

# RULES OF THE SOCIETY OF ADVOCATES OF NAMIBIA

(updated until 2017)

## 1. Definitions

In these Rules unless the context otherwise requires:

- 1.1 Words in the singular include the plural and words in the plural include the singular;
- 1.2 Words denoting the masculine gender include the feminine;
- 1.3 “*Constitution*” means the Constitution of the Society of Advocates of Namibia;
- 1.4 “*Society*” means the Society of Advocates of Namibia as established in terms of the Constitution;
- 1.5 “*Secretary-General, President, Vice President and Treasurer*” mean the member elected as such from time to time in terms of the Constitution;
- 1.6 “*Senior Counsel*” means Senior Counsel as defined in Rule 9.1;
- 1.7 “*Junior Counsel*” means Junior Counsel as defined in Rule 9.2;
- 1.8 All other terms and definitions contained in these Rules shall bear the meaning assigned to them in the Constitution and without derogating from the generality of the foregoing, reference is made to the following definitions contained in section 2 of the Constitution:

- 1.8.1 “*advocate*”;
- 1.8.2 “*associate member*”;
- 1.8.3 “*Bar Council*”;
- 1.8.4 “*High Court*” ;
- 1.8.5 “*legal practitioner*”;
- 1.8.6 “*member*”;
- 1.8.7 “*pupil member*”;
- 1.8.8 “*Supreme Court*”.

## **2. Interpretation**

- 2.1 In case there is any dispute as to the interpretation of any of these Rules the interpretation given to any such Rule from time to time by the Bar Council shall be binding on all members;
- 2.2 These Rules are designed for the guidance of members of the Society. They are not intended to be exhaustive nor to cover every point that may arise in the course of practise of the profession of an advocate;
- 2.3 In case of doubt to the proper course of conduct to be followed by a member, the member is obliged, depending on the circumstances, to obtain either a ruling from the Bar Council or the advice of a member of the Bar Council or of a senior member of the Society;

2.4 The Bar Council shall, in exceptional circumstances, have the power to depart from the provisions of these Rules.

2.5 These Rules shall be interpreted and applied subject to the provisions of the Competition Act, 2 of 2003, where applicable.

### **3. Knowledge of Rules**

It is the duty of all members to have knowledge of these Rules in their relationship with legal practitioners and their fellow members and in their general professional conduct.

### **4. New Members and Manner of Address**

4.1 A new member should introduce himself or herself to every other member of the Society unless he or she has already done so in his or her capacity as a pupil member. Pupil members also have this obligation. This should be done by visiting each member in his or her chambers.

4.2 A member must not address or refer to another member as “Mr” or “Ms”. Surnames should be used in those cases where members are not on a first name relationship.

### **5. Appearance in Foreign Courts**

Members appearing in a Court outside Namibia should observe the Rules of etiquette and professional conduct prevailing in the Courts of Namibia as well as those of the Court in which he or she is appearing, but in the case of any conflict

a member must comply with the Rules of the Court in which he or she is appearing.

**6. Communication to and with the Society**

Any communication, application or reporting to be done to the Bar Council in terms of these Rules shall be in writing and addressed to the Secretary-General.

**7. Misconduct**

With regard to misconduct other than that of a professional nature the duty of a member is no higher than that of an ordinary citizen.

**8. Reporting Misconduct to the Bar Council**

If a member has reasonable grounds for believing that another member has been guilty of unprofessional conduct it is his duty to report the matter to the Bar Council, unless the information is privileged and such privilege is not waived.

**9. Seniority**

9.1 Senior Counsel are:

9.1.1 all members holding letters patent (or letters of appointment) from the President of the Republic of Namibia, the British Monarch, the President or State President of the Republic of South Africa or any other competent authority entitled to confer that status in a foreign country which has a legal system comparable to that of Namibia;

- 9.1.2 all members holding letters of appointment of the Bar Council of the Society of Advocates of Namibia duly appointing them as Senior Counsel in terms of these Rules.
- 9.2 Senior Counsel shall, unless the Bar Council otherwise directs, rank in seniority in accordance with their patents or letters of appointment. All other members are Junior Counsel;
- 9.3 Seniority of Junior Counsel in Namibia shall be reckoned from the time when he or she became a member of the Society of Advocates of Namibia (or its predecessor) provided that any period during which he or she ceased to be a member shall be disregarded for this purpose. Provided further that if any member of the Society of Advocates of Namibia (or its predecessor) was a member of a Society of Advocates or barristers or of a referral Bar in another country, his/her date of membership of the Society as aforesaid, shall be ante-dated for a period equal to the total of any period during which he/she was a member of another Society or Bar as aforesaid.
- 9.4 Members shall give recognition to Senior Counsel from other countries who hold letters of patent or appointment issued by any authority referred to in paragraph 9.1.1 in any proceedings in Namibia or elsewhere. Their seniority shall be determined in accordance with the date of appointment as Senior Counsel;
- 9.5 The seniority of Junior Counsel from other countries shall be determined in accordance with the date when the relevant person became a member of a Society of Advocates or barristers or referral Bar in such other country (and further subject to 9.3 above). Members shall give recognition to such seniority in any proceedings in Namibia or elsewhere.

- 9.6 Seniority may be waived by any member in any proceedings provided that no Senior Counsel may waive his or her seniority to a Junior Counsel.

**10. Application for Senior Counsel Status (“Silk”)**

- 10.1 The designation of Senior Counsel provides a public identification of members whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as advocates and advisers, to the good of the administration of justice;
- 10.2 As an accolade awarded on the basis of the opinions of those best placed to judge members' qualities, the designation of Senior Counsel also provides a goal for the worthy ambition of Junior Counsel, and should encourage them to improve and maintain their professional qualities;
- 10.3 The system for the designation of Senior Counsel must be administered so as to restrict appointment to those members whose achievement of the qualities set out below displays and presages their ability to provide exceptional service as advocates and advisers in the administration of justice;
- 10.4 The Bar Council – specially constituted as set out in paragraph 10.5 below – shall be entitled to award the status of Senior Counsel, for and on behalf of the Society, to any member of the Society on application and to issue a letter of appointment under the hand of the President of the Society conferring such senior status. In the case of

the recipient of the status being the President of the Society, such appointment shall be made under the hand of the Vice-President of the Society;

10.5 For the purposes of the consideration of, and decision on, application for Senior Counsel, the membership of the Bar Council shall be extended to include all members (as defined in the Constitution) who hold Senior Counsel status, which Senior Counsel shall be deemed to be full members of the Bar Council for that specific purpose;

10.6 Applications for any particular year shall be considered annually at a date to be determined by the Bar Council;

10.7 A Junior Counsel who wishes to make application for Senior Counsel status shall do so in the manner set out below:-

10.7.1 He or she shall first approach all other Junior Counsel who are members of the Society and who rank in seniority above him/her and seek their approval for the said application. The application should expressly state that the foregoing requirement has been complied with. Should any of the said Junior Counsel object to the application, they are entitled to convey their objection to the Bar Council in writing (together with their reasons for objecting) within 7 (seven) working days after they have been approached as aforesaid. The Bar Council will deal with such objection in any manner it may deem fit;

10.7.2 The said applicant shall thereafter submit a written application for the conferment of Senior Counsel status to the Bar Council;

10.7.3 The application shall contain information on the aspects to be considered by the Bar Council as referred to in subparagraph 10.8 below and generally concerning the following aspects:

- (a) Legal learning acquired;
- (b) The history and nature of the practice of the applicant and the experience gained by the applicant in his/her practice as an advocate;
- (c) The level of professional skill and distinction attained by the applicant;
- (d) The leadership provided and contributions made by the applicant at and to the Society, any other referral bar, as well as the practice and the administration of justice in Namibia generally.

10.8 In taking a decision on the application, the Bar Council (as constituted for that specific purpose) shall have regard to the following qualities which are required to a high degree for appointment as Senior Counsel, which are:-

10.8.1 Learning: Senior Counsel must be learned in the law so as to provide sound guidance to their clients and to assist in the judicial interpretation and development of the law;

- 10.8.2 Skill: Senior Counsel must be skilled in the presentation and testing of litigant's cases, so as to enhance the likelihood of just outcomes in adversary proceedings;
- 10.8.3 Integrity and honesty: Senior Counsel must be worthy of confidence and implicit trust by the judiciary and their colleagues at all times, so as to advance the open, fair and efficient administration of justice;
- 10.8.4 Independence: Senior Counsel must be committed to the discharge of counsel's duty to the court, especially in cases where that duty may conflict with clients' interests;
- 10.8.5 Disinterestedness: Senior Counsel must honour the cab-rank rule, namely the duty to accept briefs to appear from which they are competent and available, regardless of any personal opinions of the parties or the causes, and subject only to exceptions related to appropriate fees and conflicting obligations;
- 10.8.6 Diligence: Senior Counsel must have the capacity and willingness to devote themselves to the vigorous advancement of the clients' interests;
- 10.8.7 Experience: Senior Counsel must have the perspective and knowledge of legal practice acquired over a considerable period. As a general criteria, and save in exceptional circumstances, an application shall not be favourably considered unless an applicant has been a member of the Society (or a member of a Society of Advocates or barristers or referral Bar in another

country) for at least 15 (fifteen) years. Mere length of period in practice shall not be determinative;

10.8.8 It is expected (without being exhaustive) that the applicants' practice will demonstrate some or all of the following:

- (a) experience in arguing cases on appeal;
- (b) experience in conducting major cases in which the other party is represented by Senior Counsel;
- (c) experience in conducting cases with a junior;
- (d) considerable practice in giving advice in specialist fields of the law.

