A BRIEF GUIDE

TO NAVIGATING THE IMPORTANT INNOVATIONS

IN THE NEW CODE OF CONDUCT[1]

Roland Sutherland:

A: INTRODUCTION

The purpose of this talk is to alert counsel to the contents of the statutory code of conduct promulgated in terms of the Legal Practice Act (LPA) by the National Forum.[2] Much of the code is a reaffirmation of the familiar, but there are also material changes from the prescriptions in the Red Book[3] and innovations of which prudent counsel need to take note. The good news is that there no reason why counsel ought to be apprehensive about the Code in relation to the day to day work process of practicing advocacy, despite some adaptations that shall indeed be appropriate.

I would be surprised if there is anybody in the room who has recently read the Red Book, with care, from cover to cover, but there's always a danger that when a

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[1] This article is an edited version of the series of talks given to the members of the Johannesburg Bar in May 2017 by Judge Roland Sutherland at the request of the Johannesburg Bar Council.

[2] The 'Code of conduct for Legal Practitioners, candidate Legal Practitioners and Juristic entities' published on 10 February 2017; GN 81 of 2017 (GG 40610) pursuant to the Legal Practice Act 20 of 2014. At the time of writing it was not yet in force. An Amendment Bill, B11 of 2017, was published for comment on 21 April 2017 (GG 40804) The Bill has no effect on the Code of Conduct.

[3] The Red Book is the *Uniform Rules of Professional Conduct* published by the General Council of the Bar of South Africa; accessible on the GCB website: www.sabar.co.za

number of counsel get together someone might have read it since pupillage. Normatively, there is not a great deal that is new in the Code but what is new is important. A lot of what was outdated or abrogated by disuse has been removed and nobody will miss any of it.

What I want to do is to offer you a way of navigating yourself around the Code. The emphasis is on all of you as individual practitioners: ie, what impact will the Code have on the way you run your practices and how will your expectations about your professional life as counsel have to change if at all.

There are two important topics I shall not address in this lecture, owing to time constraints. First, I am not going to touch at all on the impact of the LPA and of the Code on the Bar *as an institution*. The impact of the innovations on the Bar institutionally are immense, profound and largely negative. That topic is large, complex and is a subject for a debate at another time. The immediate need, I think we all agree, is for you as counsel to understand what adaptations, you need to make to the way you want to, and may, organise your own professional lives. The institutional impact of the LPA and of the Code, to the extent that it is the handmaiden of that Act, is probably going to be least felt in the Johannesburg Bar because of the Group system.[4] Because the Groups are not sub-formations of the Bar Council a lot of the *institutional negativity* is not going to filter down to Groups, which are sovereign associations or entities. But notwithstanding that,

[4] The Groups of the Johannesburg Bar are voluntary associations or sometimes juristic entities whose principal function is to lease premises for subletting to counsel and to provide a range of administrative services. The mobilisation of counsel in these groups has resulted in the group being the primary social unit of m embers of the Johannesburg Bar. the relationship between the Bar Council and the Groups is informal and driven by collegial dynamics.

even within the Groups some adaptations shall have to take place because of the needs of members to make adaptations. Second, I am not going to deal with the new creature of the LPA called the 'Trust Account Advocate'. I have omitted that topic because the focus in this talk is on what is needed to be known by you who are referral practitioners. I am assured that the Societies of Advocates will remain open only to 'referral' counsel.

By saying that we shall 'navigate the code', I mean that you need to have an understanding of how the Code forms a *coherent whole.* I will take you through the *four organising principles* which underpin Professional Legal Ethics. These organising principles dictate the substance of the Rules which you will read in the Code. The same organising principles apply to the Red Book, which the code in due course will replace. The Red Book had become, over the years, an incoherent patchwork quilt of *ad hoc* rules and practices and conventions and was unwieldy and archaic. The normative content of the Red Book has been refashioned in the code. Accordingly, what we examine is how these organising principles help you understand why the rules in the code exist and why we need them.

B: OVERVIEW OF THE CODE

The Code applies to Attorneys, Advocates (Counsel), Trust Account Advocates and employed legal advisers.[5] The Code says nothing about so called 'para-legals' an omission which has been criticised. The code does not apply to anybody who

[5] Code: 67; the idea is that a legal adviser who is an attorney or advocate ought to conform to these norms, not anyone who gives legal advice who is employed in a company. Thus, a LLB graduate who is not admitted as a legal practitioner is not covered.

gives legal advice as part and parcel of another calling. There are two obvious callings to which that the LPA does not apply in which it is unavoidable for a practitioner to give legal advice. The first calling is that of tax planner, which would include Chartered Accountants in public practice giving advice on the tax laws. The second calling is that of Labour Relations Consultants who are directly, and far more deeply, involved in habitual litigation than even tax advisors. Thus, it must be noted that the LPA and the code do not purport to comprehensively regulate the giving of legal advice *per se*.[6] The code therefore applies only to those *legal practitioners* who have the societal role of dealing with the managing of litigation and giving legal advice as their core vocation.

The Code consists of several chapters which address distinct types of legal practitioners. Two of the chapters relate to all legal practitioners; ie attorneys and counsel; one of which sets out general principles, and the second deals with court-craft. Another chapter deals purely with attorneys: I do not address that chapter, save insofar as the relationship with counsel is concerned, and for example, to note that there are some benign references about attorneys' obligations to counsel in respect of payment of fees. One chapter deals specifically with counsel and a separate chapter deals specifically with Trust Account Advocates, although much of the content is duplicated. A chapter is devoted to employed legal advisers. This structure makes it plain that what applies to you as counsel is in chapters I, II, IV, and VI.

[6] This policy choice might be contrasted with the unhappy prospect, currently an issue being litigated about, whether attorneys, who habitually demand on behalf of their clients that payments be made of what is due, might have register under the National Credit Act.

What is stipulated in the code about counsel is a fairly faithful representation of the traditional ethos of the Bar. Among other statements, you will find that in the Code there is a phrase which the GCB task team[7] coined to describe counsel as 'independent practitioners of advocacy'[8]which captures the sense that the Bar wanted to import into this Code as a distinctive characteristic of counsel.

By and large there is nothing substantial counsel need to *relearn*. The core substance that is, by now, second nature to you, has not changed. Some archaisms have been chucked out. You are not going to see anything about retainers.[9] There is nothing about 'mixed doubles' because, clearly, in this dispensation it could not make sense.[10] You will see some normative innovations which reflect the post-1994 constitutional order; eg as regards limits on cross-examination, there is a specific injunction that you may not cross-examine in a manner that violates the dignity of the witness.[11] Many of you may have practised in a way that has respected dignity anyway, but regrettably, that is not a universal occurrence.[12]

[7] Prior to the National Forum commencing its work a GCB Task team, chaired by me, was mandated to prepare a re-written Red Book, eliminating the archaic and the abrogated material, modernising the terminology and systemising the provisions in more appropriate thematic ordering. That text was put forward to the National Forum in drafting the code of Conduct. All the provisions which deal with advocates and courtcraft are, save for a few tweaks here and there, reproduced from the text proposed on behalf of the GCB in devising the code.
[8] Code: 14.1
[9] Red Book Rule: 5.2
[10] Red Book Rule: 5.11.4. the label "mixed doubles' refers to counsel being briefed with an attorney or other advocate who is not a member of the Society of advocates, as either leader of junior. In 2008 an amendment to the rule allowed this practice to take place in exceptional circumstances with permission from the Bar Council; eg a professor of law in a speciality being a co-counsel.
[11] Code: 60.1; The Constitution of the Republic of South Africa, section 8.
[12] There are many examples in the case law; S v Gidi 198494) SA 537 (C)) sets out why a principled approach is not an option. For, perhaps the most egregious example of brutal unfair cross examination, violating the dignity of the witness, see: S v Makaula 1964(2) SA 575 (E), a veritable apartheid relic.

