compare, criticise the quality of or claim to be superior to, the service provided by any other legal practitioner, whether or not such other legal practitioner is identified therein;

4.3.6 do not refer to a client by name in any publicity or advertisement published by or on behalf of an attorney unless:

4.3.6.1 the prior written consent of the client had been obtained; or

4.3.6.2 the advertisement relates solely to the sale or letting of a client's property.

4.4 Attorneys' responsibilities set out in paragraph 4.3 cannot be delegated. Where an attorney or a firm becomes aware of publicity referring to him or her or it which is in conflict with or infringes this paragraph 4, he or she or it shall immediately take appropriate steps reasonably necessary to have the publicity rectified or withdrawn and to further publish the rectification in the same medium or media as that in which the conflicting or infringing publicity appeared.

Specialisation and expertise

5. Attorneys may, on the basis of specialised qualifications or experience -

5.1 advertise or hold themselves out as being specialists or as offering specialist services, provided that if an attorney claims specialisation or expertise in any branch of the law, the Council may:

5.1.1 require the attorney to show good cause by a specified date why he or she should not be ordered by the Council to cease to hold himself or herself out as a specialist or as expert in any particular branch of the law;

5.1.2 order the attorney to cease holding himself or herself out as a specialist or expert in the branch of the law concerned if it is the opinion of the Council that the attorney's claim is not justified; and

5.1.3 declare that such order shall serve as notice in terms of the rules relating to disciplinary procedures without in any way limiting the Council's powers in terms of those rules;

5.2 be accorded senior attorney status in accordance with procedures prescribed by the Council.

Sharing of fees

6.1 An attorney or a firm shall not, directly or indirectly, enter into any express or tacit agreement, arrangement or scheme of operation or any partnership (express, tacit or implied), the result or potential result whereof is to secure for him or her or it the benefit of professional work, solicited by a person who is not an attorney, for reward, whether in money or in kind; but this prohibition shall not in any way limit *bona fide* and proper marketing activities by full time employees of the attorney or firm.

Commented [A11]: [Sigogo]: This clause might transgress against Competition Act. It does not allow marketing agencies to market the services of attorneys.

6.2 An attorney shall furnish the Council with an affidavit, within seven days of request, ~~therefor,~~ explaining the presence and function or position of an employee and manner or form of remuneration earned by such employee, or containing similar information relating to any person who is not an attorney who is apparently associated with the attorney's practice or who is continuously or repeatedly in, at or about the attorney's office.

Commented [A12]: [Qunta]: Does this mean that firms who employ forensic and tax specialists will also have to account? These are de fact multidisciplinary practices. Is it the Council's intention to prohibit such firms from employing professionals who are not attorneys?

6.3 An attorney may not hold himself or herself out as practising as an attorney while in the employ of a person who is not an attorney otherwise than as permitted in terms of section 34 of the Act.

Sharing of offices

7. An attorney, other than an attorney referred to in sections 34(5) (c), (d) and (e) of the Act, may not, without the prior written consent of the Council, share offices with a person who is not an attorney or an employee of an attorney.

Payment of commission

8. An attorney or firm may not effect payment, directly or indirectly, of agent's commission in advance of the date upon which such commission is due and payable, except out of funds provided by the person liable for such commission~~therefor~~ and on the express authority of such person.

Naming of partners and practice

9.1 Subject to paragraph 9.4, an attorney shall disclose his or her name on any letterhead used for the practice and, in the case of -

9.1.1 a partnership, the names of all the partners; or

9.1.2 a juristic entity, the names of all directors.

9.2 An attorney who discloses in his or her letterhead or in other publications the name of any person employed by him or her or his or her firm in any capacity shall indicate clearly whether or not such person is an attorney or his or her partner or fellow director; provided that, without prior written consent of the Council, such indication shall be made by using one or more of the following words and no others:

9.2.1 where such person is an attorney, "consultant", "associate", "professional assistant" or "assisted by";

Commented [A13]: [Carter]: Add "senior associate"

9.2.2 where such person is not an attorney, "candidate attorney", or in the case of professionals in fields other than law, such professional status as may be appropriate, or in the case of management employees, the descriptive management title.

Commented [A14]: [Qunta]: See my question in A6

9.3 An attorney in private practice shall practise only under a style or name which -

Commented [A15]: [Sigogo]: This clause is not supported by the LPA. It represents the provisions of the Attorneys Act and the Attorneys rules. Since the LPA is silent on the naming of law firms must be sought from the Companies Act.

9.3.1 is his or her own name or the name of a former proprietor of, or partner or director in, such practice if he or she practises without partners; or

9.3.2 contains the names of any or all of the present partners or directors or former partners or directors of or in such firm if he or she practises in partnership or as a juristic entity; or

9.3.3 is a derivative of the names referred to in paragraphs 9.3.1 or 9.3.2, or is the name of a national or international legal practice of which the attorney is an employee or with which the attorney or his or her firm is associated or of which he or she or his or her firm forms part, unless the Council in the particular circumstances prohibits the use of that name; or

9.3.4 the Council has first approved in writing, in the case of any other name.

9.4 Notwithstanding the provisions of paragraph 9.1, it will be sufficient compliance with that rule:

9.4.1 in the case of a partnership consisting of more than twenty partners, if the names of the senior partner and managing partner (and in the case of a branch office, the names of the senior partner of the partnership and the managing partner of the branch) are disclosed on the letterhead, provided the letterhead contains a note indicating the address at which the names of all the partners will be available for inspection;

9.4.2 in the case of a juristic entity, if the names of the directors are disclosed in the same manner as if the directors are partners in a partnership.

Replying to communications

10. An attorney -

10.1 shall within a reasonable time reply to all communications which require an answer unless there is good cause for refusing an answer;

10.2 shall respond timeously and fully to requests from the Council for information and/or documentation which he or she is able to provide;

10.3 shall comply timeously with directions from the Council, and must refrain from doing anything that may hamper the ability of the Council to carry out its functions.

Commented [A16]: [Qunta]: I think there should be included either here or elsewhere in the document a clause to the effect that legal practitioners should refrain from acting in a manner that hampers the ability of the LP Cot carry out its work. Such a clause could read as follows: Legal Practitioners must refrain from doing anything that may hamper the ability of the LPC to carry out its functions.

Naming in deed of alienation

11. An attorney may not act in terms of a deed of alienation of immovable property in which the attorney's name or the name of the attorney's firm has been printed or duplicated as the transferring attorney. This prohibition will not, however, apply if a separate written instruction is given to the attorney prior to the signature of the deed of alienation or to an agreement prepared by the attorney on instruction from the client.

Specific provisions relating to conduct of attorneys

12. An attorney shall -

12.1 refrain from accepting from any person directly or indirectly any sum of money which it is agreed or intended should be used as payment or part payment for services to be rendered or for disbursements to be made in the future in the event of any future act or omission forming the basis of any criminal charge against the person by or for whose benefit such payment was made;

12.2 issue and, on request, hand over or otherwise deliver to the person making payment, a receipt for any money received;

12.3 exercise proper control and supervision over his or her staff and offices;

12.4 not abandon his or her practice, or shall not close his or her practice, without priorevious notice to the Council and to his or her clients and without arranging with the clients for the dispatch of their business or the care of their property in his or her possession or under his or her control;

12.5 if he or she is practising as a sole practitioner, and intends to be absent from his or her practice for a period in excess of 30 consecutive days, give notice to the Council at least 14 days prior to his or her departure of the arrangements which he or she has made for the supervision of the practice during his or her absence. The attorney may, in the case of urgency only, give the Council a shorter period of notice. In the notice the attorney must inform the Council -

12.5.1 which other attorney will be supervising his or her practice;

12.5.2 the extent of the supervision which the other attorney will exercise;

12.5.3 what arrangements he or she has made for the payment of business and trust creditors; and

12.5.4 the reason for the late notice, if applicable.

This paragraph 12.5 applies also to attorneys who practise as partners or directors of a firm where all the partners or directors intend to be absent simultaneously from the firm for a period in excess of 30 consecutive days;

12.6 not overreach a client or overcharge the debtor of a client, or charge a fee which is unreasonably high, having regard to the circumstances of the matter;

12.7 submit an account for taxation or assessment, as the case may be, within a reasonable time after a request to do so by the Council, the client or the person purportedly liable for payment of the fee;

12.8 not act for or in association with any organisation or person, not being an attorney, whose business or part of whose business it is to solicit instructions for the attorney;

Commented [A17]: [Sigogo]: The words "not act for or" in this clause must be deleted as they imply that an attorney is not allowed to represent some people.

Commented [A18]: [Qunta]: This is not entirely clear

12.9 not buy instructions in matters from a third party and may not, directly or indirectly, pay or reward a third party, or give any other consideration for the referral of clients other than an allowance on fees to an attorney for the referral of work;

12.10 use the services of a third party (including services for the purpose of gathering evidence) only where the attorney has established a *bona fide* attorney and client relationship with the client, such that -

12.10.1 the client is free to elect whether or not to use the services of the third party;

12.10.2 the attorney takes proper instructions directly from the client; and

12.10.3 the attorney is mandated to engage the third party at the client's cost

in which event the attorney may issue an instruction to a third party whom the attorney considers will be competent to do specific work, and the attorney may, on the client's behalf, pay to the third party a fair and reasonable fee, consistent with the value of the work actually done by the third party;

12.11 when using the services of a third party, render an account to the client which discloses the payment to the third party as a disbursement;

12.12 not accept a mandate knowing there to be an existing mandate, or a freshly terminated mandate, given to another attorney without explaining to the client all the implications of his doing so, including in particular the cost implications; and in particular an attorney shall not accept a mandate in a matter taken on a contingency fee basis where he or she knew or ought reasonably to have known that there were no good grounds for the potential client to terminate the existing mandate;

12.13 perform professional work or work of a kind commonly performed by an attorney with such a degree of skill, care or attention, or of such a quality or standard, as may reasonably be expected of an attorney;

12.14 in any communication with another person on behalf of a client -

12.14.1 not represent to that person that anything is true which the attorney knows, or reasonably ought to know, or reasonably believes, is untrue; or

12.14.2 not make any statement that is calculated to mislead or intimidate that other person, and which materially exceeds the legitimate assertion of the rights or entitlement of the attorney's client; or

12.14.3 not threaten the institution of criminal proceedings against any other person in default of that person's satisfying a concurrent civil liability to the attorney's client; or

12.14.4 not demand the payment of any costs to the attorney in the absence of an existing liability ~~therefor~~ owed by the person to the attorney's client;

12.15 be in attendance, or immediately accessible, during a consultation with counsel or an attorney acting as counsel, or at court during the hearing of a matter (other than an unopposed application) in which he or she is the attorney of record, in person or through a partner or employee, being an attorney or a candidate attorney;

12.16 take all such steps as may be necessary from time to time to ensure compliance at all times as an accountable institution with the requirements of the Financial Intelligence Centre Act, 38 of 2001;

12.17 pay timeously, in accordance with any contractual terms or, in the absence of contractual terms, in accordance with the standard terms of payment, the reasonable charges of any legal practitioner, whether an advocate or an attorney, whom he or she has instructed to provide legal services to or on behalf of a client; such liability shall extend to every partner of a firm or member of an incorporated practice, and if the firm is dissolved or the incorporated practice is wound up, liability shall remain with each partner or member, as the case may be, the one paying, the others to be absolved;

12.18 dress appropriately when appearing on behalf of a client in any court or before any tribunal~~, and will be required to robe in all superior or lower courts in the same manner as he or she would robe in the superior court~~;

Commented [A19]: [Sigogo]: Robing in courts need to be relooked at by the LPC.