10.8.9 Senior Counsel will have demonstrated leadership in:

- (a) developing the diverse community of the Bar;
- (b) making a significant contribution to the Namibian legal practice and the administration of justice in Namibia.

10.9 Applicants should be aware that their applications will be the subject of distribution during the selection process and it will therefore be impossible to keep confidential the fact that an application has been made;

- 10.10 After receipt of the aforesaid application, the Bar Council shall refer the application to an existing or retired judge of the High or Supreme Courts of Namibia, who will be requested to comment on the suitability of the applicant as Senior Counsel and the application in general;
- 10.11 The Bar Council may, in its discretion, consult with as many other legal practitioners or members of the judiciary or other persons or bodies as it considers may be of assistance in considering the application;
- 10.12 The Bar Council may, in its discretion, consult with any of the persons from whom recommendations, objections or comments have already been received, for the purposes of further discussion, clarification or other assistance in its consideration of the application;
- 10.13 The Bar Council shall have an unfettered and exclusive discretion to unconditionally or conditionally grant or refuse the said application. It shall, however, only take such decision after taking into account all objections, recommendations and comments received as referred to above;
- 10.13.A Any objection referred to in Rule 10.7.1 as well as any specific consideration adverse to the applicant that may be entertained against him or her (not relating to the general criteria which should be dealt with as provided for in rule 10.7.3 and rule 10.8) should be conveyed to the applicant and the applicant should be afforded the opportunity to respond thereto either orally or in writing, before a decision is made regarding his/her Silk application:

- 10.14 The decision of the Bar Council on any application for Silk shall not be subject to any internal appeal of the Society, subject however to Section 15.3.A. of the Constitution.
- 10.15 Canvassing the support of any members for the application for Silk status (whether directly or through the agency of any other member or other persons such as a legal practitioner) is prohibited and should result in the refusal of the application;
- 10.15.A The minutes of the Bar Council (constituted as aforementioned) relating to Silk applications are to be kept separate from any other minutes of the Bar Council and shall not be circulated to any member other than those serving on the Bar Council (constituted as aforementioned), except on request from the applicant in question. Provided that in the case of a review application having been made as contemplated in Section 15.3 A of the Constitution, copies of the minutes in respect to the decision taken by the Extended Bar Council not to confer Silk on the applicant, shall be made available to the Society in General Meeting;
- 10.16 In the event of the Bar Council granting the application, a letter of appointment as Senior Counsel shall be issued to the applicant, whereafter the relevant member shall hold the rank and dignity of Senior Counsel with all obligations and privileges to be associated therewith:
- 10.16.1 Including the privilege and obligation to robe in silk during all court appearance where robing is required;
- 10.16.2 The right to use the letters "SC" (denoting "*Senior Counsel*") after his or her name.

- 10.17 Senior Counsel, by seeking and achieving appointment, undertake to use the designation only while they practise as a member of the Society or as a member of a Society of Advocates, barristers or of a referral Bar in another country or during temporary appointments in a legal capacity to a court, tribunal or statutory body, or in retirement from legal practice.

## **11. Adherence to the referral principle**

- 11.1 Members shall at all relevant times practice as an advocate as defined in the Constitution and shall adhere to the referral principle, save as expressly provided for otherwise in 11.2 below;

- 11.2 A member –

11.2.1 shall at all times have a valid exemption certificate issued by the Law Society of Namibia in terms of section 67 (2) of the Legal Practitioners Act, 1995, whereby the member is exempted from the requirement of holding a fidelity fund certificate;

11.2.2 make the following written declaration in order to obtain such certificate as contemplated in section 67 (2) (a) of such Act:

**“I shall not, in the conduct of my practice:**

- (a) accept or execute any instructions to render professional services from any person other than a legal practitioner practicing with a Fidelity Fund Certificate, the Attorney-**

**General, the Government Attorney, the Legal Aid Directorate of the Ministry of Justice, the Registrar of the High Court (in *amicus curiae* and *in forma pauperis* matters), a legal practitioner practicing at a law centre or a legal practitioner duly admitted as such and practicing in a country outside the Republic of Namibia;**

**(b) accept payment or receive monies for such professional services rendered for any person other than a person or entity contemplated in sub-paragraph (a); and**

**(c) accept, receive or hold monies for or on account of another person.”**

11.2.3 shall at all times adhere to the terms of the aforementioned declaration.

## **12. Duties of Members in connection with Briefs & Briefs Generally**

12.1 Members must be briefed to render services:

12.1.1 Mindful of the content of the written declaration referred to in paragraph 11.2 *supra*, a member may render professional services for reward only if briefed to do so.

12.1.2 A member may be briefed orally, but it is desirable that he/she receives a written brief. A member may however

insist on a written brief and may refuse to continue to act unless he/she is furnished with a written brief.

- (a) In the case of *pro deo* or *amicus curiae* defences a member is briefed when the Bar Council, or the Court, or the Prosecutor-General, allocates the defence to him.
- (b) A member who is briefed at any stage of a case (e.g. to draw the particulars of claim or other document initiating the proceedings or to draw pleadings or settle affidavits or to appear in any interlocutory application in any proceeding) thereby receives a special retainer and is, therefore, ordinarily entitled to be briefed at every stage throughout that case, unless he/she is given express notice to the contrary when receiving such first brief.
- (c) Rule 12.1.2(b) does not apply when:
  - (i) a member is briefed on a purely formal motion which does not necessitate the merits of the case being laid before him. (An application for leave to sue by way of edictal citation is not regarded as a purely formal motion).
  - (ii) consolidation of actions is ordered in terms of the Rules of Court.

- (iii) two members have been briefed: the senior need not be briefed in relation to requests for further particulars, interlocutory applications or the drawing of documents for such applications.
  
- (d) Subject to what is contained in Rule 12.7 below, a member who has appeared for a party in any proceeding, is not entitled as of right to a brief on appeal.
  
- (e) If a member is offered a brief of which another member is entitled by virtue of a retainer, and such other member states that he/she has not given up his/her claim to the brief, the member to whom the brief is being offered must ascertain from the instructing legal practitioner why the brief has not been offered to the member who is normally entitled to it.
  
- (f) With reference to Rule 12.1.2(e) unless a sufficient explanation is offered, a member offered the brief must refuse to accept it, or, if he/she has received it, return it. In considering what is a sufficient explanation, the following shall apply:
  - (i) The wish of the lay client to be represented by a member other than the member so entitled is a sufficient explanation.

- (ii) If the instructing legal practitioner explains that he/she is not prepared to pay the fee required by the member normally entitled to the brief, the member to whom the brief is offered must first enquire from the member normally entitled to the brief whether that is in fact so.
  
- (iii) Change of an instructing legal practitioner is not in itself a sufficient explanation.

12.2 It is improper for a member:

12.2.1 to accept a brief unconditionally; or

12.2.2 to retain a brief previously accepted by him or her;

if the circumstances are such that he or she should reasonably foresee:

- (a) that he or she will not be able to attend to the brief within a reasonable time; or
  
- (b) that he or she would have to surrender the brief for whatever reason; and
  
- (c) that the surrender of such brief could cause inconvenience and/or embarrassment and/or prejudice to:
  - (i) the client; and/or

(ii) a colleague who is to succeed him in the brief; and/or

(iii) the instructing legal practitioner.