However, it is now a rule and, as you will understand, everything in this Code is peremptory and breaches make you subject to discipline.[13]

An important aspect to be alert to, is that there is a lot of new substantive content that was not in the Red Book but is derived from case law, which has always applied to counsel and with which you ought to be familiar. The limits of fair cross-examination is a particularly significant example.[14] Up to now the proper limits of cross-examination derived from several cases over the last century; the substance of those cases has been codified and put into the Code.

The Referral rule[15]and the Cab Rank rule[16]have been strengthened and institutionalised in the LPA and in the code. Indeed, in respect of the Referral rule there has been an ostensible narrowing of who is eligible to issue briefs[17] and there is now an express acknowledgment that attorneys are liable themselves for the fees of counsel.[18] These provisions in the code ostensibly resolve contestations between the Attorneys profession and the Bar of long standing.[19]

What the ultimate drafters of the code have not done is to take the opportunity to create, what I would call, a 'clean Code of Ethics'. Some rules, in my view, do not belong in the code because they do not really deal with truly 'ethical' issues.

[13] Code: 3.17
[14] Code: 60
[15] Code: 18.
[16] Code: 19; Red Book: 2.1; See too – *Rondel v Worsley [1969] AC 191(HL)*
[17] Code: 19.2
[18] Code: 31.4; also, see Code: 32 on the recovery procedures.
[19] This position as regulated by the Code is not a position that necessarily enjoys the support of the Law Society despite it being represented in the National forum.

The premier example of an inappropriate rule is that about where you may sit in court.[20] When you sit in the front bench and you are not a silk you shall have committed an act of misconduct and you can be disciplined for it. I eagerly look forward see such a matter come before a disciplinary tribunal. There is a range of other courtesy rules and collegial conventions with which we are familiar that have, in my view, inappropriately, been put into the code.[21]

By contrast, what the drafters of the code have done which is commendable, is not to emulate what was done in England in their regime for regulating ethics and professional responsibility. For those of you who are not familiar with the English regime, you might note that several years ago, as resentment with the legal profession grew, the Bar was eventually subjected to the Bar Standards Board (BSB) which contains a majority of non-lawyers, who have now sought to regulate, at micro-management level, what counsel can do. For example, the Referral rule and the Cab Rank rule, in England, run to several pages.[22] We have retained, mercifully, a more *general principles* approach which is more consistent with the South African attitude to law. Indeed, one of the strategic objectives that the GCB had in mind when preparing the Revision of the Red Book in order to advance that text in the National Forum debates, was to preserve that particular approach to the way the profession ought to be regulated and avoid the micro-

[20] Code: 34.4; The insertion of this as a 'rule' is questionable as it a matter of convention and courtesy rather about an *ethical* issue.
[21] In the GCB task team, it was thought that the collegial conventions do not belong in the code; certainly, where you sit in court was inappropriate to regulate in a code carrying disciplinary sanctions for breaches. We therefore do not have a Code, which like other jurisdictions we like to compare ourselves with, eg Australia, England, Scotland etc, where codes are restricted to ethical issues only.
[22] Bar Standards Board: The Code of Conduct, Part VI: Acceptance and Return of Instructions. Accessible at www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct

management style illustrated by the English regime. The tenor of the code is going to be particularly important when, in future, the regulation of the profession becomes shared with non-lawyers whose insight into the ethos of the profession cannot be taken for granted.[23]

An important innovation in the Code is that, for the first time, what constitutes 'counsel's work' is set out.[24] There is a list of several things, all of which you will recognise. It specifically is not a closed list, but whereas formerly, counsels' work was what attorneys' work was not, there is now a far better idea about what is involved. The list includes more than the usual tasks and specifically includes acting as an arbitrator and as a mediator, both, obviously, not 'litigator roles'.[25] We will examine some of the tweaks in this regard which recognise an evolution in the scope of what counsel, in practice, do by way of being 'dispute resolvers'.

An important systemic change to note, which is a veritable sea change from the dispensation with which counsel are familiar, is the abolition of the very wide discretion which Bar Councils have hitherto exercised in order to deal, *ad hoc* with ethical questions that crop up in practice. Willem van der Linde coined a term several years ago that the Bar Council runs on the principle of '*ad hocery*.'[26] The thrust of the practice of the council was: 'Ask us a question and we will tell you whatever it is that we think the position ought to be'. So, no longer can you

[23] Eg, in England, the Cab Rank rule remains a controversial issue. Sydney Kentridge QC, drafted an important memorandum on the issue to defend the Bar's stance: [4th March 2013 (unpublished) a submission to the BSB]
[24] Code: 15
[25] Code: 15.12.13 and 15.12.15
[26] This quip arose in meetings of the Johannesburg Bar Council in 1997-1999, when Van der Linde (Van der Linde J) and I were members of the Bar Council.

effectively take a problem to the Bar Council and they can make up a solution as they go along. This change is, I think is a good thing, because it eliminates a source of arbitrariness, regardless of the *bona fides* and wisdom with which any decision might be characterised. The change is even more important in another respect; insofar as a great deal of what is going to happen that becomes controversial under the Code will be of public importance, the profession shall have to increasingly justify itself to a generally hostile lay community who have various axes to grind. A general theme of the LPA and of the code is a greater degree of public accountability, itself commendable, and a dimension of the impact on the institutional life of the Bar, a topic reserved for another day. What you still need to do, for the present, and are obliged to do if you are uncertain about what a rule in the code means, is to go to the Bar Council to get a ruling – an *interpretative* ruling – on what it means.[27] But clearly it is important to make the distinction between *interpreting* a rule and *inventing* one to suit the circumstances. There shall be no more inventions on the trot, so to speak.

Approaching the Bar Council is simply an interim arrangement because the institutions which the Legal Practice Council (LPC) have to set up do not exist yet. The Societies of Advocates will not retain their power to regulate and apply discipline when these new institutions have been established.[28] Disciplinary powers will be handed over to sub-formations at a provincial level of the LPC. When this will happen is uncertain. It will not necessarily occur when the Code

[27] Code: 14.7
[28] Section 23 of the LPA.

comes into operation, because it is going to take a long time to put all these institutions in place.

An interesting aspect of the disciplinary regime envisaged is that Section 44(1) of the LPA reserves the powers of the High Court to be the last word on what the conduct of lawyers will be.[29] This has an interesting twist. The High Court will retain its *de facto* inherent jurisdiction to regulate the conduct of people who practice before it. One must assume that, obviously, the Court cannot ignore the Code, but to the extent that one can expect a judicial gloss to develop, there is room for a Court to say a great deal about issues that become controversial; eg, about who is fit and proper to be admitted to the Roll of Advocates, and no less, who is fit and proper to be reinstated. Moreover, the experiment with Trust Account Advocates will probably provide some early controversies.