Commented [A20]: [Qunta]: Is this really necessary? I thought we should move away from "robe" and rather refer to appropriate dress which we can define a bit more specifically.. This should be discussed by Council

12.19 not tout for professional work. An attorney will be regarded as being guilty of touting for professional work if he or she either personally or through the agency of another, procures or seeks to procure, or solicits for, professional work in an improper or unprofessional manner or by unfair or unethical means, all of which for purposes of this rule will include, but not be limited to -

12.19.1 the payment of money, or the offering of any financial reward or other inducement of any kind whatsoever, directly or indirectly, to any person in return for the referral of professional work; or

12.19.2 directly or indirectly participating in an arrangement or scheme of operation resulting in, or calculated to result in, the attorney's securing professional work solicited by a third party.

For purposes of this paragraph 12.19 "professional work", in addition to work which may by law or regulation promulgated under any law be performed only by an attorney, means such other work as is properly or commonly performed by or associated with the practice of an attorney.

Misconduct

13. Misconduct on the part of any attorney will include (without limiting the generality of these rules) -

13.1 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 it is the attorney's duty to comply;

13.2 any conduct which would reasonably be considered as misconduct on the part of an attorney or which tends to bring the attorney's profession into disrepute

provided that this code is not applicable to the private life of an attorney insofar as the activities in an attorney's private life do not impact on his or her practice as an attorney, or on the attorneys' profession.

PART IV

Conduct of advocates contemplated in section 34(2)(a)(i) of the Act

14. **Preamble and Provincial Council sub-committee on advocates [PCSA]**

14.1 Part IV of this code is applicable to, and binding upon, every person who has been admitted and enrolled to practice as an advocate in South Africa and who is an independent practitioner of advocacy as contemplated in section 34(2)(a)(i) of the Act, called in part IV of this code, 'counsel'.

14.2 Part IV of this code is applicable to the professional conduct of counsel.

14.3 This code is not applicable to the private lives of counsel insofar as the activities in their private life do not impact on either counsel's practice of advocacy or on the profession of advocacy.

14.4 This code is not exhaustive of the ethical professional responsibilities of counsel.

14.5 Counsel shall upon admission as an advocate immediately become acquainted with this code.

14.6 Counsel shall comply fully with Part IV of this code

14.7 Counsel who at any time are in doubt about the meaning or applicability of Part IV of this code shall promptly apply for a ruling from a PCSA having jurisdiction in respect of the area concerned.

14.8 Until the time of the establishment of the PCSA, its powers in these and all other respects set out in part IV of this code that fall to be exercised by the PCSA shall be exercised by the LPC General Council of the Bar of the Society of Advocates of South Africa in respect of its members, or a society of advocates that currently exercises that jurisdiction and function in respect of its members (together "the PPCSA"), and until the establishment of the PCSA, references to the PCSA shall be a reference to the PPCSA.

14.9 Counsel shall report unprofessional conduct by other counsel to the PCSA in a manner as prescribed in the Professional Disciplinary Procedure.

14.10 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 the profession of advocacy, which principles are that -

Commented [A21]: [Sigogo]: The NF in establishing PCSA exceeded its terms of reference and mandate. The power to establish committees lies with the Council and PCs. This clause must be removed from the Code.

Commented [A22]: [Sigogo]: Ruling by PCSA on policy issues will cause confusion to the profession. Such rulings can only be done by the Council so that they may have national application.

Commented [A23]: [Sigogo]: This clause is the direct undoing of the purpose of the Act. In terms of this clause Bar Councils whose authority to regulate the profession has been taken away will now have the power to regulate the profession. it is even worse to think that they will have power over the attorneys as well.

Commented [A24]: [Qunta]: Should this not be the LPC after 1 November? On the one hand the LPC has the sole responsibility to regulate the profession after 1 November and on the other hand this delegates that power to GCB whereas it rests with the LPC s.3 (f) and 5 (d) and in this case until PCSA established.

Commented [A25]: [Carter]: This is not defined anywhere.

Commented [A26]: [Sigogo]: This clause is divesting the Council of its powers to regulate advocates. Any misconduct or unprofessional conduct must only be reported to the PC or the Council.

14.10.1 counsel are independent practitioners of advocacy and agents of the rule of law, who resist any undue influence from anyone, whose specialised services are available to all persons, in particular indigent people, regardless of any disregard in which persons requiring the services of counsel may be held by anyone;

14.10.2 counsel uphold the highest standards of integrity, accountability and diligence in carrying out all of their professional responsibilities;

14.10.3 Counsel understand that the profession of advocacy is primarily vocational and serves the public interest and accordingly acknowledge fiduciary duties towards the courts and to their clients and to all professional colleagues.

15. The nature of work undertaken by counsel

General Work

15.1 Counsel undertake to perform professional legal services for a reasonable reward.

15.2 There is no closed list of subject matter about which a brief may be accepted by counsel provided the brief does not require counsel to undertake work which is properly that of an attorney. In particular, counsel may accept a brief:

15.2.1 to give legal advice orally or in a written opinion;

15.2.2 to prepare any documents required for use in any court or arbitral or other adjudicative proceedings;

15.2.3 to prepare written argument and heads of argument;

15.2.4 to argue an application;

15.2.5 to argue an appeal;

15.2.6 to move an unopposed matter;

15.2.7 to appear in a trial or in an arbitration or in any other decision-making forum;

15.2.8 to negotiate on behalf of a client;

15.2.9 to settle a matter, whether on trial or otherwise;

15.2.10 to argue a matter on taxation before a taxing master;

15.2.11 to make representations to the National Prosecution Authority about whether or not to charge a person with a criminal offence;

15.2.12 to undertake a criminal prosecution on behalf of the state or ~~on behalf of~~as a private prosecutor;

15.2.13 to preside as an arbitrator, or as the chair of a disciplinary enquiry, or as presiding officer in any other adversarial proceedings, or to conduct any inquisitorial proceedings;

15.2.14 to act as an expert or to act as a referee;

15.2.15 to act as a mediator or facilitator;

15.2.16 to conduct an investigation and furnish a report with recommendations as to facts found and to make recommendations as to future action;

15.2.17 to act as a curator *ad litem*;

15.2.18 to make representations to a statutory or voluntary body or any state official;

15.2.19 to act as a commissioner in an enquiry in terms of the company laws.

Counsel as prosecutor for the state

15.3 Whenever briefed on behalf of the state to conduct a prosecution, counsel shall comply with these rules of conduct and the rules of conduct applicable to prosecutors issued by the National Prosecution Authority, and in the event that any conflict might arise between the sets of rules, these rules of conduct shall prevail.

Acting judicial appointments

Commented [A27]: [Qunta]: Comment [A6] -What role does the code then play?

15.4 Counsel who accept appointments as acting judges shall adhere to the code of conduct applicable to judges.

Commented [A28]: [Carter]: If they don't, are they subject to both that code and this code? Proceedings under this code may be far more effective, judging by past experience with the JSC.

15.5 Counsel shall, upon the acceptance of an acting judicial appointment, arrange their other professional commitments in such a manner that:

15.5.1 priority is given to the performance and timeous completion of all judicial work;

15.5.2 all reserved judgments are delivered, if not by the end of the period of appointment, within 90 days after judgment was reserved, unless exceptional circumstances exist that make such a period unreasonable.

Commented [A29]: [Carter]:Similar comment: can the LPC take steps against an acting judge for late delivery of judgments?

16. **Counsel's commitment to the practice of advocacy**

16.1 Counsel shall, in general, devote themselves to the practice of advocacy and to this end shall not engage in any other occupation or activity which is likely to compromise counsel's ability diligently to perform the work on any briefs or to diminish counsel's standing within the profession of advocacy or adversely affect the reputation of the profession of advocacy itself.

16.2 Counsel , in their professional capacity, shall not be involved in any way in any relationship or arrangement which resembles a partnership.

17. **Independence of counsel: control over decisions**

17.1 Counsel shall, in the advancement of the client's cause, resist any conduct calculated to deflect counsel from acting in the best interests of the client and to that end counsel shall be fearless in the conduct of the client's case, and shall not be deterred by the threat of or the prospects of adverse consequences to counsel or any other person.

17.2 Counsel shall unreservedly assert and defend the rights of the client and in particular in order to protect the client's liberty, to the best of counsel's ability and within lawful bounds.

17.3 Counsel shall upon acceptance of a brief exercise personal judgment over all aspects of the brief and shall not permit any person to dictate how the matter is to be conducted. If the decisions made or advice given by counsel are not acceptable to the instructing attorney or to the client, counsel must offer to surrender the brief, and if the instructing attorney elects to accept the surrender, counsel must forthwith withdraw.

17.4 Counsel shall not appear in any superior court in the absence of their instructing attorneys or instructing attorney's candidate attorneys, or other representatives, save as provided below.

17.5 Counsel may, when appearing in a matter before any court or tribunal of any kind, appear unaccompanied by their instructing attorney or the instructing attorney's representative, provided that the instructing attorney or a partner or employee of the instructing attorney (being an attorney or a candidate attorney) is accessible to counsel at all times.