12.3 A member should decline a brief – be it a specialized brief or otherwise – if he or she considers himself or herself not competent to accept the brief;

12.4 Any member is at liberty to say that he or she will not practise before a particular Court or tribunal without a special fee of a named amount. Where a special fee is required, the member should insist upon having, in addition to a reasonable brief fee, a special fee of constant amount for every brief before tribunals of the same class; but there is no objection to his or her having special fees differing in amounts for tribunals of different classes;

12.5 Subject to what is set out in paragraphs 12.1 to 12.4 above, a member is under an obligation to accept a brief in the Courts in which he or she professes to practise, at a proper professional fee, unless there are special circumstances which justify a refusal to accept a particular brief. In particular, every person who is charged before the Court has a right to services of a member in the presentation of his or her defence. Subject to what has been said above, it is the duty of every member to whom the privilege of practicing in Courts of Law is afforded, to undertake the defence of an accused who requires his or her services. Any action which is designed to interfere with the performance of this duty is an interference with the course of justice;

- 12.6 Subject to paragraph 12.7, an earlier brief, once accepted, takes precedence over a later brief, should any conflict arise in regard to the performance of such brief. Subject to paragraph 12.7, a member wishing to surrender an earlier brief in favour of a later brief shall do so only with the consent of both instructing legal practitioners;
- 12.7 If a member is briefed in a trial case such brief constitutes a retainer for the legal practitioner, by which the legal practitioner is entitled to the services of the member on appeal, provided the legal practitioner exercises this right within a reasonable time. When, therefore, a member is briefed in a trial action which is set down for the same day as an appeal under the above circumstances and irrespective of whether or not the brief in the trial action was the earlier brief, the brief in the appeal shall take precedence, save with the approval of the Bar Council. The legal practitioner in the appeal case has a preferent right to the member's services;
- 12.8 A member shall give his or her personal attention to all briefs. It is improper to hand on a brief received by the member to anyone else, except on the instructions of the legal practitioner;
- 12.9 It is improper for a member to hold a brief for other members, except in the case of illness, the intervention of unforeseen and unavoidable contingencies causing the latter's absence with proper cause or for any other reason which, in the opinion of the Bar Council, is good and sufficient in the circumstances. This shall include the absence of a member on Bar business;
- 12.10 Where it becomes reasonably probable that a member will be unable to personally attend to a brief, he or she must inform the instructing

legal practitioner at the earliest possible time, and request the latter's instructions as to what is to be done with the brief or return such brief.

12.11 A member shall not draw a bill of costs for any legal practitioner, but may give an opinion on any matter arising from the bill of costs, draw submissions in taxation disputes or appear before a taxing master;

12.12 It is not improper for a member to accept a brief to settle matters as opposed to a brief on trial;

12.13 Any member may sign any pleadings drafted or settled by him or her.

12.14 Retainers

(a) No retainer shall be binding on a member unless given in writing.

(b) A retainer is the retainer of the lay client.

12.15 General Retainers

(a) No general retainer shall be binding for more than one year from the date of receipt thereof.

(b) A member is not bound to accept a general retainer.

(c) A general retainer implies that:

(i) The holder will accept all briefs to represent the client who had retained them in which it is appropriate having

regard to his standing and the nature of the matter that he/she should be briefed if it is possible for him to do so;

- (ii) The holder shall not accept a brief from the client's opponent.
  
- (d) The holder's obligation under a general retainer does not require him to give up a brief which he/she has already accepted from another client, even if it is possible for him to do so.
  
- (e) A general retainer applies only to proceedings to which the client on whose behalf the retainer was given is a party. A general retainer on behalf of a body corporate or unincorporated body / entity does not apply to any proceedings to which the individual members or a member of the body and not the body itself are parties. A general retainer on behalf of a holding company does not in the absence of an express arrangement apply to proceedings in which a subsidiary company, and not the holding company itself, is a party.
  
- (f) A general retainer applies to a proceeding in which the client on whose behalf it is given appears separately, but not to a proceeding in which he/she appears jointly with another person.
  
- (g) The giving of a general retainer confers no authority on the member concerned. A brief must be delivered in order to authorize the member to take any step in a proceeding.

- (h) If, after the commencement of any proceeding to which a general retainer applies -
- (i) no brief or special retainer is delivered to the retained member within a reasonable time, or
  - (ii) the retained member is offered a brief on the other side and has enquired of the instructing legal practitioner acting for the lay client in such proceeding whether he/she is to receive a brief or special retainer, and has not received a brief or special retainer within seven days or has received an answer in the negative, the member may treat the general retainer as determined and with or without determining the general retainer may accept a brief or retainer from the party on the other side provided that: -
    - (aa) the non-delivery of a brief to a senior holding a general retainer on any occasion on which it is usual to instruct a Junior Counsel only and Junior Counsel only is in fact instructed, shall not operate to determine the general retainer of the senior.
    - (bb) where more than one Junior Counsel hold general retainers the delivery of a brief to one only of such counsel, on any occasion on which it is usual to instruct one Junior Counsel only and one Junior Counsel only is in fact instructed, shall not determine the general retainer of the other or others of such member. The same shall apply

where more than one Senior Counsel hold general retainers.

- (cc) the non-delivery of a brief or special retainer which the member has intimated that he/she cannot be required or ought not to accept shall not operate to determine a general retainer.

- (j) It follows from the above that the fact that the member who is offered a brief on behalf of a lay client knows that another member has a general retainer from that client, does not preclude the former from accepting the brief.

#### 12.16 Special Retainer

- (a) A special retainer implies that the member will take the brief if possible, and that he/she will not act for the other side. The acceptance of a special retainer does not oblige the member to accept the brief on dates for which he/she would not otherwise have been or have held himself available to accept briefs.
- (b) There is no obligation on the member to return a special retainer fee should he/she subsequently find it necessary to return his brief for any proper reason. The consideration for a special retainer fee is that the recipient will not take the brief for the opponent.
- (c) A member who has received a special retainer is entitled to a brief on every occasion on which such member is briefed in a proceeding to which the special retainer applies: Provided always that a special retainer does not entitle a senior to a brief on any

occasion on which it is usual to instruct a Junior Counsel only, and a Junior Counsel only has, in fact, been instructed. When more than one Junior Counsel has been retained, only one of such Junior Counsel is entitled to a brief on any occasion on which it is usual to instruct one Junior Counsel only, and one Junior Counsel only has, in fact, been instructed.

12.17 Reservation of Hearing Date

If a member, at the request of an instructing legal practitioner, has agreed to reserve a hearing date and has done so, he/she is entitled to charge a fee on hearing, even when no brief has been delivered, unless informed by the instructing legal practitioner a reasonable time beforehand that his services will not be required on that date. The specific entitlement to charge a fee of the above nature, is set out in Rule 22.2.7 below.

12.18 Representations to Public Officials

- (a) Members are permitted to accept briefs to make representations to ministers, officials or statutory bodies, but are not obliged to accept such briefs.
- (b) It is desirable that all interviews should take place in the presence of the member's instructing legal practitioner, except where this would stultify the purpose of the interview or would serve only to increase the costs unnecessarily and substantially.
- (c) For work of this nature a member should charge on the basis of his usual fees for ordinary work.

- (d) It is improper for a member in assessing his/her fee to have regard to any relationship, friendship or influence with or special means of access to the minister, official or body in question.
- (e) In general and unless there are good reasons to the contrary appointments for interviews should be arranged by the instructing legal practitioner and not by the member.
- (f) Information which is required to be conveyed from the minister, official or body concerned to the client should, wherever practicable, be conveyed by the instructing legal practitioner.
- (g) A member may make written representations to such persons or bodies. Such representations should ordinarily be in the form of a memorandum which may be signed by the member but should be forwarded to the person or body concerned through his/her instructing legal practitioner. It is undesirable for a member to conduct correspondence with such persons or bodies on behalf of the client and such correspondence should ordinarily be dealt with by the instructing legal practitioner.
- (h) It is improper for a member briefed in such matters:
  - (i) to seek to procure the exercise of a discretion or the grant of an indulgence to his/her client where such exercise or grant would be contrary to any law;

- (ii) to add his/her personal recommendation or approval to an application made by him/her on behalf of his/her client.
- (i) Where there is a provision in any law for the determination of a dispute by any kind of prescribed procedure, including but not limited to an adversary procedure or public hearing, it is improper for a member to make private representations on behalf of his/her client to the tribunal or any member of it instead of or in addition to the prescribed procedure, or to go behind the tribunal by making private representations to any minister, official or other body to whom the tribunal is required to report or to make recommendations.
- (j) The provisions of sub Rules 12.18 (e) – 12.18 (g) above shall not apply to dealings between members and the Prosecutor-General or Senior Public Prosecutor or members of their staff.

#### 12.19 Briefs from Spouse or Relatives

- (a) Generally is it not improper for a member to accept a brief from an instructing legal practitioner who is his/her spouse. There may, however, be circumstances in which it would be improper for a member to accept such a brief.
- (b) Save where a member is satisfied that his/her spouse is in no way concerned in the matter, a member should not accept a brief in any matter in which his/her spouse is the instructing legal practitioner on the opposite side. In this connection a member should always bear in mind the possible attitude of the lay client.

- (c) A member should not accept a brief in any matter in which his/her spouse is appearing as counsel or prosecutor on the other side.
- (d) It is not improper for a member to accept a brief in a matter where either or both of the member's parents are partners in the firm of instructing legal practitioners acting on the other side.
- (e) In all cases where a spouse or relative of the member is involved, whether on the same side or on the opposite side, and the member has any doubt as to the propriety of accepting the brief, he/she should obtain a ruling of the Bar Council as to whether he/she should accept the brief or not.

