



SUBMISSIONS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE DRAFT AMENDED CODE OF CONDUCT

The Law Society of South Africa (LSSA) has considered the draft amended Code of Conduct previously published in terms of Section 97(1)(b) of the Legal Practice Act, 28 of 2014 (as amended) and comment as follows:

General:

The Code of Conduct should be consistent with the objectives of the Legal Practice Act (the Act), which is to enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners. This should be reflected in the Code of Conduct. It is suggested that the separation of advocates and attorneys, as reflected in the draft Code, be reviewed in its entirety.

Specific Comments:

Paragraph 1.12 [page 3]

The phrase: 'as the case may be' is superfluous.

Paragraph 1.20 [page 4]

The definition of 'Minister' should read 'Minister of Justice and Correctional Services' not the 'Minister of Justice and Constitutional Development'.

Paragraph 3.3.3 [page 6]

The phrase 'observation of the law' should read: 'observance of the law'.

Part III Conduct of Attorneys

We suggest that a number of paragraphs in Part III be reflected as part of a General Section applicable to all legal practitioners. Refer to our comments under 'General' above.

The following is an example of a paragraph that may be re-drafted to be applicable to all legal practitioners:

Paragraph 4.17: This paragraph can be inserted under paragraph 3.18 in the following manner:

'A legal practitioner, candidate legal practitioner or juristic entity, who at any time is in doubt about the meaning or applicability of any part of this code shall promptly apply for a ruling from the Council or from any sub-structure of the Council to which the Council has delegated the function.'

Paragraph 4 [page 8]

This paragraph should also include a preamble, in the same manner as paragraph 14.

Paragraph 4.3.2 [page 9]

It is not clear what is meant by the words 'in respect of a matter in which another attorney has already received instructions'. If the intention is to protect such attorney from his/her instruction being taken away by another attorney in the normal process of competition, this may possibly be regarded as anti-competitive.

Paragraph 4.3.4 [page 9]

The phrase: 'accord in every respect with the requirements of this rule' is superfluous and should be deleted.

Paragraph 4.3.5 [page 9]

The clause prohibits the publication or communication of comparisons or criticisms of services provided by other legal practitioners. It is generally recognised by Competition authorities that the excessive limitation of advertising may have anti-competitive effects. On the other hand, it has been recognised that unfair comparative advertising may create distortions of the market. Accordingly, it is recommended that the words 'or unfairly or unreasonably' be inserted before the word "compare" in the first line.

It is noted in passing that the comparative advertising rule for advocates in paragraph 23 is differently worded than paragraph 4.3.5 and we see no reason for the distinction. It is suggested that the wording of both paragraphs should read the same.

Paragraph 12.8 [page 14]

Whilst the need and rationale for this rule is understood (namely to protect vulnerable consumers against unscrupulous touting or so-called "ambulance chasing"), there is a risk that it may be regarded as anti-competitive by the Competition authorities as it sets a standard for doing business, namely prescribing attorneys' business associates. Accordingly, it is recommended that the LPC applies for an exemption in terms of Schedule 1 to the Competition Act.

Paragraph 12.16 [page 13]

This paragraph provides for disputes about the quantum or rate of fees to be decided by the Council or an authorised sub-structure of the Council. The Competition Commission has previously expressed a view that fee assessment committees in the statutory Law Societies can give rise to price fixing. While we understand the need and rationale for a fee assessment function of the LPC and fee assessment committees under its supervision (namely to protect consumers against overreaching by attorneys), this conduct will possibly only be allowed if the empowering statute, the Legal Practice Act, permits it (which it currently does not as the fee regulating provisions of that Act has not yet come into force) or if the LPC applies for an exemption for such conduct in terms of Schedule 1 to the Competition Act.

A similar comment is applicable to paragraph 33 relating to advocates.

Paragraph 12.17 [page 15]

Reservation is expressed with the underlined phrase as different professions and industries may have different standard practices.

12.17 ‘... pay timeously, in accordance with any contractual terms or, in the absence of contractual terms, in accordance with the standard terms of payment, the reasonable charges of any legal practitioner, whether an advocate or an attorney, whom he or she has instructed to provide legal services to or on behalf of a client; such liability shall extend to every partner of a firm or member...’

Paragraph 12.19 [page 16]

It is suggested that the word ‘opinion’ be replaced by ‘discretion’, as a decision cannot be based on an opinion of a body.

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

Paragraph 14.9 [page 18]

We suggest that the word ‘purposefully’ be used instead of ‘purposively’.

Paragraph 15.2.2 [page 19]

It is suggested that the word ‘arbitration’ be used instead of ‘arbitral’.

New Paragraph 15.4 [page 20]

A new paragraph 15.4 should be inserted, reading:

“An advocate shall if he or she accepts appointment as an acting judge, adhere to the code of

conduct applicable to judges.”

This will read consistent with paragraph 37.4, which reads: “The provisions of paragraph 15.4 of this code apply, with the necessary changes required by the context, to trust account advocates.”

Paragraph 16 [page 20]

The heading ‘Acting judicial appointments’ appears to be misplaced.

Paragraph 12.18 [page 16]

This clause relating to an attorney's dress when rendering services is vague and may be used to increase barriers of entry to the profession. The rule should be scrapped or rephrased or the LPC should apply for an exemption for such conduct in terms of Schedule 1 to the Competition Act.