Commented [A30]: [Carter]: The wording of the provision should accord with 12.15, which imposes the similar obligation on attorneys, but talks of being "immediately accessible"

17.6 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.

17.7 Counsel shall ordinarily consult with instructing attorneys, clients and witnesses at the chambers of counsel, and to that end shall be obliged to keep chambers at a place suitable for the practice of an advocate.

Commented [A31]: [Qunta]: Chambers have not been defined. This may be important. For example are all advocates required to have chambers as opposed to normal office. What would be the rationale apart from tradition? Considering issues of costs is it necessary to have chambers or even to consult only there. The issue of access and cost to those entering the profession should be considered when considering not only this clause but the Code as a whole.

17.8 In circumstances which reasonably indicate that consultations cannot conveniently be held at the chambers of counsel, counsel may exercise a discretion to consult at some other place appropriate to the circumstances, which places include the home of counsel or the offices of the instructing attorney or the offices of the client, provided that counsel in so doing guards against compromising counsel's independent status, which circumstances may include -

17.8.1 where the large volume of documents to be scrutinised cannot usefully be accommodated in or transported to or from counsel's chambers;

17.8.2 where the great number of witnesses to be interviewed make it more convenient to meet at the place where they can be conveniently assembled;

17.8.3 where the consultations are to be held after hours or on weekends;

17.8.4 where the persons to be interviewed are located in places distant from counsel's chambers;

17.8.5 where counsel is to appear in proceedings occurring in a place other than counsel's home centre.

18. Acceptance of briefs and the cab-rank rule

18.1 Counsel are at liberty to limit in what areas of practice, and in which courts, they wish to accept briefs and to appear, and tothereupon profess to practise in such limited areas and courts. In the absence of expressly professing to practise in limited areas and in certain courts only, counsel shall be deemed to profess to practice in all areas of practice and in all courts.

18.2 ~~Counsel shall not refuse to accept briefs in an area of practice in which they profess to practise or in a court which they profess to practise on the grounds that they disapprove of the client or of the client's opinions or alleged conduct or because of any disregard in which such person might be held.~~

Commented [A32]: [Qunta]: This is overly restrictive. Surely if counsel has an averse opinion of a potential client he should have the freedom to choose not to take him/her as client. Attorneys have this right. He/she is unlikely to serve such client well. So it is neither in his/her or the client's interest.

18.3 ~~Counsel shall, unless they reasonably believe they are not professionally competent to do so, accept the offers of briefs to defend persons charged with criminal offences and shall resist any conduct designed to inhibit or discourage the acceptance of such a brief on any grounds, especially any disregard in which such accused person or the cause with which such accused person is associated, may be held by anyone.~~

18.4 Counsel may decline offers of briefs in matters in which they believe they are not competent to render professional services at the appropriate standard reasonably expected of a counsel in such matters or to discharge their duty of diligence, and when declining such offers counsel shall disclose those reasons to the instructing attorneys.

18.5 Counsel may decline the offer of a brief if agreement between counsel and the instructing attorney cannot be reached on the fee to be charged by counsel; provided that the fee proposed by counsel must satisfy the norm of the reasonable fee, as dealt with in paragraph 25 of the code.

18.6 Counsel may decline to accept a brief if a reasonable risk exists that counsel would be embarrassed thereby.

Commented [A33]: [Qunta]: Should the grounds for such embarrassment or at least examples not be disclosed?

18.7 Counsel shall, once alerted to the fact that the court or other adjudicative body is to be presided over by a member of counsel's family, or other person with a close relationship with counsel disclose that fact to the instructing attorney and to opposing counsel.

Commented [A34]: [Carter]: This wording is used in the following paragraphs

18.8 Counsel shall, once counsel is alerted to the fact that a family member or other person with a close personal relationship to counsel is opposing counsel or is an attorney in the opposing party's attorney's firm, notify the instructing attorney of such relationship.

Commented [A35]: [Carter]: Should there not be an obligation on the attorney to make this disclosure to the client?

18.9 Counsel may continue to act in any civil proceedings despite a family member or other person with a close personal relationship presiding over the matter, provided that none of the parties, having been informed of thisthereof, raises an objection. Whenever an objection is raised counsel must either withdraw, or the parties must jointly request and procure the recusal of the presiding officer.

18.10 Counsel shall not in a criminal trial, whether acting for the state or the defence, appear before a court presided over by his or her family member or other person with a close personal relationship to counsel.

Commented [A36]: [Sigogo]: The provisions of 18.6 to 18.10 are of general application and must be dealt with under Part II of the Code.

18.11 Counsel may refuse to accept a brief if:

18.11.1 counsel is a senior counsel and considers that the nature of the brief and the work involved does not reasonably require the engagement of senior counsel;

18.11.2 the scale and duration of the work involved in undertaking the brief is such that counsel is apprehensive, on reasonable grounds, that commitment to the briefthereto would prejudice counsel's practice or other professional or personal commitments;

18.11.3 ~~the instructing attorney is listed as being in default of paying fees due to another counsel (see paragraph 32 & 33 below), or~~ is reasonably suspected by counsel of being unlikely to pay the fees due to counsel timeously or at all.

Commented [A37]: [Qunta]: See my comment in paragraph 32 and 33

Commented [A38]: [Sigogo]: This clause may be abused by counsel who do not want to take briefs for ulterior motives. The basis for declining a brief must be objective not subjective.

19. **Acceptance of briefs: the referral rule**

19.1 ~~Counsel undertake~~Counsel undertakes to perform legal professional services in court-craft and knowledge of the law only upon the offer and acceptance of a brief.

19.2 Counsel shall accept a brief only from an attorney, and counsel shall not accept a brief directly from any other person or entity for either litigious or non-litigious work of any kind, save that counsel may accept a brief -

19.2.1 from a justice centre;

19.2.2 to perform professional services on brief from an attorney or legal practitioner in another country, including the equivalent of a state attorney or the attorney general or director of public prosecutions, without the intervention of a South African attorney;

19.3 Counsel who act as arbitrators or umpires shall do so only on receipt of a brief from the parties' attorneys, or on receipt of instructions from an arbitration body accredited by the Council or a Provincial Council.

19.4 Counsel shall receive fees charged only from or through the instructing attorney who gave the brief to counsel, except where such attorney, for reasons of insolvency, or for any other reason, is unable to pay, in which circumstances, with leave from the Provincial Council, counsel may receive the fees due from another source in discharge of the indebtedness of the attorney.

20. **Acceptance of briefs: implied undertaking of diligence**

20.1 Counsel shall ordinarily only accept a brief given in writing or by email, but in circumstances of urgency counsel may accept an oral brief but must insist on

receipt, as soon as practicable thereafter, of a written or emailed brief, failing which counsel shall in writing or by email confirm the terms of the oral brief.

20.2 Counsel shall, upon accepting a brief, not resile from the undertaking to fulfil the brief in order to attend to another brief offered later, except for good cause; which cause shall be deemed to be present under either of the following circumstances:

20.2.1 the interests of justice would otherwise be impaired;

20.2.2 the instructing attorneys of both the initially offered brief and of the later offered brief agree in writing to release counsel from the initially offered brief.

20.3 Counsel shall not pass on a brief to another counsel except on the express prior agreement of the instructing attorney.

20.4 Counsel shall personally attend to all of the work involved in the briefs accepted by them, save as undertaken by leading counsel and one or more junior counsel briefed together, and subject to the long-standing practice of employing a "devil" in terms of which counsel shall be entitled, by agreement with another counsel, to have that counsel undertake research work in a particular brief in return for a fee agreed between counsel, and paid by the counsel on brief, provided that this shall not be converted into a permanent arrangement akin to employment of one counsel by another.

20.5 Counsel, upon accepting a brief, tacitly undertake unconditionally to perform the necessary work to the best of their abilities, in keeping with counsels' seniority and relevant experience and:

Commented [A39]: It has been suggested that in 20.5 counsel should "unconditionally undertake", rather than "tacitly undertake unconditionally". This suggests an active undertaking, but in reality it is an implied undertaking.

20.5.1 counsel, upon acceptance of a trial brief, tacitly represent that they can properly commit themselves to remaining available throughout the period of the trial without compromising such commitment by reason of any prior commitments in other matters, regardless of whether such other matters have been set down at a time before or after the period estimated for the duration of the trial;

20.5.2 counsel, upon acceptance of a brief in any opposed application, tacitly represent that they can properly commit themselves to remaining available throughout the period during which that opposed application may be heard without compromising such commitment by reason of any prior commitments in other matters, regardless of whether such other matters have been set

down at a time before or after the period during which the opposed application may be heard.

20.6 Counsel must decline the offer of a brief if their other commitments do not reasonably allow them to discharge their duty of diligence in the preparation of the brief. In particular, counsel shall not accept any brief if it is reasonably foreseeable that -

20.6.1 counsel shall be unable to attend to all of the necessary work within a reasonable time;

20.6.2 the risk exists that counsel might, because of a conflict of interest or any other reason, have to surrender the brief;

20.6.3 the failure to attend to the brief timeously or the surrender of the brief is likely to result in embarrassment, inconvenience or prejudice to the instructing attorney or the client or a fellow counsel who might be briefed thereafter, or to the court.

20.7 If, after counsel has accepted a brief in any matter, any circumstance arises that imperils the proper discharge of counsel's duty of diligence, counsel shall, once such eventuality is apparent, especially in respect of trial briefs, report such circumstances to the instructing attorney to facilitate timeous steps to inhibit prejudice to the client and facilitate a successor to be briefed in time to take over the brief.

20.8 Counsel shall not accept more than one brief on trial for the same day.

20.9 Counsel shall not, when briefed on trial on a given day, also accept a brief to appear in any other opposed matter, save an application for leave to appeal, provided such proceedings are arranged to ensure no interference with the matter in which counsel is briefed on trial.

20.10 Counsel may, on a day on which counsel is briefed on trial, accept a further brief as listed below only, provided that the performance of that further brief does not interfere with the conduct of the matter in which counsel is briefed on trial:

20.10.1 a brief to mention, at a roll call, a trial matter for postponement by agreement;

20.10.2 a brief to record, at the roll call, the fact of a settlement of a trial matter and submit a settlement agreement to be made an order of court;

20.10.3 a brief to note a judgment in a matter in which counsel had been briefed to conduct the case;

20.10.4 a brief to attend to any matter during a period outside of court hours.

20.11 Counsel may, once released from any obligation to remain available in relation to a trial matter, accept any other brief for that period.