#### 12.20 Briefs Which Could Cause Embarrassment

- (a) No member can be required to accept a retainer or brief or to advise or draw pleadings if he/she has previously advised another person on or in connection with the same matter, and he/she ought not to do so if by reason of confidence imposed in him by such person, or if his acceptance of a retainer or brief or instructions to draw pleadings or advise would be inconsistent with the obligation of any retainer held by him/her and, if he/she received any such retainer, brief or instructions inadvertently, he/she should return the same.
- (b) A member is not obliged to accept a brief if he/she has previously accepted a brief to advise another person on or in

connection with the same matter. He/she is precluded from doing so:

- (i) if any confidential information having any bearing whatsoever on the matter in question was disclosed to him as a result of his first brief; or
- (ii) if it might reasonably be thought by the person first advised that, if the member were to accept the second brief, he/she would be prejudiced.

12.21 Opinion given to the other side

Where a member has given an opinion to one side and is not briefed to argue the case for that side, he/she is not necessarily precluded from taking a brief to argue the case for the other side. If he/she has been placed in possession of facts which would embarrass him in the conduct of the case he/she must refuse the brief. In all cases, however, he/she must obtain the permission of both instructing legal practitioners before he/she can accept the brief.

12.22 Members previously acting as Commissioner or Counsel in enquiry under the Companies Act

- (a) A member who has sat as a Commissioner at an enquiry held in terms of the Companies Act and has submitted the report on the evidence is not entitled to accept a brief on behalf of the State to prosecute any of the Directors or Officers of the Company for contraventions of the Act or for any offence revealed during the enquiry, nor is he/she entitled to accept a

brief for the defence of any person who gives evidence during the enquiry.

- (b) A member who has appeared for the Liquidator at an enquiry under the Companies Act is not permitted to accept a brief on behalf of any person charged with an offence connected with the Company in question.

12.23 Appeals

Where a member has held a brief for a party in any proceeding he/she is not entitled to accept a brief on appeal for the opposite side.

12.24 Where Counsel is a Director of a Company

A member who is a director of a company or a member of a close corporation must not accept a brief on behalf or against such company or the holding company of such company or a subsidiary thereof or corporation.

12.25 Where Counsel is a Member of a Local Authority Council / Regional Councils

A member who is a member of a local authority council or regional council shall not accept a brief on behalf of that local authority or regional council.

12.26 Where Briefing might be influenced

A brief should not be accepted if the member so briefed might reasonably be thought to have been in a position to exercise influence in the decision to deliver the brief to him.

12.27 Where Counsel is a member of a Voluntary Association

There is no objection, in general, against a member who is a member of a voluntary organization accepting a brief for such organization, but there may be special circumstances rendering it undesirable for a member to do so.

12.28 Arbitrations

(a) A member who acts as an arbitrator or umpire in an arbitration should obtain a brief from a person or entity referred to in Rule 11.2.2. Normally the legal practitioner who approaches the member to obtain his consent to act in such capacity should provide the brief.

(b) A member may not appear before an arbitrator unless briefed as contemplated by 11.2.2 above.

12.29 Review Matters

When acting for any tribunal or person whose decision has been, is about to be or may be attacked or questioned on review, a member may settle the formulation of the reasons for such decision, for the purposes of their disclosure either in affidavits filed in the review proceedings or in any other document supplying them, by expressing them in language which he/she regards as appropriate and

simultaneously indicative of their true meaning, as intended by the tribunal or person who gave the decision. A member may not, however, when setting the formulation of such reasons, in any material respect or to any material extent add to, subtract from or alter the true meaning of such reasons, as intended by such tribunal or person.

12.30 Curator *ad Litem*

- (a) A member who has been approached by a legal practitioner to act as *curator-ad-litem* should obtain a brief from the person or other such entity referred to in Rule 11.2.2 who nominated him/her to act in such capacity.
- (b) Where a member has been appointed *curator-ad-litem* in relation to any matter and the applicant's legal practitioner is thereafter blacklisted in terms of these Rules, the Curator, having been appointed by the Court, may not refuse to continue as such. His/her fees as Curator may be charged against and recovered from the estate. He/she may, however, approach the legal practitioner in question and ask him to apply to Court for the appointment of another Curator in his/her place.

12.31 Commissioner

A member who has been approached to act as a commissioner under the Companies Act or under the Commissions Act should obtain a brief to do so.

12.32 Senior and Junior Relationship

It is recommended that senior counsel be briefed with another senior or a junior in any matter in which, in the opinion of the senior counsel the circumstances warrant and make it desirable that another senior or junior be employed.

12.33 Double Briefing – Continuous Roll – High Court

Without, in any manner, derogating from the Rules pertaining to double-briefing, members are not permitted to accept more than one brief in respect of trials set down for the same week on the continuous High Court roll, irrespective of whether or not such matters in respect whereof the double-briefing is held are to be called before the same presiding judge.

**13. Duties of Members in connection with Litigation**

13.1 Duty to client:

13.1.1 According to the best traditions of the Bar, a member should, while acting with all due courtesy to the tribunal before which he or she is appearing, fearlessly uphold the interests of his or her client without regard to any unpleasant consequences either to the member or to any other person;

13.1.2 A member has the same privileges as the client of asserting and defending the client's rights and of protecting the latter's liberty by the free and unfettered statement of every fact, and the use of every argument and observation, that can legitimately, according to the principles and practice of

law, conduce to this end; and any attempt to restrict this privilege should be jealously guarded against.

### 13.2 Duty to the Court:

A member's duty to divulge to the Court material facts of which he has knowledge is governed on the one hand by his overriding duty not to mislead the Court, and on the other hand by his duty not to disclose to any person including in a proper case the Court itself, information confided to him or her as Counsel. The application of this principle in particular circumstances and the question of when a member may be said to have knowledge of facts may be difficult to resolve, and in such cases counsel should refer to the Bar Council for guidance.

*Note: It is difficult to formulate in concise terms counsel's duty to divulge facts to the Court more precisely. It seems that at any rate in opposed matters counsel's duty not to mislead the Court does not necessarily extend to correcting errors in the facts advanced by the other side. Thus according to Halsbury (4<sup>th</sup> Ed.) Vol. 3 at p. 619, para 1137 at note 9, counsel is not obliged to correct information given by the prosecution if the correction would be to his client's detriment. See also p. 659, para 1195. The duty of prosecuting counsel may be different: p. 623/4, para 1140.*

### 13.3 Duties regarding cross-examination of witnesses:

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

- 13.3.2 A member who is instructed by a legal practitioner that in his/her opinion the imputation is well-founded or true, and is not merely instructed to put the question, is entitled *prima facie* to regard such instructions as reasonable grounds for so thinking and to put the question accordingly;
- 13.3.3 A member should not accept as conclusive the statement of any person other than the legal practitioner instructing him that the imputation is well-founded or true, without ascertaining, so far as is practicable in the circumstances, that such person can give satisfactory reasons for his statement.
- 13.3.4 Such questions, whether or not the imputation they convey is well-founded, should only be put if, in the opinion of the cross-examiner, the answers would or might materially affect the credibility of the witness; and if the imputation conveyed by the question relates to matters so remote in time that it would not affect the credibility of the witness, the question should not be put;
- 13.3.5 In all cases it is the duty of the member to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person and to exercise his or her own judgment both as to the substance and form of the question put;

Note: As to the qualified privilege of Counsel see *Findlay v Knight*, 1935 AD, at p. 70 et seq.

See also: *Moolman v Slovo*, 1964 (1) SA 760 (W) and *Poggrund v Yutar*, 1967 (2) SA 564 (AD)

#### 13.4 Imputation of criminal conduct –

It is inadvisable to lay down what a member defending a client on a criminal charge may legitimately do in the course of his defence. He or she however is not entitled, wantonly, or recklessly to attribute to another person the crime with which the client is being charged, nor, unless the facts or circumstances given in the evidence, or rational inferences drawn from them, raise at the least a not unreasonable suspicion that the crime may have been committed by the person to whom the guilt is so imputed;

#### 13.5 Undesirable conduct [professional as opposed to personal interest]–

It is undesirable that Counsel should become personally, as opposed to professionally, associated with his or her client's interest. A member should not for instance stand bail for the client, not take part in a public movement for the client's reprieve or in support of the client's cause.

#### 13.6 Postponements –

Where a member has accepted a brief to appear in any forum on a particular date or dates, it shall be improper conduct for the member to seek or arrange a postponement of the matter or to cause the hearing thereof to be deferred in order to suit the member unless:-

- (a) The member has obtained the consent of the legal practitioner to whom the member has fully disclosed the reasons for requiring the matter to be postponed or deferred and the

member has been assured by the legal practitioner that the client has agreed to such postponement or deferment; and

- (b) In any matter in which another party or other parties is or are involved, the member has similarly disclosed the reasons for seeking the postponement or deferment to the legal representatives of the other party or parties.