C: PROFESSIONAL ETHICS- WHAT IS IT? THE ORGANISING PRINCIPLES.

One of the thoughts that has to be borne in mind is to understand what we are talking about when we bandy about the word "ethics". We are talking specifically about *Professional Ethics*. We are not talking about the obvious stuff about being

[29] Section 44 of the LPA provides:
(1) The provisions of this Act do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity.
(2) Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity or in connection with any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge.'

honest, being truthful and not cheating. You do not need a Code to tell you that. Professional Ethics, which is becoming more and more a distinct subject of study, understands itself to be a sub-set of ethics within the broader philosophical sense. To take, for example, Medicine, the profession that has the most developed ethical norms; it has developed norms which are functional to what it does: it is at war with death and disease and is sworn to respect and protect life and human dignity. In the same way, 'legal ethics' and the 'ethics of advocacy' need to be functional to our legal system and particularly to our adversarial litigation process. An adversarial system deliberately sets up a contest, the result of a deliberate policy choice made by Society and the State. Disputes arise between people and between the State and individuals, and by way of a contest, in which opponents or adversaries confront one another according to a set of known rules, disputes are resolved authoritatively. The code cannot therefore be an anodyne nursery rhyme code: it has to recognise that its purpose is regulate a confrontational process.

The Rules in the code, as the Rules in the Red book have in the past, recognise that the terrain that is to be regulated is an adversarial system of litigation. From a philosophical, or from a practical, point of view, you have to ask yourself, how, in an adversarial system, does one define and understand the role of counsel? A term that has been coined to capture the role of counsel in such a system is *licensed fiduciary intermediary*.[30] Licensed, obviously, because counsel are admitted, in terms of law, to appear in courts, having met prescribed standards for admission

[30] For a perspective of the adversarial litigation system, see: "*A defence of the Standard Conception of Adversary advocacy'* Roland Sutherland, a dissertation submitted in March 2016 for the degree MA (Applied Ethics) in the University of the Witwatersrand, Accessible at www.wiredspasce.wits.ac.za

to the Bar. Fiduciary, because counsel have obligations to clients, to the court, and to professional colleagues, all of which need to be balanced; like Constitutional principles and norms, counsel have to engage with principles and norms which bump into one another from time to time. Lastly, as an intermediary, ie stepping between a judge and a client, and a client and an adversary, counsel needs to intervene on behalf of a client and provide to a court an intelligible and cogent presentation of a case, in a manner that properly promotes the interests of the client and of the court to reach a valid decision.

So, in the Professional Ethics of Advocacy what are the core 'organising' principles'? I contend that there are four organising principles, ie: independence, specialist expertise, integrity and service in the public interest. When you come to deal with rules in the code that seem obscure or the application is uncertain or there are a couple of rules which tend to contradict one another, you will find that you will likely be able to reconcile them by having regard to these four organising principles.

Independence

The first principle is independence. I do not here mean the independence of the Bar as an institution. Institutional independence of the Bar is important, but what we are talking here about your individual independence as a legal practitioner. I take the view that counsel's independence is where you locate the Cab Rank Rule,

the Referral Rule, the rules that relate to you as counsel having control over the case (as opposed to your client) and how you regulate personal conflicts of interest.

Specialist Expertise

The second principle is specialist expertise. This is perhaps self- evident. In respect of specialist expertise there is now an express *duty of diligence* which hitherto has not existed, or if you prefer, was not hitherto articulated. It is an area where the code makes demands to learn and improve advocacy skill-sets on an ongoing basis. The obligation for participation in continuing legal education is greater than at present. There is now a very strong demand on maintaining skills levels. Continuing legal education, which has been somewhat of an add-on up to now, is going to move far closer to centre stage than ever it had been in the past.[31] You need to have a good look at what is involved in that injunction.

Integrity

The third principle is integrity, with which you will all be familiar. There is little that is new in the code, but the articulation of the norm is more direct. The rules about how you manage conflicts amongst clients are the same as the substance of the rules in the Red Book.[32] Frank disclosures to the court are required as in the past. [33]

[31] Code: 24
[32] Code: 62
[33] Code: 61

Service in the Public Intertrest (Vocationalism)

The fourth principle is Service in the Public Interest, or if you like 'vocationalism' We are all familiar with the injunction in the Red Book about practice at the Bar not being a 'mere money getting' operation; rather, it is primarily vocational and it is in the public interest. That norm is replicated in the code.[34] Service in the public interest includes your duty to the Court. An express articulation of the duty to support the judicial process has been fleshed out and fortified quite considerably. I will have something important to say about the Bench's attitude to this injunction too. [35] *Pro bono* obligations, which as I think all of us are aware, loom larger and larger, not just for public relations purposes in order to justify the Bar's elitist role in society but because of a genuine commitment in that regard.[36] The question of fees resides under this principle, about which there is much to be said.[37]

D: INDEPENDENCE OF COUNSEL

Code 13.9 and Code 17 deal with independence in as many words and say what you will be familiar with, so I am not going to dwell on that aspect.

Code 16 requires a 'commitment to practice' which has been beefed up. You are all aware that you are not entitled to get involved in other callings that may

[34] Red book: 7.1.1; Code: 25.1
[35] Code: 3.3 and 64
[36] Code: 21
[37] Code: 25-26

interfere with the practice of the law. This does not mean that you can't breed racehorses or run wine farms or do other things as long as when you do your legal work you do not have rush out to make sure that the vines have been sprayed with the right insecticide or that the right fodder has reached your stables.

There is a familiar duty which is now formulated is in quite strident terms about serving your client's best interests. The code says that the interests of your client are 'paramount'.[38] However, it also says that your client's interests are paramount *subject* to a whole range of exceptions, but let's not quibble too much about that anomaly. The point is made is that you have a significant duty to your client and you have got to balance that duty with your duty to the court and with your duty to your colleagues.

There is a caution to how gifts can compromise your independence, which is a repetition of the familiar Red Book rule. [39]

The Cab rank rule

The Cab Rank rule has been considerably reinforced in the way that it has been phrased and this reflects word for word what the GCB put forward for inclusion in the Code. The Cab Rank rule now extends, expressly, to *pro bono* briefs. It says that you cannot refuse a *pro bono* brief purely on the basis that it is *pro bono*, if you are operating in that particular field of practice. [40]

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[39] Code: 21; Red Book: 4.7
[40] Code: 18

There is clarity on how your cab rank rule obligations are restricted to your chosen field of practice.[41] One of the things that frequently comes up in pupillage lectures on ethics is: 'What if I am this or that sort of person and I don't approve of this or that - how do I deal with it?' The short answer, as is now clarified, is that if you are a general practitioner and you take whatever comes through the door, then you are going to take all matters from whomsoever presents the brief. If you want to be, say, a specialist intellectual property practitioner, then you are perfectly entitled to say no to every other brief that's offered because you only hold yourself out to practice in that field. Also, if you only want to be a High Court practitioner, or if you say I will do anything except criminal law, that is a valid self-limit to your practice but you cannot be a criminal practitioner and say I don't want to represent Oscar Pistorius even if they do turn the cameras off. So that position is far clearer than it used to be, and there is hardly any room, I would think, for confusion on the part of newer advocates who are a little puzzled about how to make those choices.