20.12 Counsel shall in appropriate circumstances expressly advise the client about the prospects of and availability of dispute resolution options other than litigation.

20.13 Counsel shall upon acceptance of a brief take reasonable steps to determine whether or not prescription might be imminent and if so deal with the matter to avoid that consequence.

21. **Acceptance of briefs: *pro bono* and legal aid cases**

21.1 Counsel shall not refuse to accept a *pro bono* brief in counsel's professed area of practice solely on the grounds that the brief is *pro bono*, except for good cause.

21.2 Counsel shall not refuse to accept a Legal Aid South Africa brief in counsel's professed area of practice solely on the grounds that the brief is offered by the Legal Aid South Africa, except for good cause.

22. **Integrity in performance of professional services**

Commented [A40]: [Carter]: Most of these should also be applicable to attorneys. As many of them are also applicable to "trust account advocates", if we have time should we not have a section containing those provisions that are relevant to all legal practitioners?

22.1 Counsel shall take reasonable steps to avoid and prevent any reasonable suspicion arising that counsel's integrity is compromised in any respect.

22.2 Counsel shall not, in giving advice to a client, advise conduct that would contravene any law; more particularly, counsel shall not devise any scheme which involves the commission of any offence.

22.3 Counsel may give advice about whether any act, omission or course of conduct may contravene any law.

22.4 Counsel may give advice designed to limit or avoid liability for any taxation law, but shall not give advice about the evasion of the provisions of such a law.

22.5 Whenever counsel performs any act in a personal capacity, which is ostensibly of a professional nature, counsel shall not permit any confusion to exist on the part of any interested person about whether counsel acts in a personal or professional role or both.

22.6 Whenever a client charged with an offence confesses at any time to counsel that the client is guilty of the offence, counsel must at once explain to that client that the future conduct of the matter shall be subject to these strictures:

22.6.1 counsel shall not assert or imply any fact, or permit the assertion or implication of any fact, which counsel knows to be untrue, nor shall counsel connive to substantiate a falsehood;

22.6.2 counsel shall not put forward any affirmative case inconsistent with the confession of the client;

22.6.3 counsel may argue that the evidence adduced to support the charge is insufficient to justify a conviction;

22.6.4 counsel may invoke or assert any point of law that might be of advantage to a resistance to a conviction;

22.6.5 the client may choose to retain counsel on the basis set out or choose to relieve counsel of the brief.

22.7 Counsel 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 counsel.

22.8 Counsel shall in the composition of pleadings and of affidavits rely upon the facts given to counsel by the instructing attorney or client and in so doing:

22.8.1 shall not gratuitously disparage, defame or otherwise use invective;

22.8.2 shall not recklessly make averments or allegations unsubstantiated by the information given to counsel.

22.9 Counsel who is briefed to prepare a document articulating the reasons relied upon by any entity or person whose decision is being reviewed or subjected to administrative appeal, must scrupulously express the reasons, as instructed, and must not distort their meaning by the manner of formulation or by the addition or subtraction of additional material.

22.10 Counsel shall, in giving any advice about the prospects of success in any matter, give a true account of counsel's opinion and shall not pander to a client's whims or desires. However, in any matter in which counsel's opinion is adverse to the prospects of success, counsel may upon client's insistence place before a court the

client's case for the adjudicating officer to decide the matter and counsel shall advance that case as best as the circumstances allow.

22.11 Counsel shall not abuse their positions of influence over clients by undue pressure upon them to:

22.11.1 plead guilty or plead guilty to a lesser charge;

22.11.2 accept a settlement of a matter.

23. **Advertising of counsel's services**

Counsel may publish information about the professional work which they undertake and the areas of practice in which they profess a preference to practise or any specialised expertise. In this regard, any representation made by counsel, whether individually or in conjunction with other counsel, shall not compare any one or more counsel with any one or more other counsel, or be boastful, false, deceptive, sensationalist or vulgar or give rise to a risk that the profession of advocacy might be brought into disrepute or ridicule.

24. **Continuing legal education**

Counsel shall take reasonable steps to keep abreast of legal developments in the areas of practice in which they profess to practise, on their own initiative and by participation in the programmes that are organised and accredited by the Council or any other organ of the legal profession.

25. **Counsel's fees**

The norm of the reasonable fee

25.1 Counsel shall, in calculating a fee for services rendered or to be rendered, be mindful that the profession of advocacy is primarily vocational and exists to serve the public interest, and accordingly, shall charge only reasonable fees for all work undertaken.

25.2 Counsel shall calculate a reasonable fee by having regard to the following factors, none of which is determinative and all of which are simply guides to a fair calculation:

25.2.1 the time and labour required;

25.2.2 the customary charges by counsel of comparable standing for similar services;

25.2.3 the novelty and difficulty of the issues involved;

25.2.4 the skill and expertise required to properly address the matter;

25.2.5 the amount at stake in the mattercontroversy;

25.2.6 the importance of the matter to the client.

25.3 Counsel shall, in calculating a fee, guard against both overvaluing and undervaluing the services to be rendered.

25.4 Counsel shall not, in calculating a fee, inflate the amount because the client is able to pay generously.

25.5 Counsel may, in calculating a fee, on the grounds of a client's lack of means to pay fees, charge the client an amount less than would otherwise be reasonable for the services rendered, or charge no fee at all.

26. **Agreements about fees**

26.1 If an attorney offers a brief to counsel which is already marked with a fee, counsel upon acceptance of the brief tacitly agrees to that fee; if counsel chooses to refuse the brief on those terms, counsel and the instructing attorney must expressly agree in writing or by email to a different fee, otherwise, if counsel performs the work mandated by the brief, the initial marked fee shall bind counsel.

26.2 Counsel shall, at the time of upon accepting a brief, at the time of acceptance, stipulate to the instructing attorney the fee that will be charged for the service or the daily or hourly rate that shall be applied to computing a fee.

26.3 Counsel shall, in respect of every brief, expressly agree with the instructing attorney the fee or the rate of fees to be charged, unless there is a tacit understanding between counsel and the instructing attorney about the fees or the rate of fees usually charged by counsel for the particular kind of work mandated by the brief.

26.4 Counsel who is briefed under circumstances of urgency which are such that an agreement on the fees or the rate of the fees to be charged cannot reasonably be concluded immediately when the brief is offered, must take reasonable steps to agree a fee as soon as possible thereafter.

26.5 If for any reason, despite reasonable steps by counsel to reach an agreement about the amount or the rate of fees, no agreement is achieved, counsel shall mark the fee that counsel calculates as a reasonable fee.

Commented [A41]: [Sigogo]: This clause may be abused by counsel. To safeguard the interests of both parties counsel must not accept brief when there is no agreement on reasonable fees in terms of clause 18.5.

26.6 Unless expressly agreed to the contrary with the instructing attorney, the following standard terms, which counsel must draw to the attention of the instructing attorney, shall be implied in a brief offered to and accepted by counsel:

26.6.1 counsel may, but is not obliged to, afford his or her instructing attorney credit to pay counsel's account from the end of the month in which the fee invoice is rendered, in accordance with any local practice in existence at the time of the commencement of this code of conduct. In the absence of an agreement an attorney shall settle counsel's account within 30 days from the end of the month in which the fee invoice is rendered, irrespective of whether or not the attorney has received payment from the client. It is recorded that the purpose of this rule is to allow the attorney sufficient time to collect monies to pay counsel's fees that were not already collected in advance of receipt of counsel's invoice, and accordingly the attorney is obliged to pay over to counsel any monies collected already from the client in respect of counsel's fees for the services upon receipt of counsel's invoice;

26.6.2 it is acknowledged that junior counsel of less than five years' experience in practice constitutes a vulnerable category, in particular having regard to the transformation, racial and gender factors as contemplated by the Act, and correspondingly the attorney shall make every effort to ensure prompt payment to that category of counsel notwithstanding that the time period contemplated in paragraph 26.6.1 has not yet elapsed. The failure to create measures to ensure gainful practice of this category may impede the efforts to transform the legal profession or the racial and gender representation in the profession. In this regard briefing attorneys shall be required to negotiate fair, sustainable, market-related and reasonable fees for services rendered by this category of junior counsel;

26.6.3 no amount agreed upon shall exceed a reasonable fee;

26.6.4 counsel may charge a reasonable fee for a reserved hearing date unless the instructing attorney releases counsel on reasonable notice;

26.6.5 counsel who charges a fee for a reserved hearing date shall deliver to the instructing attorney a certificate to the effect that counsel did not undertake any other brief for a hearing for the reserved date;

26.6.6 interest shall be payable on any overdue payment of fees at the prescribed mora rate from the date the fees are payable until date of payment;

Commented [A42]: [Carter]: This whole section imposes obligations on atromeys and gives rights to councel, and yet if alls under the Part of the Code dealing with advocates. If these provisions are to remain, they should be placed in the appropriate section dealing with attorneys. Although the introductory remarks say that all these terms shall be implied in a brief from an attorney, the last two sentences of 26.6.2 in particular cannot be implied terms if a brief.

Commented [A43]: [Sigogo]: Clauses 26.6.1, 26.6.2, 26.6.4 and 26.6.7 are regulating the conduct of an attorney not advocate. They must be moved to Part III of the Code. Clause 26.6.1 must give attorneys and advocates unfettered discretion and power to negotiate any term they see fit when an advocate accepts the brief. The default position of 30 days or any period must be removed from the Code.
Liability to pay counsel must rest with client (clause 26.6.7

26.6.7 liability to pay counsel's fees shall extend to every partner of a firm of attorneys, or member of an incorporated attorneys practice, and if a firm of attorneys is dissolved or an incorporated practice is wound up, liability shall remain with each partner or member as the case may be, the one paying, the others to be absolved.

26.7 Counsel may expressly, in writing or in an email, conclude an agreement with an instructing attorney which includes provision for any or all of the following:

26.7.1 that the fees must be paid prior to the performance of any obligation in terms of the brief;

26.7.2 that the time for payment may be advanced to an earlier date than would be the standard period in accordance with the standard terms of payment;

26.7.3 that a special collapse fee shall be payable to counsel in the event that proceedings in a court or before tribunal, for which counsel has, at the request of the instructing attorney, reserved a number of days, not proceed as envisaged, whether as a result of the matter being settled, postponed by agreement between the parties or by an order of court, or concludes earlier than the end of the period reserved by counsel, provided that the fee actually charged is a reasonable fee.