## 14. General Professional Conduct

### 14.1 Interviewing clients and witnesses –

- 14.1.1 Save in exceptional circumstances [and save in Legal Aid and/or *amicus curiae* matters where no instructing legal practitioner is involved], lay clients and witnesses should not be interviewed except in the presence of the legal practitioner or a candidate legal practitioner. On application the Bar Council may grant exemption from this Rule;
- 14.1.2 Consultations should ordinarily be held in or at the member's chambers or at his home and should not be held in the legal practitioner's offices, unless the bulk of the documents, the number of persons involved, or other special circumstances, make a consultation elsewhere practical. In those circumstances prior consent of a member of the Bar Council should be obtained;
- 14.1.3 Consultations may be held in the legal practitioner's offices if the legal practitioner's those offices are situated in a city or town other than the city or town where the member practices.

14.2 Interviews with witnesses called by a member after such witnesses have been sworn in –

14.2.1 It is improper for a member to interview a witness who is under cross-examination, unless circumstances make such an interview necessary. Where such circumstances exist a member who desires to hold the interview must inform his or her opponent before doing so, and if the opponent objects, the Court should be asked for permission;

14.2.2 It is improper for a member to interview a witness after the cross-examination is completed and before or during re-examination unless circumstances make such an interview necessary. Where such circumstances exist, a member who desires to hold the interview must inform his or her opponent before doing so. In cases where circumstances render it necessary to interview a witness before or during re-examination and the opponent objects, the Court should be asked for permission.

14.3 Interviewing persons likely to be the opponent's witnesses –

14.3.1 Civil proceedings –

A litigant's legal representatives are entitled, at any time and for the purpose of obtaining information which may assist the litigant to prepare or to present any part, aspect or stage of his or her case, to interview any person whom they have reason to believe is in possession of such information. In particular, they cannot be deprived of this

right by any of the circumstances that the other side has subpoenaed such persons to testify in the litigation, or has otherwise arranged for the witness to do so, or has interviewed or arranged to interview him or her in connection with the litigation, or has obtained or arranged to obtain a statement from him or her in that connection. The only limitations to this right are that:

- (a) where the litigation has commenced, but before such person has testified therein, an interview with him or her may not be held or if it has started proceed further once it is discovered that the other side has taken any of the above steps referred to in the introductory sentences of 14.3.1, unless and until the other side's legal representatives have been timeously notified by whatever means are adequate in the circumstances of the intention to hold or to proceed with the interview;
- (b) after such person has testified in the litigation as a witness for the other side, but before the litigation has finally been determined, he or she may not be interviewed in the absence of the other side's legal representatives, unless they, having been timeously notified by whatever means as are adequate in the circumstances of the intention to hold the interview, have declined to attend such interview;
- (c) In the case provided for in paragraph (a) above:

- (i) it is the duty of the litigant's legal representatives, when the circumstances known to them are such that it is reasonable for them to suppose that the other side may have taken the above steps referred to in the introductory sentences of 14.3.1, to ascertain from such person whether or not the other side has in fact done so;
  - (ii) the other side is not entitled to attend or to be represented at the interview.
- (d) In both the cases provided for in paragraphs (a) and (b) above, the other side's objection to the interview does not preclude the litigant's legal representatives from holding or proceeding with it.
- (e) Should a member wish to consult with his opponent's witness whilst such witness is giving evidence, he shall request his opponent's permission and if the opponent refuses, he may approach the Court for permission.

#### 14.3.2 Criminal proceedings –

- (a) Unless they have obtained the permission of the Prosecutor-General or of the prosecutor to do so, and unless they comply with any condition which either of the latter may have imposed when granting such permission, the legal representatives of an accused may not, at any time after the accused has

been arrested or charged and before he has been convicted or acquitted in respect of the charge against him, interview any other person in connection with such charge or the evidence relating thereto whom they know to be a witness for the prosecution in relation to such charge unless the Court orders otherwise as provided by paragraph (b);

- (b) In the event of the Prosecutor-General or the prosecutor refusing permission sought or imposing conditions which cannot reasonably be fulfilled, the legal representatives of an accused shall be entitled to interview a state witness if so authorized by a competent court and subject to such conditions as may be imposed by that court;
- (c) It is the duty of the legal representatives of an accused, when they do not know whether or not any other person is a witness for the prosecution in relation to the charge against the accused but when the circumstances are such that it is reasonable to suppose that such other person may be, to ascertain either from such other person or from the prosecutor or the police, before endeavouring to interview such other person in circumstances in which to do so is prohibited in terms of paragraph (a) above, whether or not such other person is in fact a witness for the prosecution in relation to such charge;

- (d) For the purpose of paragraphs (a) and (c) above, a witness for the prosecution in relation to a charge against an accused:
  - (i) is someone from whom at any time, whether before or after the accused was arrested or charged, the prosecutor has or the police have obtained a statement in connection with such charges or the events from which it has ensued;
  - (ii) is also someone who, having been called by the prosecutor to do so, has testified during the trial resulting from such charge.

#### 14.4 Affidavits from witnesses –

Affidavits should ordinarily not be obtained by members from prospective witnesses, except in cases in which the witnesses' evidence is intended to be presented by means of the production of affidavits deposited to by them.

#### 14.5 Members giving evidence or making affidavits –

14.5.1 A Member must avoid, as far as possible, putting himself or herself in any position where he or she may have to make statements or give evidence in relation to matters which are in dispute in the case in which he or she is appearing;

14.5.2 In all cases, before a member may make an affidavit or volunteer to give evidence concerning matters which

became known to him or her while acting in his or her professional capacity, permission of the Bar Council must first be obtained.

14.6 Evolving schemes on behalf of clients to evade provisions of the law –

14.6.1 A member is entitled to advise his or her client whether any proposed conduct will contravene the law. Further, the member is entitled to advise a course of conduct which will so order the affairs of the client as to avoid liability under taxation and other statutory provisions;

14.6.2 A member is clearly not entitled to devise a scheme which involves the client in the commission of any offence.

*Note: As to the effect of incorrect legal advice on the criminal liability of client, see S v Colgate-Palmolive Ltd, 1971 (2) SA 149 (AD).*

14.7 Gifts from clients –

14.7.1 It is permissible to receive gifts of a personal nature from a client without notice to the Bar Council, but apart from such, the fact and the circumstances of every honorarium accepted by a member must be reported to the Bar Council;

14.7.2 It is not improper for a member to accept from a client a gift of money or a gift of substantial value, which is intended as an additional fee, or as a reward for professional services rendered, provided that such gift is received by him through the legal practitioner in the matter, and that the gift and the circumstances thereof are notified to the Bar Council. The

Bar Council may in its discretion disallow the receipt of part or all of such gift if it considers that its size or nature or circumstances under which it was received or tendered to warrant such disallowance.

14.8 Company meetings –

If a member is briefed to make representations or to speak on behalf of any clients, e.g. at a company meeting, he or she should disclose that he or she is appearing as counsel even though he may also be entitled to appear in his own right.

14.9 Interviewing a judicial officer –

It is undesirable, save in special circumstances for a member in a contested case in the absence of his opponent and without the latter's consent, to seek to interview the judicial officer who is hearing or is about to hear the case.

14.10 The position of a member briefed in a criminal case who is informed by his client that he is guilty of the offence charged with –

Where a client makes a confession to a member either before or during criminal proceedings, the member should explain to the client the basis on which the member may continue with the case, namely:

14.10.1 The member may not in the proceedings assert that which he or she knows to be untrue nor may he or she connive in or attempt to perpetrate a fraud or an untruth;

- 14.10.2 He or she may appropriately argue that the evidence offered by the prosecution is insufficient to support a conviction and may take advantage of any legal point which might relieve the accused from criminal liability;
- 14.10.3 He or she may not, however, set up an affirmative case which he or she knows to be inconsistent with the confession;
- 14.10.4 If the client, having been so informed, desires the member to appear on the abovementioned basis, the member should continue to hold the brief and act in accordance with the principles set out above. If the client desires the member to give up the brief, the member must do so.
- 14.11 Ill-feelings and personal antagonism between members and other legal practitioners –
- Clients, not counsel, are the litigants. Whatever may be the ill-feeling existing between clients it should not be allowed to influence members in their conduct and demeanour towards his or her opponent or towards suitors in the case. All personal antagonism between members should be scrupulously avoided. In the trial of a cause it is improper for a member to allude to the personal history or the personal peculiarities and idiosyncrasies of his/her opponent. Personal colloquies between opponents which cause delay and promote unseemly wrangling should also be carefully avoided.
- 14.12 Judgment reserved – further material to be placed before Court –

As a matter of principle, it is improper for members to attempt to place any further material, of whatever nature, before the Court after judgment has been reserved without the consent of his opponent. Such consent should not be unreasonably withheld, particularly when the request made is to refer the Court to authorities which will assist it in giving a correct judgment. Nonetheless, if consent is refused, the proper course is to request the Court, through the Registrar, to receive the further material or, where appropriate, to make an application to re-open the case. An unreasonable refusal to consent to the placing of further authority before the Court will doubtlessly influence the award of the costs of such application.