The Referral rule

The referral rule, as I said earlier, has been reinforced.[42] Except for the Trust Account Advocates, which is a special category, you can take briefs only from attorneys or from Legal Aid South Africa (which in the LPA and Code is identified

[41] Code: 18.1
[42] Code:19

as justice centres).[43] You can also take a brief from an accredited 'arbitration centre'. There is a difficulty with this list of 'briefing authorities'. The first is one of policy. This text differs from what the GCB put forward. The GCB tried to capture practice as we know it now, and what is missing from the code's list are the Legal Aid Clinics. Legal Aid Clinics are defined in section 34(2)(c) of the LPA and the GCB had them listed as briefing agents. They are omitted from the Code. It cannot be an oversight; it must have been deliberate and the question is why? The most benign answer I can come up with is the assumption that Legal Aid Clinics are staffed by attorneys who are admitted practitioners on the practising roll and therefore, through that indirect way, the attorneys in clinics shall brief counsel. Why law clinics are identified as a specific species in the LPA and are ignored in the Code, is, otherwise, inexplicable.

As far as arbitration and mediation is concerned, the question arises what do you need to do in regard to getting and accepting those appointments? When they come through an attorney, there no problem; a brief is given. But now that we have accredited arbitration centres - what does that mean? Does it mean to say arbitration *and mediation* centres? Arbitration centre is not defined. Does the Code mean to include only institutions such as the Arbitration Foundation of South Africa (AFSA) and Tokiso which will then be accredited by the LPC? Both offer mediation and arbitration services. Does the Code mean to make that distinction between arbitration and mediation? Must we read 'arbitration' to mean all Alternative Dispute Resolution (ADR)? It is not clear, certainly on a textual level.

[43] Section 1, definitions, LPA. Code: 19.2

What is interesting of course is that whilst we may prognosticate that the LPC shall, as the GCB has done, accredit domestic arbitration centres and mediation centres, but what about the rest of the world? I suppose it is possible that the LPC will accredit some of the well-known international arbitration bodies but what about the arbitration centre at Vladivostok or Luanda, who no-one has ever heard of before you are offered the appointment? How will that work? Will it mean, if you are offered an appointment you need to approach the LPC to ask whether it will accredit them; perhaps *ad hoc*? I imagine that, even if the LPC is a really efficient, it would take time to achieve formal accreditation, which presumably implies some degree of vetting. It does not seem to me to be something which can be sorted out on the trot, so there are likely to be difficulties in regard to how the appointment or instruction will come to you. If you have to wait too long you may forfeit the appointment. The text merits revision, but that is not something that we can look forward to happening in a hurry.

However, the important point is the reinforcement of the referral rule and the primacy of attorneys as the source of that work. That theme is reflected coherently in other provisions in the code including the provisions about fees. Overall this aspect as covered in the Code, is business as usual.

There is, at present, a practice in Cape Town, known as the 'Cape exception'. In terms of this practice, certain corporate bodies were always entitled to brief counsel directly without the intervention of an attorney for advice; eg the Board of Executors and institutions of that nature would get advice on their commercial

matters directly from silks at the Cape Bar. The Cape exception now seems to be abolished. The absence of mention of it and the fact that this Code now applies to the entire country, must without, I imagine a very astonishing about face, exclude the Cape exception. I cannot see the LPC having an appetite to accredit the Board of Executors as an arbitration centre and unless there is a massive change on this issue, which will undermine the solidity of the referral rule we must acknowledge that the Cape exception is history.

Exercising control over the matter

The issue of counsel's control over the case has been given considerable emphasis.[44] Control is exercised in two ways.

The first is that the existing rule has been reinforced, and I need not dwell on that.[45] The obligation about giving frank advice to clients, whether specifically for litigation or in order to run a business, is now beefed up in Code.[46] The code specifically says that thou shalt not pander to your client's whim; ie: If 1 + 1 = 2, then it's also 1 + 1 for you, Mr Client. For those of you who have had experience with the captains of industry who have become accustomed to snapping their fingers and saying: "make it happen", there's always been a danger about counsel succumbing to the boardroom pressure to try and accommodate the maverick executive director's requirements. You will be in trouble if you give sycophantic

[44] Code: 17
[45] Code: 17.3; Red book: 5.6
[46] Code: 22.10

advice, and if there is a comeback on that advice, you might have breached your duty of diligence.

The second way in which the control over the conduct of a case is beefed up is in regard to *where* you consult. The Johannesburg Bar has a local rule about consultation venues and the Code, which has been taken up lock, stock and barrel in the Code.[47] The code provides that thou shalt consult in chambers and if you make a decision not to do so, you must have a sound reason to do so. That sound reason has to fall into one of the categories of exceptions; ie, (1) the number of witnesses you have to see makes it impractical for them to occupy your chambers, or (2) the number of documents that you have to inspect are too voluminous for them to be in housed in your chambers, or (3) the case is an urgent application, it is after hours, you need a secretary to type up the papers, in which case you may go to the attorney's boardroom and work from there, and (4)obviously, when you are out of town attending to a matter. Therefore, there is nothing new in the Code, save that what Johannesburg counsel are familiar with, shall now apply to the entire country.

Personal Conflicts

The management of your personal competence gives rise to two points. The first is all the motherhood and apple pie stuff that you are familiar with is repeated in the code, simply in modernised form and there is no new normative content. What is new is something about which we South Africans have been very slack about

[47] Code: 17.7; Johannesburg Bar local rule: 4.1

for a very long time; that is family connections. [48] If you read up the controversies that have occurred in other jurisdictions with which we like to compare ourselves, there's a very acute awareness of the public perception of unfairness if there is a family connection implicating counsel; ie You appear before your father, or the client that you appear for has, as a partner or employee, your spouse or a close relative. These relationship issues are now regulated. The problem is not academic. There are two particular instances which have taken place in recent history, which illustrate why family connections are important. The one is illustrated by the *SARFU* case where there was a fuss made about who gets invited to whose wedding.[49] *SARFU's* ruling was a pragmatic one about which I suspect most of us are quite content, but I would not put money the norm which was relied on there, being necessarily be applicable in future. A second controversy was where the Judge President in the Northern Cape Division presided over a criminal appeal and his wife appeared for the State in the appeal.[50]The SCA expressed strong disapproval and set the decision aside.

E: SPECIALIST EXPERTISE

The duty of Diligence

Let's deal now with specialist expertise. The first point to be made is about your duty of diligence. The Code provides for concrete undertakings which are implied

[48] See Malcolm Wallis "*The Family Business curtailed"* (2010) December pp 70-74 Advocate, published by the GCB, accessible on www.sabar.co,za

[49] A recusal application was brought because the son of a judge hearing the matter had invited President Mandela, a litigant, to his wedding. The application was dismissed: see President, RSA vv SARFU 1999 (4) SA 147 (CC)

[50] Dube v The State 2009 (2) SACR 99 (SCA)

by your undertaking a brief.[51] If you take a brief on trial there is an implied undertaking that you are going to be available for the whole of the trial. You are not going to go fishing and you are not going to be somewhere else at the times you are needed. There is also an implied undertaking that you are in a position to give proper attention throughout the preparation phase to be ready to go to trial. So, if your availability is not compatible with those obligations, you will be in trouble if you accept the brief. As will happen from time to time, but rarely, having accepted a brief in good faith on those terms you may find that some unexpected event occurs and you cannot honour your commitment. That risk is regulated expressly and you have to give timeous notice so that you do not prejudice your client, in order to extricate yourself from a brief where you have good cause for being unable to honour those undertakings. These duties are not themselves new, but what is important is that the code establishes a more effective system of accountability which will be less benign about failures than you have been accustomed to in the past. The fact that these injunctions have been expressly set out in the Code makes it far easier, forensically, to hold counsel to account and when there are complaints by aggrieved attorneys or aggrieved clients, there will be a far bigger hook on which to hang the complaint. You need to be in a position to protect yourself against those sort of occupational hazards, by remaining alert and compliant.