Commented [A44]: [Sigogo]: Collapse fee must not be allowed. Advocates must play a role in estimating the number of days a trial or a hearing will last and take responsibiloity of the collapse days.

27. **Pro bono briefs**

Commented [A45]: [Carter]: I suggest that this also apply to pro amico matters

27.1 Counsel who accept *pro bono* briefs shall not, after acceptance, seek to charge a fee.

27.2 Counsel who appear in proceedings *pro bono* shall disclose that fact to all interested parties and to the court.

27.3 Counsel shall not connive with an instructing attorney to include in a bill of costs, fees of counsel when no fees were charged.

28. **Contingency fee agreements**

Counsel may accept briefs on contingency provided that the provisions of the Contingency Fees Act 66 of 1997 (CFA) are strictly adhered to.

29. **Prohibited terms in fee agreements**

Counsel are prohibited from including in a fee agreement any of the following terms:

29.1 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.

29.2 Counsel shall not agree to charge a fee as allowed on taxation except in a matter undertaken on contingency.

Commented [A46]: [Sigogo]: This clause is unfair to client. The taxing master has authority to determine reasonable fees as such hir or her ruling must be what is paid to the advocate.

30. **Acceptance of gifts by counsel**

30.1 Counsel shall guard against compromising their independence by the acceptance of gifts from a client or an attorney, and whenever it is not inappropriate to accept a gift from a client it shall be received by counsel through the agency of the instructing attorney.

30.2 Counsel may accept a gift of substantial value which is or may be considered to be in consideration of services rendered.

30.3 Counsel may, whenever gifts of substantial value are offered, seek advice from the PCSA about the appropriateness of acceptance, before acceptance of the gift.

31. **Marking briefs and submitting fees accounts**

31.1 Counsel shall mark a fee as soon as practicable after the specific service has been rendered and shall render an account monthly of all fees owing by every debtor.

31.2 Counsel shall render accounts to the instructing attorney or accredited entity and shall receive payment only from the instructing attorney or accredited entity.

Commented [A47]: [Carter]: There is no definition of "accredited entity". What is this - a justice centre or law clinic?

31.3 Counsel shall not submit an account directly to a client except by agreement with the instructing attorney and client and on condition that the same account is simultaneously submitted to the instructing attorney, nor receive payment directly from a client.

Commented [A48]: [Carter]: This can be deleted in view of 31.2

31.4 Liability to pay counsel's fees shall extend to every partner of a firm of attorneys, or member of an incorporated attorneys practice, and if a firm of attorneys is dissolved or an incorporated practice is wound up, liability shall remain with each partner or member as the case may be, the one paying, the others to be absolved. Such liability shall extend only to the monetary liability to pay and shall not extend to any professional misconduct in failing to pay counsel's fees, and such professional misconduct shall be limited to the attorney who briefed counsel and who failed to pay counsel's fees that remain due, owing and payable after the exhaustion of any deferral of payment or dispute resolution process that may be engaged.

Commented [A49]: [Carter]: This is by and large a repeat of 26.6.726.6.7. There is another provision that should not be in the Part dealing with advicates

Commented [A50]: [Sigogo]: This clause is regulating attorneys conduct It must be moved to Part III of the Code. Liability must be borne by client.

31.5 Counsel shall maintain a banking account into which every fee received shall be deposited.

31.6 Counsel shall keep and preserve records of account, in either physical or electronic format, up to date, for five years or for such longer period as may be required by any law, and hold them available for inspection by the Council at all times. Such records of account shall accurately record every fee marked, the instructing attorneys or other accredited entities who gave the briefs, the nature of the service rendered, the dates of performance, and every payment received.

31.7 Counsel shall not mark a brief, or in any form record a description of fees in any record of account, which is false or misleading as to the true nature of the brief or of the services rendered; in particular:

31.7.1 a brief to settle an agreement to resolve litigation shall not be recorded as a brief on trial;

31.7.2 a brief to negotiate a settlement shall not be recorded as a brief on trial.

32. **Recovery by counsel of fees owing and payable**

Commented [A51]: [Sigogo]: This clause is about debt collection and not the conduct of advocates and it must be removed from the Code. NF was not authorised to determine committees for Council. PCSAs are unauthorised and therefore illegal.

32.1 Counsel may report to the PCSA, with a copy to the instructing attorney, any default by an instructing attorney to pay fees due and payable. In such event-

32.1.1 the attorney shall be entitled to make countervailing representations to the PCSA, with a copy to the counsel, within seven days of notice of the default sent by email to the counsel's usual email address. Notwithstanding the exercise or otherwise of the right to make countervailing representations, counsel who reported the matter to the PCSA may not proceed with default proceedings until the expiry of the seven days granted to the attorney to make representations;

32.1.2 the PCSA may in an appropriate case refer a report of a default to a conciliator who shall endeavour to resolve any dispute or negotiate a resolution of the default;

32.1.3 an attorney who is in default may seek a deferral of payment from the PCSA, which, if good cause is shown, and after consultation with the creditor counsel, the PCSA may grant on such terms as are appropriate in the circumstances;

32.1.4 counsel shall as soon as a defaulting attorney discharges the debt in full report that fact to the PCSA;

32.1.5 the PCSA shall, after a notice to an attorney reported to be in default, and a failure to pay the indebtedness in full within ~~7~~ 14 days thereof or such longer period as it may in its discretion grant, add the name of that attorney to a defaulters list and keep that name listed until all indebtedness to all counsel is discharged in full;

32.1.6 the PCSA shall publicise that list to all legal practitioners by maintaining an up-to-date copy on the website of the Council;

32.1.7 ~~notwithstanding the provision of any other rule, counsel shall be under no obligation to accept a brief from an attorney whose name appears on the list of defaulters;~~

~~32.2.0 counsel shall not agree to a compromise of fees owing by a listed attorney without having prior thereto, consulted the PCSA about the prudence of doing so;~~

~~32.3.0 counsel shall not waive any fees due and payable or are yet to become payable without having prior thereto consulted the PCSA about the prudence of doing so.~~

~~32.4~~32.2 Counsel may sue an attorney or other accredited entity for fees due and payable to him or her if –

~~32.4.1~~32.2.1 the debtor attorney or accredited entity has not paid the said fees to counsel, and

~~32.4.2~~32.2.2 the debtor attorney or accredited entity has not obtained a deferral of time from counsel to pay the said fees,

provided that, if counsel has elected to follow the procedure in 32.1 above, that procedure first has to be concluded before counsel may sue for the said fees

~~32.5~~32.3 Counsel may conclude agreements to factor their fees, provided these rules of conduct are not compromised and the factoring house is/are fully informed that any agreement concluded by counsel remains subject to these rules of conduct.

33. **Disputes About Fees**

33.1 Any disputes about the quantum or rate of fees charged by counsel or about work done by and value received from counsel shall be subjected to a fees enquiry to be

Commented [A52]: [Carter]: Will this be in a section of the website where access is limited to legal practitioners, or will it be available to the world at large? The intention is to publicise to "all legal practitioners" only. 36.3, in the section for trust account advocates, talks of briefs from the public or a justice centre.

Commented [A53]: [Qunta]: This is excessive punishment. The listing of names of defaulting attorneys is sufficient punishment. Plus counsel can sue. Additionally it seems to burden the PCSA with additional work.

conducted by a Fee Dispute Resolution sub-committee ("the FDR") appointed by the PCSA.

Commented [A54]: [Sigogo]: The status of FDR is the same with that of the PCSA.

33.2 An onus shall rest on counsel to justify the reasonableness of fees charged and that work charged for was done and was reasonably necessary to do or was done at the request of the instructing attorney or the client.

33.3 The FDR shall comprise not less than two counsel and one attorney, and their decision shall comprise an administrative decision which is final and binding and not subject to any appeal but is subject to review on grounds recognised by the Promotion of Administrative Justice Act, 3 of 2000.

Commented [A55]: [Sigogo]: This clause elecated FDR to be above the Council. It must be deleted.

33.4 The procedure shall comprise the following: a written complaint, a written answer, and a written reply, and the decision shall be given according to those documents, save that in the event of a genuine and *bona fide* dispute of fact either party may request the FDR (who shall have a discretion whether or not to grant that request, or itself to refer the matter to oral evidence) to refer the matter to the hearing of oral evidence by the FDR. Any such referral to oral evidence shall be conducted in an inquisitorial manner by the FDR as if it were a small claims court sitting under the Small Claims Court Act, 61 of 1984.

34. **Professional Etiquette**

Commented [A56]: [Carter]: There should be one section of the code dealing with dress for all LPs. In fact this whole section should be applicable to all LPs

Commented [A57]: [Sigogo]: Clauses 34.1 to 34.11 are of a general application and must be moved to Part II of the Code.

34.1 Counsel shall robe in all superior and lower courts, and shall robe in the same manner as they robe in superior courts.

Commented [A58]: [Qunta]: See my earlier comment regarding robing

34.2 Counsel shall dress in clothing suitable to be worn with counsel's robes of office.

Commented [A59]: [Qunta]: What does this mean? What is "suitable"

34.3 Counsel shall, upon a first appearance before a judge, approach the registrar of that judge before the hearing in order to present themselves to that judge; the rule is applicable to acting judges too, and any prior professional or personal acquaintance with the acting judge is irrelevant.

34.4 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.

34.5 Counsel shall deal with the judicial officer, court staff and all other persons in court with civility and respect.

34.6 Counsel shall, on the completion of counsel's matter, remain in the courtroom until counsel in the next matter has risen, or if counsel is the last counsel in court, until the court has risen.

34.7 Counsel shall not, when briefed in an opposed matter, approach a judicial officer in the absence of opposing counsel or opposing attorney, unless opposing counsel or attorney has expressly agreed thereto.

34.8 Counsel shall not allow any ill-feeling between litigants to interfere with the civil and professional conduct of the matter.

34.9 Counsel shall not indulge in personal remarks about opposing counsel, attorneys or witnesses, whether in court or out of court, and shall not allow any antipathy that might exist between counsel and the opposing counsel and attorneys personally to intrude upon the conduct of the matter.

34.10 After a hearing when judgment is awaited, counsel shall not place before, or try to send to, a judicial officer any further material of whatever nature, except by agreement among counsel for 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, counsel 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.