#### 14.13 Appearances in Court –

The following Rules of conduct, while applying to all members, are set out more particularly for the attention of new members:

- 14.13.1 A member should arrange to be introduced to the judge or other presiding officer before his or her first appearance before that judge or officer. In the case of a judge, the introduction should be arranged with the Registrar or Judge's clerk;
- 14.13.2 As far as the seating in Courts, especially in the Motion Courts is concerned, members should give preference to more senior members in the order of seniority. In Motion Court – where no Senior Counsel is in attendance – Junior Counsel are required to leave at least one seat vacant which, according to seniority, would be available to accommodate any Senior Counsel who may appear;

### 14.13.3 Duty to remain in Court –

A member should remain in Court after he or she has completed his or her matter until the counsel or legal practitioner in the next matter has risen.

### 14.14 No right to participate in other callings whilst in practice at the Society

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14.14.1 A member of the Society is not entitled to practise as an advocate while actively engaged in the carrying on of any other professional or commercial or industrial or regulatory undertaking. A practising member of the Society may be a Director, but not the Managing Director or Chief Executive Officer, of a limited liability company or a statutory body corporate engaged in such an undertaking;

14.14.2 Subject to 14.14.1, a member of the Society is entitled to engage directly or indirectly in any occupation unless:

- (a) his or her association with that occupation adversely affects the reputation of the Society; or
- (b) such engagement prejudices the member's ability to properly attend to the interests of clients;
- (c) such engagement affects his professional independence.

14.14.3 There is no objection to a member of the Society holding a post as a part-time lecturer at a University or the Justice

Training Centre or other educational institution which does not interfere with the carrying out of his or her normal duties as a member of the Society, but the holding of a full-time teaching post is incompatible with active practice as a member of the Society.

14.14.4 Nothing contained in this Rule, in any manner, shall be construed so as to prevent a member from accepting a temporary judicial appointment in the High or Supreme Courts.

14.15 Partnerships –

Members are not permitted to practise in partnership with one another.

14.16 Advertising –

14.16.A General

Subject to what is provided below, the Rules of the Law Society of Namibia shall apply and be adhered to by members and in so far as they pertain to advertising by legal practitioners.

14.16.1 There is no objection to the Bar Council or the Law Society of Namibia informing legal practitioners in writing that a new member has commenced practice at the Society.

**15. Publications by Members**

15A General

Subject to what is provided below, the Rules of the Law Society of Namibia shall apply and be adhered to by members and in so far as they pertain to publications by legal practitioners.

15.1 Legal Publications

Members may use the designation “advocate” and their academic and professional qualifications, and may refer to their membership of the Society, but without reference to the member’s practice or reputation, in relation to: -

- (i) legal publications written or edited by a member; or
- (ii) matter, whether on legal or non-legal subjects written or edited by a member and published in legal journals or other similar legal publications.

The same Rule applies to advertisements in such publications.

15.2 Non legal publications.

15.2.1 In relation to matter on non-legal topics written or edited by a member and published in the press or other non-legal publications, the identity of the member as author or editor may be disclosed, but he/she may not be designated as an “advocate” nor may his/her professional qualifications be used.

- 15.2.2 The contribution by the member of legal articles, paragraphs or other contributions to the press or other non-legal publications, and the answering of legal questions in such media, is permitted, but practical problems submitted by readers may not be dealt with because the giving of advice except through a legal practitioner is unprofessional and contrary to the provisions contained in the written declaration referred to in Rule 11.2 hereof.
- 15.2.3 Members should not write articles in non-legal publications with regard to pending cases nor cases where the time for appeal has not expired.
- 15.2.4 It is contrary to professional etiquette for members to engage in newspaper correspondence or to issue press statements on the subject of cases in which they are or have been themselves involved as counsel.
- 15.2.5 It is undesirable for a member to express opinion in the press, by letter, article, interview or otherwise on any matter which is still pending in the Courts. Notwithstanding the foregoing, a member may express an opinion in the media, in general terms, on an issue which is still pending, provided that the member does not thereby purport to pre-judge or anticipate the result.
- 15.2.6 It is contrary to the etiquette of the Society for a member to contribute legal articles for regular publication under his name in a periodical of a non-legal nature or to allow his name to be mentioned in

### 15.3 Broadcasting and Lectures

- (a) A member may give lectures at or under the auspices of a University or other recognized educational institution using his name, title and qualifications.
- (b) With the consent of the Bar Council, a member may give a lecture or broadcast on any legal topic using his name, title and qualifications, after furnishing the Bar Council with such information as it may require, and including the following:
  - (i) the nature of the audience.
  - (ii) who initiated the proposal that the member give the lecture or broadcast.
  - (iii) how many lectures or broadcasts with particulars in each case, the members has given in the preceding three years.

### 15.4 Appearances on and participation in the Public Media and Photographs

- 15.4.1 It is generally desirable that in proper cases members of the Society should take part in discussions of matters of general interest on television (or radio), particularly where some topic having relation to the administration of justice is to be discussed.
- 15.4.2 A member of the Bar appearing on television or radio may be introduced as an advocate, his/her name may be given

and if a Senior Counsel, he/she may be described as such. However, no mention should be made of his experience nor of any particular expertise which he/she may have.

- 15.4.3 The member taking part must make no reference to any case of his own which is pending nor, directly, to any case in which he/she has previously appeared.
- 15.4.4 A member is not, at his/her initiation or request, to be photographed in his/her Chambers nor in the precincts of any Court nor while wearing his robes.
- 15.4.5 A member may not, except on his appointment as silk or as an acting judge, authorize or take steps to procure or facilitate the publication of his photograph in the press in the context of his practice as an advocate.
- 15.4.6 Members appearing on television or participating in radio programmes should at all times bear in mind the dignity of the profession and not misuse the occasion for the purposes of self-advertisement.
- 15.4.7 The aforementioned Rules are of equal application, *mutatis mutandis* to the electronic media, including all forms of dialogue occurring by means of or through the internet.

## 15.5 Interviews

- 15.5.1 A member must not issue statements to the press in connection with cases in which he/she is involved, and should refrain from issuing statements to any news or

current affairs media in connection with any matter in which he/she is or has been briefed or instructed.

15.5.2 A member should not, at his own initiative, give information to the press as to whether he/she has or has not been briefed in a particular case.

## 15.6 Classified Directories

15.6.1 A member shall not in relation to his practice use any title other than “Advocate” or “Legal Practitioner”.

15.6.2 Information (excluding reference to any specialization) about members or groups of members may be made available to the public in a publication of the Society or, if sanctioned by the Bar Council, in publication of a group of members of the Society, provided that the names of all the members of the Society or such group, as the case may be, are listed therein.

## 15.7 Business Cards

Subject to what is stated in paragraph 14.16 and 15 above, members are allowed to have business cards.

## 15.8 Publication and Discussion of Bar Matters

15.8.1 Proceedings of the Bar Council and Society meetings are strictly private and confidential and should on no account be communicated to the press unless the Bar Council or the Society specially indicates that a communication should be

made. The practice of annually publishing the list of office holders is, however, permissible.

- 15.8.2 Discussions with outside persons of any matter concerning professional work at the Society and its members should be conducted with the greatest discretion. Many such matters and much of the information which comes to the knowledge of members in their practices or in the course of discussion with fellow members is of a confidential nature, and it should be treated accordingly.

15.9 Judicial Appointments

No member of the Society should make known, except in so far as is necessary, the fact that he/she has been offered, or has refused or accepted, an appointment to the Bench, whether acting or otherwise.

15.10 Complaints Regarding Legal Practitioners or Members

A member desiring to complain to the Law Society of Namibia or the Statutory Disciplinary Committee about a legal practitioner's or member's conduct should communicate the complaint to the Law Society or the Statutory Disciplinary Committee, as the case may be, and provide the Bar Council with a copy of such complaint simultaneously with laying same.

**16. Court Dress**

- 16.1 A member should robe before the Supreme Court, the High Court, the Regional Court and the Magistrates' Court, and such other Courts where robing is required by the Court's decorum.

- 16.2 In the case of any other Court, if the Court is robed and desires Counsel to be robed, the member should robe.
- 16.3 In any appearance in a Court where robing is required, a member should wear a black coat and a white shirt, and a bib and dark trousers under his or her gown. In the case of female members, a dark skirt instead of dark trousers is permitted.
- 16.4 Generally, a member should adhere to the attire requirements ordinarily required in any Court or tribunal in which he/she may appear, and as may be directed by that Court or tribunal from time to time.