Part of your duty of diligence is to evaluate whether it is proper for you to accept the brief that's been sent to you. So if you get a tax brief on opinion, and you've

[51] Code: 20

been at the Bar for ten minutes, it's probable that the brief has not come to the right pigeon hole and if your name is Van der Merwe or Joubert, of which there are many such persons, you have to make sure that you are the right one that got the tax brief. In another scenario, if the brief is intended for you because the attorney in the firm that has sent you the brief is your chum and he wants to support your practice: gratifying as that may be, the code nevertheless stipulates that, in accepting that brief, you are representing that you can deal with it competently, and if you cannot you are duty bound to decline the brief. Sometimes, you can resolve the problem of lack of experience by calling for a leader, but sometimes a brief does not require a leader, or there are no funds to provide you with a leader to simply overcome what you don't know how to deal with by yourself. So, you have got to be careful about what you accept, and particularly, that is important to the counsel who choose to practice in limited fields, which choice implies expertise in such matters. If your diary is empty and you are, for arguments sake, a family law specialist, and someone offers you an insolvency case and you do not have time to beef up on it, you need to second-guess yourself about how bullish you ought to be about dealing with it. In saying this, I do not mean to discourage you from taking the view that Johannesburg counsel do not need to sleep and that you can be ready for anything in the morning. But then you really do have to be ready, and your ability not to need sleep during the 24 hours between the time you're getting the brief and you are standing up in court is part of what you need to assess.

The prohibition on double briefing and its stablemate, overreaching is repeated in the code.[52] There's nothing more to be said about that. There are the usual exceptions. To take the usual suspects: if you have an RAF brief on trial for Monday, and it settles on the previous Wednesday, you probably can charge a reserved day fee in terms of the rule of court. But if you have got two trials on Monday and one settles early and you are just going to court to have the settlement made an order of court, you can charge for going to court to do that but you cannot charge a trial fee for what is, in reality, a formal appearance. Also, bear in mind that because of the way you have all been accustomed to charging fees is on a time basis, the preparation work that you do is never sacrificed. For those who do not have the energy to read the judgment of Wallis JA in *Geach*,[53] if you read the code you will capture the essence of it.

There are three new obligations which come under the rubric of your duty of diligence.

The first is that there is an obligation to give early advice on the prospects of success.[54] This particular rule is in the general chapter which applies to all practitioners. It is primarily the attorney's duty when taking on a client and asking for a deposit to funs the case to be able to advise the client that there are prospects of success. To some extent, most of the anxiety about giving that early advice will be the attorney's burden. But how do attorneys deal with their anxieties? They

[52] Code: 20.8 – 20.10
[53] GCB v Geach and others 2013 (2) SA 52 (SCA)
[54] Code 3.10; Section 35 of the LPA

send briefs to counsel to advise them what they should be or not be anxious about. And this means the following – if, on day one, Attorney Smith has taken on a client, he needs within a reasonable time to give advice that there are prospects of success. He will send you a brief on what information he has, and this will be pre-pleading, pre-discovery and maybe in some cases pre-everything. You are going to be asked to advise whether it is worth investing money in this matter. That is not something that you have been, generally, accustomed to doing. Sometimes the advice may be a pure question of law. Is it enough to just say that a cause of action exists? More is surely needed if a client is to be told there are prospects of success. But what is required of counsel is an adaptation to practice if you are going to look after your stable of attorneys responsibly. You have to recognise that your attorneys will have a need for rapid turnover of such advices. You can't leave that brief lying around and it means you are going to have to decide how you circumspectly give advice on very little information. This is an issue about which you need to be alert.

The second newish obligation is the obligation in Code 20.12 to advise about alternative dispute resolution; ie arbitration and mediation and so forth. It says that you must give that advice in *appropriate* cases. Now we can suppose on a common-sense basis, that if you have a family case or if you have a building case, or if you have a labour case clearly, ADR is a real option. But there are lots of other matters where what is an ‘appropriate’ case is not clear; particularly if you are dealing with commercial matters or delictual matters, but nevertheless, you need to ask yourself that whether the circumstances are *appropriate* for ADR. If

you are suing the RAF you already have an institutionalised environment for settlement in which you might think that the circumstances are not appropriate circumstance for ADR. But is that correct? What about the two experts that have minimal differences over the brain damage and they are not all that far apart; how many days are you going to spend in court fighting over this? Maybe that is an appropriate case for mediation by another expert. It's an open question complicated by different subjective reasonably held perspectives. We know that since 1994 there's hardly a piece of legislation that has been enacted that doesn't have some part of it relate to mediation and ADR in some way. The National Credit Act has got six different ADR options before you get to litigation. Most of them are never used because the institutions that are required to drive them have never been created but there is a knee-jerk reaction in legislative policy to try and keep lawyers out of it. It has been, ironically, the principal fact why litigation has expanded as much as it has. But the point is, you are going to have to take a view about how you deal with these things. Without prescribing to you how to run your professional lives, you need to develop a stock approach to dealing with advice where you can tick off the block that you invited the client through your attorney to consider whether or not ADR was suitable, and to make a note that you took a view on these facts why it was not appropriate to use ADR or that it was suitable, and you invited your client but he said, "no".

The third new obligation is to guard against prescription.[55] Many of you would already do so, but now that is a specific obligation. Over time many, I hope not all

[55] Code 20.13

of you, will experience sitting on a Sunday evening, drafting particulars, for a claim that is going to prescribe the following day. You will be called upon to rescue your attorney under those circumstances. But worse than that, if took that the blue brief cover that reached your pigeon hole and chucked in the queue to wait until it found its turn coming up, you may discover, if you are lucky, on that Sunday afternoon it is about to prescribe tomorrow, if it is already too late, it will be your fault. You need to look at what you have been asked to deal with as soon as it comes in so that you don't fall foul of that rule which applies as much to counsel as it will to attorneys.

Maintaining Skills

The second leg of the specialist expertise theme is the question of maintaining skills. In the general section in the Code which deals with all practitioners, it simply says that all practitioners must keep reasonably abreast of legal developments.[56] I am assuming that means more than buying or reading the law reports. However, in the chapter about counsel, there is a more onerous duty because. although it repeats the mantra of keeping reasonably abreast, counsel have the obligation to participate in the programmes of skills advancement which are provided for by the LPC and in the interim by the GCB and the Bar Council itself.[57] That is why I said earlier that the issue of continuing legal education is going to be a matter that moves to centre stage. How far that's going to go is obviously going to depend on the LPC's appetite and the resources that are

[56] Code: 3.13
[57] Code: 24

available. All of the resources which the Bar marshals now for continuing legal education are given free. Whether we can expect that to happen forever is not something to take for granted. But I want to give you a small horror story about what's happened in England in regard to maintaining skill levels and what, at the instance of the Bench, has taken place in respect of criminal matters. You cannot go into a criminal court in England unless you have been certified at one of four levels as to your competency to be there. At the lowest level you can represent someone who is pleading guilty to a low-level crime. Then there's a second level where you can represent someone in a proper trial where it's a minor offence. The further levels go all the way up to the important crimes. In England, unlike here, alas, murder is thought to be important. So, you have to be a seasoned and experienced and accredited at level 4 to represent people charged with murder. Legal Aid South Africa, which is responsible for the majority of criminal defences is resource-strapped and to the extent that it is, in a sense determining the norms that regulate the calibre of performance, we are nowhere near the sort of regulation in England. But the point I want to make is that the appetite for regulation is going to be influenced by what is seen elsewhere in the world, and that kind of regulation is not something that I think we should ignore entirely forever.