34.11 Counsel shall not deliberately seek to catch an opposing counsel off-guard. Accordingly -

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

34.11.2 whenever counsel gives a bundle of authorities to the court, counsel shall also give at least a list containing the authorities to opposing counsel;

34.11.3 whenever counsel makes use of a transcript of proceedings, counsel shall give the opposing counsel a copy thereof no later than the first time reference is first made thereto;

34.11.4 whenever counsel 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 counsel in good time to avoid that opposing counsel being taken unawares;

34.11.5 whenever counsel intendsis ~~intent on~~ presenting to thea court with an unreported judgment, counsel shall in advance of the hearing, notify and give a copy thereof to the opposing counsel in good time to avoid that opposing counsel being taken unawares.

34.12 Counsel who have cause to lodge formal complaints about the conduct of other counsel shall compose a full account of the circumstances giving rise to the complaint and shall submit the complaint to the PCSA.

Commented [A60]: [Sigogo]: PCSA is undermining the Council. Complaints must be submitted only to the Council or PCs.

34.13 Complaints shall be dealt with in accordance with prescribed procedures for the regulation of professional conduct.

35. Applications For Silk

Applications for silk shall be dealt with in accordance with a procedure to be prescribed by the Council.

PART V

Conduct of advocates contemplated in section 34(2)(a)(ii) of the Act

36. **Preamble**

36.1 The rules of conduct in Part V of this code of conduct are applicable to, and binding upon, every person who has been admitted and enrolled to practice as an advocate in South Africa in terms of section 34(2)(a)(ii) of the Act, called in Part V of this code "a trust account advocate".

36.2 The provisions of paragraphs 12.9, 12.10, 12.12, 12.14, 12.16 and 12.17 which apply to the attorneys, and paragraphs 14.2 to 14.7 inclusive, 14.9 and 14.10 which apply to counsel, will apply, with the necessary changes required by the context, to trust account advocates.

36.3 For purposes of this Part V a reference to a trust account advocate's accepting a brief shall include his or her accepting an instruction directly from a member of the public or from a justice centre.

37. **Nature of work undertaken by trust account advocates**

General Work

37.1 The provisions of paragraph 15.1 and 15.2 of this code apply, with the necessary changes required by the context, to trust account advocates.

37.2 A trust account advocate shall comply with the requirement to be in possession of a Fidelity Fund certificate and shall conduct his or her practice in accordance with the relevant provisions of chapter 7 of the Act and the rules relating to the opening and keeping of trust accounts and the handling of trust monies.

Trust account advocates as prosecutors for the State

37.3 The provisions of paragraph 15.3 of this code apply, with the necessary changes required by the context, to trust account advocates.

Acting judicial appointments

37.4 The provisions of paragraph 15.4 and 15.5 of this code apply, with the necessary changes required by the context, to trust account advocates.

38. **Trust account advocate's commitment to the practice of advocacy**

The provisions of paragraph 16 of this code apply, with the necessary changes required by the context, to trust account advocates.

39. **Independence of trust account advocates: control over decisions**

39.1 The provisions of paragraph 17.1, 17.2, 17.7 and 17.8 of this code apply, with the necessary changes required by the context, to trust account advocates.

39.2 A trust account advocate shall upon acceptance of a brief, whether from an instructing attorney or from a client directly, exercise personal judgment over all aspects of the brief and shall not permit any person to dictate how the matter is to be conducted. If the decisions made or advice given by the trust account advocate are not acceptable to the instructing attorney or to the client, the trust account advocate must offer to surrender the brief, and if the instructing attorney or the client elects to accept the surrender, the trust account advocate must forthwith withdraw.

39.3 A trust account advocate shall not appear in any superior court in the absence of his or her instructing attorney or instructing attorney's candidate attorney, or the client where the trust account advocate has taken an instruction directly from a member of the public, save as provided below.

39.4 A trust account advocate may, when appearing in a matter before any court or tribunal of any kind, appear unaccompanied by the instructing attorney or the instructing attorney's representative, or the client where the trust account advocate has been instructed directly by a member of the public, provided that the trust account advocate is able to remain in contact with the instructing attorney (or where the trust account advocate has been instructed directly by a member of the public, the client at all times ~~or the client at all times~~.

39.5 The trust account advocate shall not bring about a binding settlement of any matter without an express and specific mandate by the instructing attorney or by the client, as the case may be, as to the terms and conditions of an agreement of settlement.

Commented [A61]: [Sigogo]: This clause is of general application and must be moved to Part II of the Code.

40. **Acceptance of briefs and instructions and the cab-rank rule**

40.1 The provisions of paragraphs 18.1, 18.2, 18.3, 18.6, 18.9, 18.10 and 18.11 of this code apply, with the necessary changes required by the context, to trust account advocates.

40.2 A trust account advocate may decline offers of briefs in matters in which the trust account advocatecouncil believes he or she is not competent to render professional services at the appropriate standard reasonably expected of a trust account advocate in such matters or to discharge his or her duty of diligence, and when declining such offers the trust account advocate must disclose those reasons to the instructing attorney, or to the client where the trust account advocate has accepted an instruction directly from a member of the public.

40.3 A trust account advocate may decline the offer of a brief if agreement between him or her and the instructing attorney or the client (where the trust account advocate has been approached directly by a member of the public) cannot be reached on a fee to be charged in the matter; provided that the fee proposed by the trust account advocate must satisfy the norm of the reasonable fee, as dealt with in paragraph 25 of this code.

40.4 A trust account advocate shall, once he or she is alerted to the fact that the court or other adjudicative body is to be presided over by a member of his or her family or other person with a close personal relationship with him or her,, disclose that fact to the instructing attorney, or to the client (where the trust account advocate has received an instruction directly from a member of the public), and to opposing counsel.

40.5 A trust account advocate shall, once he or she is alerted to the fact that a family member or other person with a close personal relationship to him or her is opposing counsel or is an attorney in the opposing party's attorneys' firm, notify the instructing attorney or the client (where the instruction has come directly from a member of the public) of such relationship.

Commented [A62]: [Sigogo]: These clauses are of general application and must be moved to Part II of the Code.

41. Acceptance of briefs and instructions

41.1 A trust account advocate shall perform legal professional services in court-craft and knowledge of the law only upon the offer and acceptance of a brief.

41.2 A trust account advocate may accept a brief from an attorney or from a member of the public or from a justice centre.

41.3 Where a trust account advocate accepts a brief from an attorney or from an accredited entity, the trust account advocate shall receive deposits and payment of accountsfees charged only from or through the instructing attorney or from or through the accredited entity which gave the brief to him or her, except where the attorney or accredited entity, for reasons of insolvency or for any other reason, is

Commented [A63]: [Carter]: Again, referec=nce here to "accredited entity". The code uses "accredited entity", "justice centre", "client" and "member of the public" in similar contents.

Commented [A64]: [Carter]: A trust account advocagte may have disburcements as well as fees, so I suggested reference to "ac:ounts"

unable to pay, in which circumstances, with leave from the PCSA, a trust account advocate may receive paymentsfees due from another source in discharge of the indebtedness of the attorney or accredited entity.

41.4 Where a trust account advocate receives instructions directly from a member of the public or from a justice centre, he or she may receive fees from that member of the public or justice centre or from any other source, subject to his or her complying with chapter 7 of the Act.

42. **Acceptance of briefs: implied undertaking of diligence**

42.1 The provisions of paragraphs 20.1, 20.4, 20.5, 20.6, 20.8, 20.9, 20.10, 20.11, 20.12 and 20.13 of this code apply, with the necessary changes required by the context, to trust account advocates.

42.2 A trust account advocate shall, upon accepting a brief, not resile from the undertaking to fulfil the brief in order to attend to another brief offered later, except for good cause, which shall be deemed to be present under either of the following circumstances -

42.2.1 the interest of justice would otherwise be impaired;

42.2.2 the instructing attorneys or the instructing clients of both the initially offered brief and of the later offered brief agree in writing to release the trust account advocate from the initially offered brief.

42.3 A trust account advocate shall not pass on a brief to another advocate except on the express prior agreement of the instructing attorney or of the client where the trust account advocate has been instructed directly by the client.

42.4 If, after a trust account advocate has accepted a brief in any matter, any circumstances arises that imperils the proper discharge of his or her duty of diligence, he or she shall, once such eventuality is apparent, especially in respect of trial briefs, report such circumstances to the instructing attorney or to the instructing client, as the case may be, to facilitate timeous steps to inhibit prejudice to the client and facilitate a successor to be briefed in time to take over the brief.

43. **Acceptance of briefs: *pro bono* and legal aid cases**

The provisions of paragraph 21 of this code apply, with the necessary changes required by the context, to trust account advocates.

44. **Integrity in performance of professional services**

The provisions of paragraph 22 of this code apply, with the necessary changes required by the context, to trust account advocates.

45. **Advertising of services of trust account advocates**

The provisions of paragraphs 4.2, 4.3, 4.4, 5.1, 12.19 and 23 of this code apply, with the necessary changes required by the context, to trust account advocates.

46. **Continuing legal education**

The provisions of paragraph 24 of this code apply, with the necessary changes required by the context, to trust account advocates.

47. **Advocate's fees: The norm of the reasonable fee**

The provisions of paragraph 25 of this code apply, with the necessary changes required by the context, to trust account advocates.

48. **Agreements about fees**

48.1 The provisions of paragraph 26.1, 26.4 and 26.5 of this code apply, with the necessary changes required by the context, to trust account advocates.

48.2 A trust account advocate shall at the time of ~~upon~~ accepting a brief or an instruction, ~~at the time of acceptance~~, stipulate to the instructing attorney or to the client, as the case may be, the fee that will be charged for the service or the daily or hourly rate that will be applied to computing a fee.

48.3 A trust account advocate shall, in respect of every brief, expressly agree with the instructing attorney (or with the client, where the trust account advocate is instructed directly) the fee or the rate of fees to be charged, unless there is a tacit understanding between the trust account advocate and the instructing attorney or the client, as the case may be, about the fees or the rate of fees usually charged by the trust account advocate for the particular kind of work mandated by the brief or instruction.

48.4 Unless expressly agreed to the contrary with the instructing attorney, the following standard terms, which the trust account advocates must draw to the attention of the instructing attorney, shall be implied in a brief or instruction offered to and accepted by the trust account advocate:

Commented [A65]: [Carter]: My comemnts in regard to 26.6 above apply equally here.