## 17. **Notice to Opponent**

- 17.1 Where a member is not compelled according to the Rules of Court (read with the applicable Practice Directions) to deliver heads of argument, but nevertheless decides to do so *ex gratia*, there is no Rule of professional practice, etiquette or courtesy, which requires him to make such heads available to his opponent, unless those heads have been made available to the Court.
- 17.2 Where a member does, however, hand in heads of argument *ex gratia*, he/she must not hand his heads to his opponent at any time later than that on which he/she has handed the heads to the Court.
- 17.3 Apart from those cases where the Rules of Court (read with the applicable Practice Directions) make it obligatory to do so, a member must inform an opponent timeously of the fact that a legal point, not

evident on the papers, which may catch an opponent unawares and may embarrass him is being taken.

**18. Recommending Counsel or Instructing Legal Practitioners**

18.1 A member of sufficient experience and standing may request his/her instructing legal practitioner to instruct a particular member, who is a junior, to act with him/her in any matter and may to that end surrender such portion of his/her fee as he/she may agree with the instructing legal practitioner and the Junior Counsel concerned, the amount of such portion to constitute Junior Counsel's fee in the matter, such fee to be paid to the Junior Counsel by the particular instructing legal practitioner.

18.2 Save in exceptional circumstances, it is improper for a member to recommend a particular instructing legal practitioner or firm of legal practitioners to lay clients.

**19. Appearance before Tribunal of which Counsel is a Member**

Save in exceptional circumstances, and with the prior consent of the Bar Council, it is improper for a member to appear on brief before a statutory court, board and tribunal of which he/she is, at the time of his appearance, a permanent, temporary or acting member.

**20. Pro Bono Work**

The Society may require its members to undertake *pro bono* work on the basis that it allocates such work amongst its members on a basis that is fair, reasonable, equitable and transparent.

## **21. Legal Aid**

- 21.1 It is the duty of all members, when so directed by the Bar Council, to undertake legal aid matters as contemplated in section 2 of Act 29 of 1990.
- 21.2 Members acting in legal aid matters shall be entitled to the appropriate prescribed fees for his/ her services.
- 21.3 Where a member claims payment of his/her fees directly from the Legal Aid Board he/she shall not thereafter seek to claim or recover payment of those fees from the instructing legal practitioner. Attention is drawn to section 6(3) of Act 29 of 1990.

## **22. Fees**

### **22.1 Fees must be reasonable**

22.1.1 Members are entitled to a reasonable fee for all services. In fixing fees, members should avoid charges which over-estimate the value of their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the services, though his or her lack of means may require a lower charge, or even none at all.

22.1.2 On determining fees the foremost consideration is that the profession is a branch of the administration of justice and not a mere money-making occupation.

### **22.2 Guidelines for determination of reasonable fees**

- 22.2.1 The determination of a fee in respect of a particular service must in all circumstances be based on the time and labour required to be spent, the novelty and difficulty of the issues involved, the skill requisite to conduct the matter properly, the customary charges by members of comparable standing for similar circumstances, the amount involved, and the nature and extent of the controversy and its importance to the client. None of the above considerations are, of themselves, definitive. They merely constitute guidelines in ascertaining the real value of the service rendered.
- 22.2.2 The attention of members is specifically drawn to the words “time and labour required”. They refer to the amount of time, which the matter, objectively regarded, requires and therefore the amount of time, which may be regarded as having been reasonably spent on the matter. Time reasonably spent on the matter is not necessarily the same amount of time actually spent because the latter may include time wrongly spent on the matter as a result of inefficiency or excessive caution on the part of a member, or similar factors.
- 22.2.3 Notwithstanding any agreement between a member and the client or instructing legal practitioner to charge fees on a time basis, members must in all cases, ensure that they charge only for the time reasonably spent on the matter.
- 22.2.4 Members are obliged to disclose, either in the brief returned or in a separate invoice addressed to the instructing legal

practitioner, in respect of the fees charged, the following information:

- (a) if the fee is calculated on a day basis, the date in respect of which the fee is being charged, an indication of the nature of the work performed by the member during that day, e.g. preparation for trial, reading record, etc.
- (b) If the fee is calculated on a time basis, the date on which the time was spent, the number of hours (or part of an hour) spent, the approximate time of day when the time was spent and an indication of the nature of the work performed by the member during the time in question, e.g. on consultation, preparation for trial, reading record, etc.

22.2.5 Where members charge a day rate, they are not permitted to charge a fee on a time basis over and above the fee charged per day in question. This means that a fee per day would include, in addition to the Court appearance, all after hours work, including preparation and consultation, during those 24 hours.

22.2.6 Members shall not charge fees for work not actually done, except in cases of reservation fees and collapse fees.

22.2.7 Reservation fees:

- (a) A reservation fee shall for all purposes be defined as the following:

“Where a trial, application or arbitration, as the case may be, does not proceed on the days on which it was set down, because it was either settled or postponed by virtue of an agreement reached (preferably in writing) or as a result of some other reason occurring, it would usually be regarded as reasonable were a member to charge day fee in lieu of the first day’s hearing and a fee based on a day fee or a percentage thereof for one or more consecutive days.”

- (b) Reservation fees generally are chargeable in accordance with the following sliding scale:
  - (i) If the case is settled or postponed on or within 5 court days prior to the date of the hearing, the reasonable and/or agreed day fee.
  - (ii) if settled or postponed between 5 court days and 10 days prior to the date of the hearing, two thirds of the reasonable and/or agreed day fee:
  - (iii) If the case is settled or postponed between 10 days and within 21 days prior to the hearing, one half of the reasonable and/or agreed day fee.
  - (iv) NB. Attention is drawn to the differentiation between normal and court days above.

- (c) In the case where (b)(i) is applicable, members are entitled to charge the reasonable, usual and/or agreed day fee for the first day on which the case was set down, without recourse to his/her instructing legal practitioner.
- (d) If the case was set down for more than one day, members are entitled to charge additional reservation fees subject to the principles set out before but only after consultation and agreement with the instructing legal practitioner.

NB. The ration for (c) and (d) above is inter alia the rules against double briefing of a member (being sole trader) which is prohibited to practise in partnership or association.

#### 22.2.8 Collapse fees:

- (a) A collapse fee shall for all purposes be defined as the following:

“If a member has for a specific case been reserved for a specified period which exceeds 4 days either in preparation or in conducting a case and the matter does not last for the full specified period, counsel shall be entitled to charge a collapse fee for such period reserved but not utilized. The collapse fee is in addition to the fees charged up to the last actual work done or services rendered by a member after commencement of the preparation or conducting the

case and will be regarded as compensation for a member where such preparation, trial or arbitration does not last for the full period for which the member has been reserved”.

- (b) A collapse fee shall not exceed 60% of the average day fee chargeable for the particular preparation or trial or arbitration, i.e. if a collapse fee is charged for 10 days it will be 60% of the applicable day fee, multiplied 10 times.
- (c) A member is permitted to charge a collapse fee if –
  - (i) an express agreement, in writing, has been reached between him or her and the instructing legal practitioner;
  - (ii) such written agreement has been reached prior to the commencement of the preparation or trial or arbitration;
  - (iii) the reservation period for the specific matter exceeds 4 days;
  - (iv) if the period of reservation has actually commenced and a reservation fee is not applicable.
- (d) If no prior written agreement was reached concerning collapse fees, a member will be free to negotiate reasonable reservation fees.

22.2.9 A refresher fee is allowed only where a minimum of 6 weeks in time has lapsed between two appearances in the same trial proceedings and includes perusal of record.

22.2.10 A member is entitled to charge in addition to his or her fees the following:

(a) Value Added Tax (if VAT Registered);

(b) If and when appearing at any place which is not situated within the Windhoek district, a member is entitled to charge additional fees to his or her ordinary fees as agreed with the client/legal practitioner.

### 22.3 Overdue Fees

22.3.1 Where the fees due to any member are unpaid for 90 days after a member has rendered his or her first monthly statement reflecting those fees, a member shall charge interest on amounts due and payable by a legal practitioner to that member, calculated from the 1<sup>st</sup> (first) day when the aforementioned monthly statement was rendered until the date of receipt of payment, at the mora rate, prescribed from time to time.

22.3.2 Where the fees due to any member are unpaid for 120 days after a member has rendered his or her first monthly statement containing those fees, such member (and subject to Rule 22.3.7) must on the expiry of such 120 days, at the

end of the month during which those 120 days had expired, notify the Secretary-General in writing of the fact of non-payment, stating the name of the legal practitioner's firm, the member of the firm in question who gave the instruction, the relevant legal practitioner's reference number and the name of the client in respect of which the fee is overdue. The amount of the fee shall not be disclosed..