Paragraph 20.4 [page 24]

It is suggested that this paragraph be re-drafted to explain the terminology and clarify the long-standing practice more succinctly.

Paragraph 22 [page 27]

This paragraph is generally applicable to all legal practitioners and may be moved, with the necessary amendments, to a general section.

Paragraph 23 [page 28]

Refer to our comment under paragraph 4.3.5.

Paragraph 24 [page 29]

This paragraph is generally applicable to all legal practitioners.

Paragraph 25 [page 29], read with paragraph 31 [page 32]

It is suggested that provision be made for counsel to provide a breakdown of fees. Should Section 35(7) in its current form remain, it will be difficult, if not impossible, for an attorney to provide a client with a cost estimate without such a breakdown.

Paragraph 26 [page 30]

The burden placed upon attorneys with reference to advocates' fees is too onerous. Provision should be made for the payment of advocates' fees to be negotiated and determined upfront.

Paragraphs 26.6.2 and 26.7.2 [pages 30 and 31]

There is a risk that these paragraphs relating to collapse fees may be regarded as anti-competitive by the Competition authorities as being price fixing amongst advocates. These rules should be scrapped or rephrased or the LPC should apply for an exemption for such conduct in terms of Schedule 1 to the Competition Act.

Paragraph 26.7 [page 31]

It should be possible for an attorney and counsel to enter into an agreement as to how and when counsel's fees will become payable. It should also be possible for counsel to recover their fees from the client direct. In these circumstances, it will be appropriate to amend paragraph 26.7 to read:

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

A new paragraph 26.7.3 should then be included as such:

'26.7.3 in the event of counsel's fees not paid by the client to the instructing attorney pursuant to paragraph 26.7.1, the counsel shall, after performing the brief, be entitled to recover his/her

fees due directly from the client and to the exclusion of liability on the part of the instructing attorney.’

To ensure consistency with the new paragraph 26.7.3, paragraph 32.1 [page 33] will then have to be amended as follows:

‘32.1 Except as provided for under paragraph 26.7.3, counsel may sue an attorney or other accredited entity for fees due and payable to him or her if –‘

Paragraphs 27 and 28 [page 32]

These paragraphs are generally applicable to all legal practitioners.

Paragraphs 29 [page 32]

Delete the following words in the heading: ‘terms in contingency’.

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

A number of provisions in Part V, such as paragraphs 54.3, are applicable to all legal practitioners and consideration should be given to moving them to a general section.

Paragraph 32.1 [page 33]

Refer to comments in respect of paragraph 26.7.

Paragraph 33 [page 33]

Refer to our comments under paragraph 12.16.

Paragraph 51 [page 40]

Delete the following words in the heading: ‘terms in contingency’.

Paragraphs 54.3 [page 41]

This paragraph is generally applicable to attorneys as well.

Paragraph 55 [page 41]

Reference to paragraph 34 should be to paragraph 33.

Part VI Conduct of legal practitioners and candidate legal practitioners in relation to appearances in court and before tribunals [page 42]

It is suggested that Part VI be reviewed in its entirety to determine which provisions would be more appropriate in guidelines as opposed to a Code of Conduct.

Paragraphs 59.1 and 59.2 [page 42]

These paragraphs reflect inconsistencies with reference to advocates and attorneys. The exceptions listed under paragraph 59.2 should be applicable to attorneys as well.

In particular, the following exceptions should apply to all legal practitioners – not only to advocates with trust accounts:

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

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

59.2.4 when the instructing attorney gives permission.

Paragraph 61.10 [page 46 and 47]

The word 'inhibited' should read 'prohibited'.

Paragraph 62.8 [page 48]

It is recommended that this paragraph should also make reference to 'trustee' and 'business rescue practitioner'.

Paragraph 66.9.3 [page 51]

The word 'that' should be added, as indicate below:

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

Paragraph VII Conduct of legal practitioners not in private practice

The LSSA requests specific reference in terms of the Act for the inclusion of corporate counsel under the ambit of the Code of Conduct.

Competition Act 89 of 1998:

The Code of Conduct must be assessed against the provisions of the Competition Act 89 of 1998 (Competition Act). In particular, Section 4(1)(a) of the Competition Act prohibits an agreement or concerted practice between competitors or a decision by an association of competitors if it has the effect of substantially preventing or lessening competition in a market unless a party to the agreement, practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.

The LPC will be aware that the Competition Commission in 2011 ruled that certain of the Professional Rules of the four statutory Law Societies which preceded the LPC contravene the Competition Act and turned down an application for exemption of those rules from the ambit of the Competition Act. In fact, the Commission referred a complaint against the Law Society of the Northern Provinces arising from certain of its rules to the Competition Tribunal. In subsequent engagements between the LSSA and the Commission, it became clear that the Commission is closely watching the developments in the legal profession and will most likely scrutinise the Code of Conduct, once adopted, for any contraventions of the Competition Act.

Accordingly, it is incumbent of the LPC to ensure that the provisions of the Code of Conduct do not contravene the Competition Act or cannot give rise to a contravention of the Competition Act by its Provincial Councils or committees. If there is any risk in this regard, the LPC should consider –

- a. engaging with the Competition Commission on a pro-active basis to bring the Code of Conduct in line with the Competition Act; or
- b. applying for an exemption from the Competition Act in terms of Schedule 1 of the Competition Act.