Commented [A66]: [Sigogo]: This clause must be dealt with the same way as clause 26.6 above. There is no need to afford a Trust Account Advocate any protection from the attorney as they have more or less the same powers.

48.4.1 a trust account advocate may, but is not obliged to, afford his or her instructing attorney credit to pay the trust account advocate's account from the end of the month in which the fee invoice is rendered, in accordance with any local practice in existence at the time of the commencement of this code of conduct. In the absence of an agreement an attorney shall settle the trust account advocate's account within 30 days from the end of the month in which the fee invoice is rendered, irrespective of whether or not the attorney has received payment from the client. It is recorded that the purpose of this rule is to allow the attorney sufficient time to collect monies to pay the trust account advocate's fees that were not already collected in advance of receipt of the trust account advocate's invoice, and accordingly the attorney is obliged to pay over to the trust account advocate any monies collected already from the client in respect of the trust account advocate's fees for the services upon receipt of the trust account advocate's invoice;

48.4.2 it is acknowledged that junior trust account advocates of less than 5 years' experience in practice constitutes a vulnerable category, in particular having regard to the transformation, racial and gender factors as contemplated by the Act, and correspondingly the attorney shall make every effort to ensure prompt payment to that category of trust account advocates notwithstanding that the time period contemplated in paragraph 48.4.1 has not yet elapsed. The failure to create measures to ensure gainful practice of this category may impede the efforts to transform the legal profession or the racial and gender representation in the profession. In this regard briefing attorneys shall be required to negotiate fair, sustainable, market-related and reasonable fees for services rendered by this category of junior trust account advocates;

48.4.3 no amount agreed upon shall exceed a reasonable fee;

48.4.4 interest shall be payable on any overdue payment of fees at the prescribed mora rate from the date the fees are payable until date of payment;

48.4.5 liability to pay the fees of a trust account advocate shall extend to every partner of the firm of attorneys or member of an incorporated attorneys' practice, and if a firm of attorneys is dissolved or an incorporated practice is wound up, liability shall remain with each partner or member, as the case may be, the one paying the others to be absolved.

48.5 A trust account advocate may expressly, in writing or in an email, conclude an agreement with an instructing attorney, or with a client, as the case may be, which includes a provision for any or all of the following:

48.5.1 that payment of fees must be made prior to the performance of any obligation in terms of the brief; provided that in such a case the payment shall be held in a trust account in accordance with chapter 7 of the Act and the accounting rules applicable to a trust account advocate;

48.5.2 that the time of payment may be advanced to an earlier date than would be the standard period in terms of custom.

49. ***Pro bono* instructions**

49.1 Paragraphs 27.1 and 27.2 of this code apply, with the necessary changes required by the context, to trust account advocates.

49.2 A trust account advocate shall not connive with an instructing attorney or with a client (where instructions are taken directly from a member of the public) to include in a bill of costs, fees of the trust account advocate when no fees were charged.

50. **Contingency fee agreements**

The provisions of paragraph 28 of this code apply, with the necessary changes required by the context, to trust account advocates.

51. **Prohibited terms in fee agreements**

The provisions of paragraph 29 of this code apply, with the necessary changes required by the context, to trust account advocates.

52. **Acceptance of gifts by advocates**

52.1 Trust account advocates shall guard against compromising their independence by the acceptance of gifts from a client or an attorney, and whenever it is not inappropriate to accept a gift from a client it shall be received by the advocate through the agency of the instructing attorney, where the advocate is briefed by an attorney.

52.2 The provisions of paragraphs 30.2 and 30.3 of this code apply, with the necessary changes required by the context, to trust account advocates.

53. **Marking briefs and submitting fees accounts**

53.1 The provisions of paragraphs 31.1, 31.4, 31.6 and 31.7 of this code apply, with the necessary changes required by the context, to trust account advocates.

53.2 A trust account advocate shall render accounts to the instructing attorney or accredited entity and shall receive payment only from the instructing attorney or accredited entity. Where a trust account advocate receives an instruction directly from a member of the public or from a justice centre accounts shall be rendered to the client directly, and payment may be received from a client or from a third party.

Commented [A67]: [Carter]: Again, use of "accredited entity

53.3 A trust account advocate shall not submit an account directly to a client nor receive payment directly from a client where the trust account advocate has been instructed by an attorney.

53.4 A trust account advocate shall maintain banking accounts in accordance with chapter 7 of the Act and the accounting rules applicable to trust account advocates, and shall cause payments in respect of accountsfees to be paid into the appropriate banking account in accordance with chapter 7 of the Act and the accounting rules.

54. **Recovery by trust account advocates of fees owing and payable**

54.1 The provisions of paragraph 32 of this code apply, with the necessary changes required by the context, to trust account advocates in respect of accountsfees owing arising from briefs from attorneys.

54.2 A trust account advocate acting in terms of an instruction received directly from a member of the public or from a justice centre shall be entitled to recover directly from the client any accountsfees owing and payable by that client.

55. **Disputes about fees**

The provisions of paragraph 33 of this code apply, with the necessary changes required by the context, to trust account advocates.

56. **Professional etiquette**

The provisions of paragraph 34 of this code apply, with the necessary changes required by the context, to trust account advocates.

57. **Applications for Silk**

The provisions of paragraph 35 of this code apply, with the necessary changes required by the context, to trust account advocates.

PART VI

Conduct of legal practitioners and candidate legal practitioners in relation to appearances in court and before tribunals.

58. **Preamble**

58.1 Unless otherwise stated or unless the context dictates otherwise, Part VI of this code applies to all legal practitioners and candidate legal practitioners in relation to appearances in any court in which they have the right of appearance or before any tribunal which performs a judicial, quasi-judicial or administrative function.

58.2 If Part VI of this code conflicts with any of the other provisions of this code then those other provisions will prevail and take precedence over the provisions of Part VI.

59. **Interviewing of Witnesses**

General

59.1 ~~An Advocate/counsel~~ legal practitioner ~~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).

59.2 In ~~exceptional~~ certain circumstances ~~only~~, a 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 instances ; ~~exceptional circumstances in this regard shall be deemed to be present:~~

59.2.1 when the matter is undertaken on brief from Legal Aid South Africa or a lawegal clinic;

59.2.2 when there is a need to interview a witness and the instructing attorney cannot reasonably attend;

Commented [A68]: [Qunta]: If accessibility is to be considered then the LPC should decide if this is necessary and what rationale for it is. It increases cost for clients who have ot pay both attorney and advocate and there does not seem to be a sufficient rationale for it. Perhaps the first consultation requires this for fact finding and clarification. A discussion is needed. Perhaps a list of instances where this is not necessary can be included.

59.2.3 when the legal practitioner is at court or before the tribunal with the client and the instructing attorney is absent.

59.2.359.2.4 wWhen the instructing attorney gives permission

59.3 A legal practitioner shall ordinarily interview witnesses whose credibility might be in issue separately from other witnesses whose credibility might (not)2 be in issue.

Commented [A69]: [Qunta]: This sentence does not read well.

59.4 Unless a 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 the legal practitioner or written statements made by witnesses that are given to the legal practitioner by the instructing attorney (where applicable) may not be obtained on affidavit.

59.5 Once a legal practitioner has called a witness to testify, the legal practitioner shall not again interview that witness until after cross examination 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.

Interviewing of witnesses of the opposing party in civil proceedings

59.6 A 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 -

59.6.1 subpoenaed or contemplates subpoenaing that person;

59.6.2 already interviewed or has arranged to interview that person.

59.7 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 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.

59.8 Whenever a legal practitioner arranges to interview a person who has already testified for the opposing party, before such interview may be conducted, the legal practitioner must invite the opposing party to attend the interview, on reasonable notice. However, regardless of the presence or absence of the opposing party, the interview may be conducted as arranged in the notification.

Interviewing of prosecution witnesses by defence legal practitioner

59.9 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 witness before conducting the interview.

59.10 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.

59.11 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.

60. **The scope and limits of legitimate cross-examination**

60.1 A legal practitioner shall cross-examine a witness with due regard to the right to dignity of the witness.

60.2 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 cross-examination by exercising personal judgment about the propriety of all and any imputations.

60.3 A legal practitioner shall not put to a witness an allegation of fact if the legal practitioner has no reasonable expectation that admissible evidence, whether oral or otherwise, is available to be adduced to substantiate the allegation of fact.

60.4 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 -

60.4.1 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;

60.4.2 if 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.

60.5 Regardless of whether the imputations about the witness are well-founded or true, the legal practitioner shall not put such imputations to a witness unless the answers that might be given could reasonably be believed to be material to the credibility of that witness or to be material to any issue in the case.

60.6 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.

61. **Disclosures and non-disclosures by legal practitioner**

61.1 A legal practitioner shall take all reasonable steps to avoid, directly or indirectly, misleading a court or a tribunal on any matter of fact or question of law. In particular, a legal practitioner shall not mislead a court or a tribunal in respect of ~~as regards~~ what is in papers before the court or tribunal, including any transcript of evidence.

61.2 A legal practitioner shall scrupulously preserve the personal and confidential information of a client communicated to him or her, unless the information is not privileged and disclosure is required by law.

61.3 A legal practitioner shall not waive or purport to waive privilege in respect of privileged information; the decision to waive professional privilege is that of the client, not of the legal practitioner.

61.4 A legal practitioner shall, in any ex parte proceedings, disclose to a court every fact (save those covered by professional privilege or client confidentiality) known to the legal practitioner that might reasonably have a material bearing on the decision the court is required to make.

61.5 A legal practitioner shall, in all proceedings, disclose to a court or a tribunal all relevant authoritiesevery judgment of which the legal practitioner is aware that might reasonably have a material bearing on the decision the court or tribunal is required to make.

61.6 A legal practitioner shall, if the interests of justice require the disclosure to a court or tribunal of information covered by professional privilege, seek from the instructing attorney (where one is appointed) and the client permission to make the 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.

61.7 A 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.

61.8 A legal practitioner shall, if a draft order is presented to a court that deviates in any respect from standard form orders routinely made in that court, expressly draw such deviations to the attention of the court and offer a justification for such deviations.

61.9 A legal practitioner shall not rely on any statement made in evidence which he or she knows to be incorrect or false.

61.10 A legal practitioner shall not make use of any privileged information of the opposing party that has accidentally or unlawfully come into the possession of the legal practitioner, and shall at once he or she has knowledge of such circumstances, notify the legal representatives for the opposing party. However, if such information subsequently becomes available to the legal practitioner through lawful means, he or she shall not be inhibited from making use thereof.