- 22.3.3 On receiving such notice of default the Secretary-General shall as soon as practically possible and in writing notify the principal of the legal practitioner's firm concerned that the firm is in default and that, failing payment within 5 days of such notification, the firm will be placed on the list of defaulters.
- 22.3.3A Where payment is still not received upon the expiry of the 5 days' notice period, from such latter date and until such overdue fees and interest have been paid in full, the defaulting legal practitioner's firm shall be placed on the list of defaulters, the effect whereof is that from such latter date no member will be obliged to accept a new brief and/or continue to work on an existing brief from such defaulting legal practitioner's firm.
- 22.3.4 Where a legal practitioner's firm has been listed on the list of defaulters, the Secretary-General shall forthwith forward a list of the defaulting firms to each member, in such a way as to ensure the confidentiality of the information conveyed.
- 22.3.5 The reflection of the defaulting firm shall continue until the Secretary-General receives notice from the member who

listed the firm that the firm has paid the account which resulted in it being reflected on the list of defaulters, in which event the Secretary-General will remove the said firm from the list of defaulters and inform the members accordingly.

22.3.6 It shall be the duty of members who have placed a legal practitioner's firm on the list of defaulters to inform the Secretary-General forthwith of any relevant payments received.

22.3.7 Bona Fide Dispute

Where a dispute arises between a member and a legal practitioner as to the reasonableness of a member's fee then due, the member, before reporting such legal practitioner's firm as a defaulter, shall submit the dispute in question to the Bar Council for determination.

22.3.8 Dissolution of Partnership of Legal Practitioners, Change in Membership of Company of Legal Practitioners or Winding-Up of such Companies

Where a partnership or company of legal practitioners briefs a member, and thereafter the partnership is dissolved, or there is a change in the membership of the company, or the company is wound up, a member may demand payment of his or her fees from any erstwhile partner or erstwhile member of the company. Should the fees remain unpaid after the lapse of 120 days, the names of all erstwhile partners or erstwhile members of the company shall be

placed on the list of defaulters. Payment by any one of such persons shall operate to discharge all such persons from liability.

22.3.9 Portion of Fees Taxed Off

The fact that the Taxing Master has in a legal practitioner and client bill of costs disallowed a portion of fees charged by a member is not in itself sufficient reason for the Bar Council to take action in regard to a dispute between the legal practitioner and the member.

22.3.10 Brief from a Legal Practitioner on the Defaulters List

Members shall be entitled, but not obliged, to refuse a brief from a firm listed on the list of defaulters, or a correspondent acting on instructions from a firm of legal practitioners on the defaulters list, or a firm of legal practitioners on the defaulters list that has been instructed by a correspondent firm which is not on the list.

22.3.11 Fees Payable by Legal Practitioners' Firms

22.3.11.1 Fees for any professional service may only be paid by or through a legal practitioner's firm.

22.3.11.2 It is generally contrary to the spirit of the profession for a member to sue a legal practitioner's firm for fees. However, in special circumstances a member may apply to

the Bar Council for leave to sue a legal practitioner for fees due to him or her.

#### 22.4 Marking of briefs

22.4.1 All briefs must be marked with a fee at the earliest reasonable opportunity after the relevant work has been done.

22.4.2 Once marked, the fee may not be increased, reduced or waived by reason of the result of the case.

22.4.3 A brief may not be marked “at such a fee as may be allowed on taxation”.

#### 22.5 Keeping of Fee Books

22.5.1 It is the duty of every member to keep proper fee books showing at least: -

- (a) a daily record of fees earned;
- (b) the briefing legal practitioner; and
- (c) sufficient detail to identify the matter and the nature of the work done.

22.5.2 Members must also keep records which are sufficient to enable them to identify all outstanding fees and the period thereof. Fees received must be banked and the bank

deposit slips reflecting the amounts banked should be available at all times.

#### 22.6 Rendering of Fee Lists

Members shall at the end of each and every month render a statement to each legal practitioner's firm of all fees due to them by such firm.

#### 22.7 Form of Payment

No member shall accept, in payment of fees, a bill of exchange (other than a Cheque payable on presentation), a promissory note, an I.O.U., a post-dated cheque or cash.

### 23. PUPILS

23.1 Applicants for admission to the Society must be admitted legal practitioners and should first have successfully completed pupillage with the Society unless exempted by the Bar Council. Such exemption from the requirements of pupillage may be given in whole or in part and subject to such conditions as the Bar Council may deem fit.

23.2 The Bar Council shall determine guidelines for accepting applicants for pupillage.

23.3 The Bar Council is entitled to determine a limit to the number of pupils it takes on, based on its capacity.

23.4 An application for pupillage is to contain the information and supporting documentation as prescribed by the Bar Council.

- 23.5 The Bar Council shall appoint one junior member of the Society as Master to every pupil member whose duty it will be to ensure that such pupil member receives the training and experience as determined by the Bar Council.
- 23.6 A pupil Master shall have been a member of the Society for a period of at least 5 (five) years. It shall be the duty of every such junior member of the Society to accept appointment as Master to a pupil member.
- 23.7 The period of pupillage shall be determined by the Bar Council, but may not be less than 8 months, which will include 2 months as a judge's clerk (except where exempted in terms of Rule 23.1)
- 23.8 The pupil shall write the Bar Examinations during his or her pupillage: Provided that a pupil will only be eligible to sit for the Bar Examinations after having completed at least 6 months pupillage, unless exempted. The Bar Examinations shall be scheduled at such dates and times as may be determined by the Bar Council. Criteria regarding the successful completion of the Bar Examination shall be determined by the Bar Council. The curriculum for the examination shall be determined by the Bar Council. The examiners and moderators shall be appointed by the Bar Council with a convenor. It is the duty of the Bar Council to ensure that pupils are properly examined at the end of their pupillage according to acceptable and consistent standards.
- 23.9 The Bar Council shall appoint from amongst its members a pupillage coordinator who is to attend to all pupillage related matters, including acting as convenor for the Bar Examinations.
- 23.10 The Master shall ensure that the pupil member entrusted to him or her shall, during his or her period of pupil membership, obtain the required

experience, and that he or she shall be instructed as to both the written and unwritten Rules relating to the conduct of counsel's practice. Pupils shall work out of their Master's chambers and shall remain in attendance with their Master except where given reasonable time off by their Master to prepare for examinations. The pupil Master may request the assistance of other members of the Society in exposing the pupil to the requisite experience.

23.11 During the period of pupil membership the Master shall ensure that a pupil member:

23.11.1 assists actively (from the stage or preparation for trial to the conclusion of the trial or its settlement) in the conduct of three civil trials of which at least one must be in the in the High Court and one criminal trial;

23.11.2 assists actively in the settling of affidavits for and the preparation and presentation of argument in two opposed applications of which one should be in the High Court;

23.11.3 assists actively in the preparation of two appeals;

23.11.4 assists actively and gains reasonable experience in unopposed High Court motion work and undefended divorce work;

23.11.5 receives instructions as to the duties of counsel towards the court, his or her colleagues, legal practitioners and persons for whom he or she acts and as to professional conduct and ethics generally.

Provided that a Master may, if the adequate training of the pupil demands it, allow the pupil to depart from any of the requirements of the above Rules, subject to the pupil receiving adequate exposure and experience in the areas referred to.

#### 23.12 Certificate

Where a pupil member has had the instruction and experience set out in this Rule and passed the Bar Examinations, the Master shall make a written certification to this effect. Upon the issue of a certificate in terms of this Rule, the Bar Council may, on application, admit the pupil member to membership of the Society.

#### 23.13 Competency to Practise

A pupil advocate is entitled to practise as a member of the Society once such pupil has fulfilled the following requirements:-

- 23.13.1 the pupil is an admitted legal practitioner;
- 23.13.2 the pupil has passed the Bar Examinations set by the Bar Council;
- 23.13.3 the pupil has been issued with a certificate signed by the pupil's pupil Master to the effect that the pupil has satisfactorily served the pupillage applicable to the pupil; and
- 23.13.4 the pupil has been issued with an exemption certificate in terms of the Legal Practitioner's Act.

### 23.14 Appearance by Pupils

23.14.1 A pupil member may appear robed with his or her pupil Master or with any other member of the Society approved by the pupil Master at any time during pupillage without remuneration.

23.14.2 Any appearance by a pupil member in terms of this clause shall be subject to the following conditions:-

- (a) The pupil remains subject to the overall supervision and direction of the pupil Master;
- (b) The presiding judge or officer is informed beforehand of the fact that the pupil is a pupil;
- (c) The pupil must clearly state his or her status as a pupil in open court when placing himself or herself on record;
- (d) A pupil in accepting such a brief must place on record with the instructing legal practitioner that he or she is a pupil and must ensure that the legal practitioner is fully aware thereof.

### 23.15 Extra-Mural Employment and Commitment of Pupils

23.15.1 Unless exempted by the Bar Council, a pupil shall not be entitled to be gainfully employed during pupillage. A pupil may not during his pupillage earn fees for any professional services rendered without permission of the Bar Council.

23.15.2 The pupil shall not take on any commitments which are likely to interfere with the pupil's ability to study and perform the tasks allocated to him or her as part of pupillage training. Where the pupil must attend to any such commitments the prior consent of the Master must be obtained, which shall only be granted where such commitments will not unduly interfere with the pupillage and are very limited in time.

#### 23.16 Library

Pupil members shall have the full use of the Society's library.

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