F: INTEGRITY

I move now to the third organising principle, integrity. The code contains what is familiar to counsel.

There is one interesting innovation, a specific rule that counsel is to preserve the '*privilege* and confidentiality' of clients.[58] Why there is a need to put a protection of privilege in the code is unclear; one would have thought that's the law anyway. Thus, is this just a bit of tautology? The risk of breaching *confidentiality*, at a practical level, is a far greater danger; ie idle chatter in the lift, going down the hall to ask someone for advice about a difficult thing and mentioning that it's Smith v Jones and so forth. You are more than likely to trip over preserving confidentiality than to surrender privilege.

A new rule is Code 59, that now makes compulsory what was always prudent relates to interviewing practice. When you are consulting with a witness you are going to call whose credibility will be an issue, you must consult with that witness independently and separately from other witnesses who are going to be called on that issue. This is going to be an adaptation for most of you because I far as I know, this is not standard practice. I think we have all had that experience where an attorney brings everybody to your chambers and you start having a chat with a witness on issue X and the client keeps on prompting the answer. That spoils the interview because you cannot find out what this fellow really can say. This new rule resolves that problem. The adherence to this rule will also afford a basis for explaining to your client why he has to sit in a reception and read the paper.

There is a couple of new rules about dealing with counsel bullying clients.[59] The code says that you may not use *undue pressure* to get your client to settle or to

[58] Code: 3.6
[59] Code: 22.11

plead guilty. This is common sense, but where do you draw the line? If, in a family dispute, you are struggling to discover where the husband hid the assets and you are advising the soon-to-be ex-wife that you can't disprove that he is the pauper he claims to be because the Maserati is one that his father lent him and his condo actually belongs to the father's company, should you advise her to settle? Is this pressure that is undue? This is not an easy decision. The important thing here is not that its common sense not to browbeat your client; the important thing is what happens when a disgruntled client later on says I never intended to plead guilty or I never wanted to settle under adverse circumstances. The refrain that 'I am as innocent as this driven snow, it is my counsel who was in a hurry who demanded that I plead guilty' is not a fiction. Particularly, in *pro bono* matters where you may not have an attorney present, there may be a credibility contest between you and your erstwhile client. Part of the way you protect yourself, of course, is never to consult alone but this is an area where it seems to me that prudence dictates that you need to keep a paper trail of your encounter with the client and if you ever are alone with the client, even more so, in order to rebut allegations of unprofessional conduct at a later time.

There is a new twist to the question of illegally getting and then using privileged information. We all know about the brown paper envelope that appeared mysteriously under the door of the attorney's office on the Monday morning and provides all the dirt on the adversary. How do you deal with it? The code says that you cannot use that information and you also have to disclose the fact that you

have got it to all parties involved so there are no surprises to any party.[60] You can use the material if it comes to you in later on in a legal fashion. But if you have illegally obtained information you need to know that you cannot use it and you have to share this knowledge. This of course presupposes that you have taken the trouble to apply your mind to the fact that it has been illegally obtained. How will you, as counsel, know? Do you interrogate your attorney on every document he sends to you? There may be instances where you simply do not know. But you cannot hide behind the fact that you didn't ask therefore you didn't know. When you get the damning prejudicial letter or the damning internal memo or, in particular the damning cell-phone recording, common sense is going to tell you that you need to interrogate the source in order to make sure that you do not make yourself inadvertently complicit in the illegal procurement of privileged information.

Conflict of interests amongst clients is regulated in the code which replicates injunctions with which you are familiar; ie, appearing for multiple Accused persons and so forth.[61]

The is nothing new in the code about *ex parte* disclosures, which in effect codifies existing case law.[62]

[60] Code: 61.10
[61] Code: 63
[62] Code 61: The case law is extensive; eg: Incorporated Law v Bevan 1908 TS 724; Schoeman v Thompson 1926 WLD 282; Estate Logie v Priest 1926 AD 312 at 323; Power N O v Bieber & Others 1955 (1) SA 490 (W); Ex Parte Hay Management Consultants (Pty) Ltd 2000 (3) SA 501 (W); Ulde v Minister of Home Affairs 2008 (6) SA 483 (W) At [36] ff.

G: SERVICE IN THE PUBLIC INTEREST

The Justification for the existence of the profession

The fourth organising principle is service in the public interest. Now don't make the mistake of subsuming 'the public interest' with *pro bono* work. Moreover, do not confuse 'the public interest' with the initiatives which you as an individual or the Bar institutions have taken to advance transformation. Yes, these actions are done in the public interest but what we are talking about here is the normative content of the profession *per se*.

The very profession of Advocacy justifies itself on the grounds that it exists in order to serve the public interest. It's not linked to a particular programme which has a social significance or a political significance or any other kind of significance. It is of the essence of the profession. And it is in that context that you have a set of new rules about support for the judicial process and your duty to the court along with protecting your client's interests. These injunctions are now express whereas previously these duties were implied, ie counsel must not abuse the process and must promote expeditious litigation.[63]

On the issue of support for the process of court and not abusing it, I want to say something from the point of view of the Bench. Speaking for my colleagues at the Johannesburg High Court, we have a growing appetite to be more interventionist with chancers and you can expect that appetite to result in a more critical view

[63] Code: 64

than you may have been accustomed to over the years, in regard to wasting time, taking pointless technical points and generally kicking for touch. Punitive costs are going to flow and referrals of counsel for professional misconduct are going to hang on this hook in the code. For example, the days of indulging professional debtors being sustained by artful counsel are over. I mention this in the context of case management, another novelty. The Rules Board has published amended rules to provide for case management for comment.[64] Case management is a part of our court practice which has as its principal aim the reduction of time in court, which will demand a narrowing of the issues and generally being constructive about getting the dispute resolved. The ethical rule in the code needs to be seen in the context of that developing ethos.

Counsels Fees

What remains is the issue of fees of counsel. This is obviously an area where most of you will be vulnerable to attack if someone is unhappy with what you have done.

What you need to bear in mind is that the regulation of fees in this Code is not to be confused with a tariff, a topic about which the LPC will in due course introduce regulations. There is no point in discussing the implications of a tariff now; I am simply alerting you to the fact that the quantification of fees and rates has not yet begun and obviously that's going to have a huge impact on everybody.

[64] Draft rules for comment are at the time of writing in circulation for comment on Uniform Rules of Court 30A, 36, 37A.

For the most part, what is in the code shall be familiar to you. The norm of the reasonable fee – that's the phrase used in the Code – is extracted from the GCB text and it replicates what you will be familiar with from the Red Book; ie computing a fee must take into account the complexity, the amount of work involved, your own seniority, the importance and so forth. Those norms remain unchanged. [65]

There are however twelve innovations that I draw to your attention. Except for a few tweaks, what is in the code reflects the GCB input.