62. **Conflicts of interests involving legal practitioners**

62.1 A legal practitioner shall guard against becoming personally, as distinct from professionally, associated with the interests of the client.

62.2 A legal practitioner shall not stand bail for the client.

62.3 A legal practitioner shall not accept a brief to appear before any court, council, board or other adjudicative tribunal, and whether statutory or voluntary in nature, if the legal practitioner is contemporaneously a member of that court, council, board or adjudicative tribunal, whether by election or appointment, and whether such membership is permanent, temporary or in an acting capacity.

62.4 A legal practitioner shall not be obliged to accept a brief if ~~prior thereto, he~~ or she has previously accepted a brief to advise another interested party about the matter., ~~but t~~The legal practitioner must refuse such a brief if any confidential information having any bearing on the matter had been received by him or her with the earlier brief or a reasonable belief might exist that the client in the earlier brief might be prejudiced by such acceptance.

62.5 A legal practitioner may accept a brief to argue a case for a party despite having earlier given an opinion on the issues to the opposing party, provided that -

62.5.1 no information had been received by the legal practitioner for the purpose of giving the opinion about which a reasonable belief might exist that the client in the earlier brief might be prejudiced by acceptance of the later brief; and

62.5.2 the attorneys for both parties (where appointed) agree to the offer of the later brief before an acceptance.

62.6 A legal practitioner may not accept a brief on appeal if the legal practitioner has accepted a brief for the opposing party at any stage of the proceedings.

62.7 A legal practitioner who has presided at an enquiry in terms of the company laws shall not at any time accept a brief to act in any capacity for any interested party in any subsequent proceedings related in any way to the subject matter of the enquiry.

Commented [A70]: [Carter]: Why should this be limited to enquiries under the company laws?

62.8 A legal practitioner who has accepted a brief for a liquidator shall not at any time accept a brief to act in any capacity for any interested party in subsequent proceedings.

62.9 A legal practitioner shall not accept a brief if he or she has any form of relationship, including a family relationship, with the client or an opposing party which compromises, or which might reasonably be expected to compromise, the legal practitioner's independence.

62.10 A legal practitioner shall not accept a brief where a position or office previously occupied by him or her with a client or with an opposing party compromises, or might reasonably be expected to compromise, his or her independence.

62.11 A legal practitioner shall not accept a brief on behalf of a company of which the legal practitioner is a director.

Commented [A71]: [Carter]: Is this necessary? It would preclude an attorney from acting for his or her own juristic entity, and force him or her to use another firm. Why should a large firm, where one partner is a director of a listed company, not be able to act for that company?

62.12 A legal practitioner shall not accept a brief on behalf of a company about any matter in respect of which the facts giving rise to the matter occurred during a period when the legal practitioner had formerly been a director.

Commented [A72]: [Carter]: See comment above

62.13 A legal practitioner shall not accept a brief on behalf of a provincial or municipal council of which he or she is a member.

62.14 An advocate who was previously an attorney acting for the client in a matter should not accept a brief as a legal practitioner in the same matter where the advocate's former capacity, the extent of control and direction exercised by him or her as an attorney, or his or her established relationship as attorney with the client is likely to compromise the expectation that the advocate's advice about the conduct of the matter will be independent.

63. **Conflicts of interest among clients of legal practitioners**

63.1 A legal practitioner shall, when acting for two or more clients, be aware of the risk of a conflict of interests existing or arising in the course of the proceedings, whether criminal or civil, and once the legal practitioner is alerted to the existence of a conflict he or she shall withdraw from acting for one or all clients in those proceedings as soon as possible, and in particular -

63.1.1 if the legal practitioner has become aware of privileged or confidential information of any one client relevant to the proceedings that could be used to the prejudice of any other client, the legal practitioner may not act in any proceedings in which the prejudiced client is a party;

63.1.2 if the legal practitioner learns of a conflict of interest among clients at a time and under circumstances where the legal practitioner is not made aware of

any privileged information, the legal practitioner may continue to act for one or other client as nominated by the instructing attorney (where one is appointed).

63.2 A legal practitioner may act for two or more adversaries in drawing a settlement agreement to capture their agreement, but must advise the parties of their rights to independent legal advice. Moreover, in any matter involving a settlement of a matrimonial dispute or a matter involving the regulation of care and residence of children, the legal practitioner shall take active steps to ensure that all aspects of any contemplated settlement is equitable to all parties and in the best interests of the children.

64. **Commitment of legal practitioner to an effective court process**

64.1 A legal practitioner shall not abuse or permit abuse of the process of court or tribunal and shall act in a manner that shall promote and advance efficacy of the legal process.

64.2 A legal practitioner shall not deliberately protract the duration of a case before a court or tribunal.

64.3 A legal practitioner shall take all reasonable steps to arrive promptly in a court or tribunal where the legal practitioner is expected to appear, and shall in this regard take reasonable steps to allow for habitual events that might inhibit prompt arrival.

64.4 A legal practitioner who is expected to appear in a court or before a tribunal at a given time shall honour that commitment and shall organise other commitments to prevent interference with the scheduled court hearings, ~~and i~~ In particular, the legal practitioner shall not endeavour to seek or arrange a postponement of the matter or a change to a different time to suit his or her convenience, except when the instructing attorney (where appointed) and the client, having been fully and accurately informed of the reasons relied upon by the legal practitioner, have agreed, and

64.4.1 when an opposing party is affected, the opposition legal representatives, if any, having been fully and accurately informed, have agreed, and

64.4.2 the business of the court or tribunal is not materially compromised.

65. **Public comment by legal practitioner**

65.1 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.

65.2 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 pre-judging an actual case before the courts or any tribunal at that time.

66. **Additional provisions relating to legal practitioners**

The provisions of rules of conduct 18.7 to 18.9, 22.6, 22.7 and 22.11 shall apply to legal practitioners, with the necessary changes required in the context, as if they were included specifically in this Part.

Commented [A73]: [Sigogo]: This clause is a duplication of what is there already, it must be deleted.

PART VII

Conduct of legal practitioners not in private practice

Commented [A74]: [Qunta]: See my comment in A2 Based on the definition of Legal practitioner in the Act this section will only apply to those legal practitioners in the corporate world who are at the same time admitted AND enrolled with the LPC.

67.1 Unless otherwise stated or unless the context indicates otherwise, Part VII of this code applies only to legal practitioners who are not in private practice and who are employed by an employer for the purpose of providing that employer with a dedicated source of legal services and advice in exchange for a salary or remuneration (all of whom, for purposes of Part VII, and unless the context otherwise requires, being referred to as "corporate counsel"). If Part VII of this code conflicts with the provisions of Part II then the provisions of Part II will prevail and take precedence over the provisions of Part VII.

67.2 Corporate counsel must at all times act in an ethical manner and should, without limiting the general nature of this duty, adhere to the following standards of conduct:

67.2.1 act in a fair, honest and transparent manner, and with dignity and integrity;

67.2.2 remain impartial and objective, and avoid subordination or undue influence of their judgment by others;

67.2.3 give effect to legal and ethical values and requirements, and treat any gap or deficiency in a law, regulation, standard or code in an ethical and responsible manner;

67.2.4 not engage in any act of dishonesty, corruption or bribery;

67.2.5 make disclosure to any relevant party any personal, business or financial interest in his or her employer or its business or in any stakeholder so as to avoid any perceived, real or potential conflict of interest;

67.2.6 not knowingly misrepresent or permit misrepresentation of any fact;

67.2.7 provide opinions, decisions, advice, legal services or recommendations that are honest and objective.

67.3 Corporate counsel must, when providing legal services or advice to his or her employer, be free from any conflict of interest, financial interest or self interest in discharging his or her duty to the employer. Without limiting the generality of this duty, a corporate counsel must -

67.3.1 be and appear to be free of any undue influence or self-interest, direct or indirect, which may be regarded as being incompatible with his or her integrity or objectivity;

67.3.2 assess every situation for possible conflict of interest or financial interest, and be alert to the possibility of conflicts of interest;

67.3.3 immediately declare any conflict of interest or financial interest in a matter, and must recuse himself or herself from any involvement in the matter;

67.3.4 be aware of and discourage potential relationships which could give rise to the possibility or appearance of a conflict of interest;

67.3.5 not accept any gift, benefit, consideration or compensation that may compromise or may be perceived as compromising his or her independence or judgment.

67.4 Corporate counsel must at all times act in a professional manner. Without limiting the generality of this duty corporate counsel must -

67.4.1 act with such a degree of skill, care, attention and diligence as may reasonably be expected from a corporate counsel;

67.4.2 communicate in an open and transparent manner with his or her employer and with third parties, and not intentionally mislead his or her employer or any third party;

67.4.3 make objective and impartial decisions based on thorough research and on an assessment of the facts and the context of the matter;

67.4.4 exercise independent and professional judgment in all dealings with his or her employer and with third parties;

67.4.5 remain reasonably abreast of legal developments, applicable laws, regulations, legal theory and the common law, particularly where they apply to his or her employer and the industry within which he or she operates;

Commented [A75]: [Sigogo]: This clause requires more of these practitioners than other clauses in respect of the other practitioners.

67.4.6 comply with and observe the letter and the spirit of the law, and in particular those relevant to his or her employer or to the industry in which he or she operates, including internal binding and non-binding codes, principles and standards of conduct;

67.4.7 observe and protect confidentiality and privacy of all information made available to him or her and received during the course of performing his or her duties, unless there is a legal obligation to disclose that information;

67.4.8 generally act in a manner consistent with the good reputation of legal practitioners and of the legal profession, and refrain from conduct which may harm the public, the legal profession or legal practitioners or which may bring the legal profession or legal practitioners into disrepute.

[Lutendo Sigogo]

General Comment

- The Code of Conduct is too long. Many clauses are repeating on different parts of the Code. Most of the clauses may be put together under Part II. In this manner the Code will be shortened.
- I did not deal with some repeating clauses. My comments on similar clauses must be taken as if they have addressed all the related or similar clauses.
- The Code does not have provisions to protect junior attorneys. Such provisions must be introduced.
- The Code must be linked to the rules so that disciplinary action flowing from the Code must be applied through the procedure in the rules. The Code must be published (incorporated) in the rules and required under section 36.4. This suggests that the rules and the Code must be one document or instrument.