In the same way that the duty of diligence included implied undertakings that you give when you accept a brief, when you accept a brief there are *implied default terms* for how you are going to get paid. [66]

At the moment, it is only the two Bars in Gauteng which apply a 97-day rule. The rest of the country is on 30 days. You will be glad to know that our colleagues in the rest of the country stood up and the 30-day rule has triumphed. The default position will be that payment is due in, effectively, 37 days later. [67] The GCB is at the time of writing seeking to apply a 30-day rule earlier than the coming into force of the Code.

[65] Code: 25; Red book: 7.1
[66] Code: 26.6
[67] Code: 26.6.1

There is a new rule, which deals specifically with juniors of less than five years standing.[68]. This rule says that junior counsel of less than five years standing are in a *vulnerable class* and that in relation to the attorney's obligation to pay their fees, they must negotiate and agree on fair, market-related fees and they must pay up promptly. This is an astonishing intrusion into a section of the code on counsel's ethics which imposes a duty on attorneys, who are not only made personally liable for counsels' fees, but are expressly told to pay up early for juniors up to five years of seniority, and not to offer payment to them at discounted rates. No doubt this will be very welcome for the junior bar.

Contingency fees are referred to by alluding to the Contingency Fees Act.[69]All the rules which hitherto exist in the Red Book that impose on counsel additional duties or duties duplicated from what is in the Contingency Fees Act are abolished. In future, if you take a brief on contingency the only place you would look at to know what you are supposed to do by way of concluding an agreement, is the Contingency Fees Act. That is a useful bit of tidying up.

There is an anomaly between the *pro bono* rule and section 92 of the LPA. [70] The *pro bono* rule says, once you accept a *pro bono* brief you cannot afterwards change the nature of the brief and earn a fee. There is a self-evident ethical principle involved here. Not all briefs on *pro bono* are going to result in any money changing hands. But

[68] Code: 26.6.2
[69] Code: 28.
[70] Code: 27; section 92 of the LPA.

section 92 of the Legal Practice Act says that, *ex lege*, when a lay litigant concludes a contingency fees agreement with an attorney and a knock-on agreement with counsel, there is a deemed cession of the claim for the costs order. This provision does not sit well in regard to the approach in respect a *pro bono* brief. What does this mean in real life? If you are appearing *pro bono* in a criminal matter it doesn't matter because there are no costs orders to be had. But there will be matters which could be offered *pro bono* and could also be dealt with on a contingency brief basis. It seems to me that there are two points to be made. If you are offered the brief *pro bono* and it's a civil matter, and it will, if it runs its full course, end up with a costs order, and you could get the costs order if you were on a contingency basis, is there any reason why you do not say to the attorney who is offering you that, I will take it on contingency not *pro bono*? *Prima facie*, (remember what I said about the cab rank rule) you are not entitled to refuse a *pro bono* brief if it is in your field of expertise. But is your counter-offer to take it on contingency, a refusal of the *pro bono* brief? My sense of it is that it is not, and if that view is wrong, the code must be changed to eliminate an absurdity. To a large extent, whether you are ever going to be placed in that position, will depend on the attorney's awareness of this distinction, (assuming this does not get tidied up when revisions are made to this Code in due course). Common sense tells us that if you are going to do *pro bono* type work where contingency is applicable, it would make sense to have it done on that basis rather than on a pure *pro bono* basis.

Then moving on to our old favourite, collapse fees, which has kept the Johannesburg Bar Council Fees committee busy for several years: the rule in Johannesburg – and interestingly, it was a local rule, not a Red Book rule – says that if you are asked to reserve a month or months ahead and you want to be secured against being idle

because the matter collapses before then, you must in writing agree with your attorney now, when you accept the obligation to reserve those days, a collapse fee agreement in which exactly what is to be expected by way of payment is set out.[71] When this was debated in the GCB team, only the Johannesburg contingent favoured an express provision that the agreement be in advance of the eventuality of collapse. Colleagues around the country could not see the point in having that agreement beforehand, which means that when you come to trial and the month you have set aside collapses on the night before the matter begins, and you then say to your attorney: 'I would now like to negotiate with you a collapse fee', what is likely to happen? How do you negotiate then? The Code reflects the GCB submission, which was the consensus view from Bars around the country. My sense of it is that it will be foolish to apply this rule in that way. The very point of a collapse fee is to protect yourself against a future disaster. You do not wait until your house is burning down before you phone an insurer. And whatever interpretation is placed on the code, in my view, the prudent practice management rule is to agree upfront. One of the reasons why this is important is that there is an implicit contradiction with code 3.12, which is not in the fees section but is tucked away in the general chapter. It is not obvious the two injunctions were understood to have an impact on one another. Rule 3.12, which is brand new, says that you may not make 'unreasonably timed demands' for payment to a client.[72] So let's just look at that. Mainly, this rule is going to affect the attorneys, but obviously counsel are also implicated. If an attorney has been doing work for a commercial

[71] Code: 26.6.3; see also Fluxmans Incorporated v Lithos Corporation of SA 2015 (2) SA 295 (GJ) on the practical application of a collapse fee arrangement.
[72] Code: 3.12; section 35 of the LPA. This obligation falls mainly on the attorneys. For a perspective on how that section functions in respect of attorneys see: "*Aspects of the Legal Practice Act- Ratcheting up Accountability*" an address by Sutherland J to the Gauteng Law Council 7 October 2017; accessible at the Johannesburg attorneys Association website: www.jaa.org.za

client for some time, or an entrepreneur, and everything has been hunky dory on previous occasions, and so he does not ask for cover well in advance, and when it's a week before the trial and he says to his client: 'I would like a million Rand in my trust account to cover the costs of going to court' for a fortnight, or a month whatever the case might be, is the client going to say, that is an unreasonably timed demand? And then, if so, what are you as counsel going to do? There is a procedure to facilitate the LPC to intervene to determine if the demand is unreasonable; but, how long might that take to achieve? The attorney is committed to run the case during that period, you have accepted the brief to be available under your duty of diligence and you are keeping yourself available. What's going to happen if the attorney does not or cannot pay? The code provides that if an unreasonably timed demand is made for money, you may not refuse to perform the mandate even though you are not secured in funds. Your reliable attorney with whom you have worked for years, who has been let down, is going to come to you and say, I have been caught in a snare, I have briefed you to do this work for a month, I don't have the money to pay and neither of us can escape from our obligations in terms of this mandate. Now this is a horror story against which you need to protect yourself at a practical level. It's tricky because it involves how you manage relationships with your stable of regular attorneys. When you get briefed by someone you have never heard of before, there is always a bell that rings to tell you to be extra alert and make sure that everything is going to be in place. But when you have got your usual stable of attorneys in whom you can place confidence, is it still safe to do so? If you get a brief on a matter of substance, and you want to guard yourself against untimely demands, what is appropriate? Do you in January, when you get the brief that you are asked to reserve time for in August, say to your attorney, I am happy to

take this brief, I am going to reserve these days you asked me for, but I want you to furnish me, in writing, confirmation that you are in funds in order to pay my fees. Is that appropriate? I am not here to prescribe a solution, but the problem is an acute one. It's not one that you can resolve by making a decision on your own and, in relation to that kind of danger, is seems to me that practitioners need to take a view about how you are going to manage it.

There is another new rule, which is the little brother of the double-briefing rule. If you reserve next Wednesday for a trial and it is settled tonight you are released and you can charge your reserved fee - or can you? The new rule changes the position radically.[73] Under the new rule if it fortuitously happens that you get a brief in court for that day, then you cannot get paid for both matters. Moreover, in order to get paid for the day that you have reserved and for which you do not get another court brief, you have to give a certificate to the attorney stating that you did not get a court brief on that day. That applies to trials, and applications – any court brief. Textually, it would include the noting of a judgment too, but let us assume that is excluded. To illustrate the difficulty, I take a simple example: you are released from a trial and you take up an opposed motion of an elementary nature, or worse for the juniors, you end up going with two or three unopposed motion matters on that same day to court that you had initially been briefed in a trial. You are in court. You cannot therefore charge for the trial that you had reserved. To take another example: You have reserved for a trial for which you are going to earn X, it settles, then you are then offered an unopposed brief on that day and in order not to sacrifice your opportunity to say that

[73] Code: 26.6.5

you were not in court on that day and to be able to give a certificate you refuse to accept an unopposed court brief: is that violating your cab rank rule? On the face of it, yes. If you have decided that you are not interested in motion court and you are purely a trial practitioner, then you will have no trouble in saying: I do not go to motion court, thank you very much. The bloke in the chambers next door to you who does go to motion court under the same circumstances, would have to take that brief. You are going to have to make adaptations. A very keen look at this rule is needed to see just exactly what the parameters are. I am not going to try and explore all the permutations but it is clearly a rule that is going to give trouble simply because it is unpopular and it runs against existing common practice. This innovation articulates a perspective of the profession that is hostile to what counsel has been accustomed to and gives voice to a belief that counsel are exploiting fee-earning opportunities unfairly.

In the existing Red Book rules there is a provision for charging interest on overdue fees.[74] I am not aware of anybody who has ever taken the trouble to do so because the administration in trying to work that out is usually not worth the bother. In the Code, it is again provided for.[75] If you are going to agree to interest payments on overdue fees, it obviously has a direct practice management implication because of the kind of accounting system you apply, whether it is electronic or manual. You have to cater for the VAT implications on interest paid and so forth.

[74] Red book rule: 7.7.8
[75] Code: 26.6.6

A new rule provides that you may choose to give credit to your attorney if he doesn't pay you on the due date.[76] Now this is not really new, but it is new in a way, because under the current Red Book regime if your attorney did not pay on the 97th day and said, I am awfully sorry I am in trouble but I can pay you in six months' time or I can pay you in instalments, you are obliged to say the rules of my Society forbid me to conclude such an agreement. You would have to go to the fees committee who will consider your proposal and decide whether or not it should be allowed. And the fees committee will say to you, what do you want to do and ask the attorney to motivate why terms should extended to pay. There would be a ruling. If the attorney gets an extension of time to pay, that is exactly the same thing as granting credit. What is missing from the code, which is more important than you might initially think, is that there is no room for the Bar Council to play nanny anymore. You cannot hide behind the Bar Council and say, I would like to give you credit but the Bar Council will not allow me. Now you are on your own and particularly for junior juniors, it means that, without the nanny protection, you need to prepare yourself to deal with such overtures. The best way to deal with these things is to have a default position that you want to rely on in order to deal with it, because if you get caught wrong-footed one tends to be nice and say yes to everything. So, if there is going to be a risk of you having to grant credit, (and there may be good grounds, after all, we are not talking only about an example of an unreasonable demand) you need to have in place a system which suits you and upon which you are prepared to offer credit to your attorneys. Again, I mention the accounting administration implications for which you need to make provision. I alluded earlier to the shift in emphasis in the code away from the cosiness

[76] Code: 26.6.1

of the Bar conventions. Once again, you can see reflected in this change, the trend of the times in terms of which counsel are more and more exposed to the laws of real life and the trade union dimension of the Red Book rules have been either watered down or eliminated entirely. The mantle of the Bar's protection is gone and counsel will have to be mature about how they deal with the business dimension of practice.

Another old favourite is the blacklist, which is retained.[77] An interesting innovation that has been made is that now instead of being circulated only to counsel, the blacklist gets circulated to all legal practitioners. So, every firm of attorneys in the country will know that Smith & Jones has defaulted, not only counsel. Whether that level of embarrassment will make the blacklist work any better, than at present, is something you can all decide for yourself. My own sense of it is that attorneys who default are incapable of being embarrassed and the greater exposure as a defaulter is unlikely to make any material difference. Whether there is any point in having the blacklist remains as much a controversy now as it ever was. And that throws up something which has been bubbling underneath ever since the blacklist enforcement rule was abandoned in 2001, ie no counsel would take any work from a blacklisted attorney. That is simple old-fashioned collegiality. If you can live with yourself taking a brief from a blacklisted attorney, when your neighbour in chambers, has been bilked by that attorney, and if you can walk through the reception with that attorney who owes your colleague fees and expect your relationships within the Bar to be preserved, well, good

[77] Code ..

luck to you. Absent collegiality, the blacklist does not work. It is a specific exception to the Cab Rank Rule that you can refuse a blacklisted attorney's brief.[78]

The last thing I want to say about fees relates to fees enquiries. I am not dealing with the procedures themselves, because they have yet to be set up in their new form and we are not sure how it is going to work because it is subject to negotiation. The current position is this: if your attorney or the client complains about a fee, you will report it to the fees committee, an Ombud will look at it, if that doesn't result in anything useful, there will be a fees committee enquiry, with two counsel and one attorney presiding, to decide what is payable, if anything. And if you are unhappy with that or the client is unhappy with that, then there's an appeal to the GCB who will establish an *ad hoc* appeal tribunal. Now what the code does is abolish that second step; ie no more appeals. What is expressly provided for now is that after that intial enquiry, whether as you currently know it under the fees committee and the Bar Council, or under some statutory formation which could be created in a year or so, the only remedy for anybody disgruntled with the outcome is a review.[79] This shall be a proper review under the Promotion of Administrative Justice Act 1 of 2000 (PAJA). Thus, after an initial enquiry, you are straight into litigation. So, one of the things that you need to bear in mind if you are vulnerable to that kind of complaint, is that your risk of having to engage in litigation (as a respondent more so than as an applicant) is heightened. The really skullduggerist client, or a professional debtor, is almost certainly not going to take the fees committee, in whichever guise it is, at its word and is likely to have a punt at a review. You might think that you need to have a litigation kitty to which you

[78] Code: 32.1.7
[79] Code: 33

can appropriate part of the fees, so that if you do have to litigate, you can do so without discomfort. Remember, every matter that runs *pro amico* always incurs real disbursements too. This might be area in which the Societies of Advocates may wish to put a collective insurance scheme in place.

H: CONCLUSIONS

Many of the topics and issues I have traversed carry implications for prudent practice management which obviously boosts your overheads. In addition to that, you need to bear in mind that, for the privilege of practising, you are going to be paying fees to the LPC as the primary regulator. And if you do not pay its levies, the code says that is professional misconduct.[80] I hope this survey has given you a useful sense of what you have to look forward to and has offered you an idea of how the parts fit together to address the four organising principles to which I have made reference. Good luck to you all.

Roland Sutherland.

[80] Code: 3.16