

GUIDELINES FOR DISCIPLINARY ENQUIRIES

Updated August 2020 (following amendments to the CBC Constitution at the AGM on 17 June 2020)

A. PRELIMINARY INVESTIGATION

1. Upon receipt of a disciplinary complaint against a member, the Chairperson or Vice Chairperson of the Bar Council may nominate a member of the Bar (hereafter referred to as the "*preliminary investigator*") to conduct a preliminary investigation of the matter.
2. The duties of the *preliminary investigator* shall be:
 - (a) to refer the complaint forthwith to the member concerned and to call for the response of the member concerned within a period of two weeks;
 - (b) to refer the member's response to the complainant for a reply (if any) within a further period of two weeks;
 - (c) upon receipt of the aforementioned reply, to prepare a brief synopsis of the matter to be placed before the next meeting of the Bar Council;
 - (d) where he/she comes to the conclusion that the matter does not warrant further investigation or proceedings, to recommend to the Chairperson or Vice Chairperson that the complaint be dismissed.
3. Should the Chairperson or Vice Chairperson agree with the aforementioned recommendation, he/she may there and then dismiss the complaint and inform the complainant and member concerned accordingly. Alternatively, the Chairperson or Vice Chairperson may decide to refer the matter to the Council.
4. In the event that the Chairperson or Vice Chairperson dismisses the complaint he or she shall at the time of informing the complainant thereof, advise the complainant that if he or she is aggrieved by such decision, he or she may appeal against such decision to the full Bar Council.
5. Any appeal to the Bar Council shall be made in writing within fifteen (15) calendar days after the date of the decision appealed against. The complainant shall lodge with the Secretary a notice that he/she is appealing against the decision of the Chairperson or Vice Chairperson and the reasons for the appeal.

6. The Secretary shall ensure that the member concerned is furnished with a copy of the notice of appeal and reasons. The member shall have the right to make written representations regarding the appeal within seven (7) days after receipt of the notice of appeal and reasons.
7. The Bar Council shall as soon as reasonably possible decide to uphold, alter or reject the decision of the Chairperson or Vice Chairperson which is the subject of the appeal and may give such further instructions as to the conduct of the matter as it may deem fit.
8. The Chairperson or Vice Chairperson and any other member of the Bar Council who took part in the decision subject to appeal shall play no part in the hearing or decision in regard thereto.

B. DISCIPLINARY SUB-COMMITTEE

9. The Council may appoint a disciplinary sub-committee consisting of two or more members of the Bar, either with plenary power to dispose of the matter, or with power to investigate a complaint and in either event to report its findings and recommendations to the Council, either after considering a report by a preliminary investigator or, where appropriate, directly after considering a complaint.
10. The sub-committee may determine the procedure to be followed in the inquiry, bearing in mind, however, the following considerations:
 - (a) It is important that the proceedings be finalised expeditiously. It is harmful to the interests of complainants, affected members and the Bar as a whole for proceedings to be protracted.
 - (b) Being a disciplinary inquiry, the proceedings need not necessarily be conducted in accordance with strict adversarial principles, but may be of an inquisitorial nature, as long as the principles of justice are applied.
 - (c) Should the sub-committee decide that a full-scale hearing is required and that the services of a *pro forma* prosecutor are necessary, the sub-committee should convey this request to the Chairperson or Vice Chairperson of the Bar
 - (d) It is important that a record of proceedings be kept:
 - (i) so as to enable the Bar Council (where the sub-committee does not have plenary power to dispose of the matter) to decide whether or not to accept the sub-committee's findings/ recommendations, either with or without motivation;
 - (ii) to enable a possible appeal to the GCB to be prosecuted, where necessary.

- (e) The Chair of the sub-committee is required to keep the record of proceedings. A "record" in this context will normally be a manuscript record of proceedings. Should the sub-committee be of the view that a mechanically recorded record is required, a request to this effect must be addressed to the Chairperson or Vice Chairperson as soon as possible. In such instance, the Administrative Officer will provide (if required) cassettes to enable the sub-committee to record the proceedings. Upon completion of the sub-committee's proceedings, the record must be delivered to the Administrative Officer for safekeeping. The engagement of commercial recording services shall only be undertaken in exceptional circumstances and with the prior approval of the Council.
- (f) The sub-committee should state pertinently in its report what it finds as facts, and (where appropriate) its conclusions in relation to the reliability of witnesses.
- (g) A committee with plenary powers has the powers of the Council as regards findings and sanctions set out in clauses 30 (a) to (f) of the Constitution (attached).

C. REPORT BY DISCIPLINARY SUB-COMMITTEE

- 11. (a) If the sub-committee has been given plenary powers to dispose of the matter, it shall prepare a written report containing its decision, and shall furnish a copy of such report to the member concerned, to the complainant and to the Council (for information). The record of the proceedings need not be placed before the Council, but shall be handed to the Administrative Officer for safekeeping.
- (b) Where a member is dissatisfied with the findings and/or sentence of a sub-committee, such member may request the Bar Council to rectify the matter. The Bar Council as original delegator of the powers may, either pursuant to such request or *mero moto*, in appropriate circumstances and in its sole discretion decide to exercise the delegated power itself or modify the decision of the sub-committee or refer the report back for amplification or clarification.
- 12. (a) If the sub-committee has not been given plenary powers to dispose of the matter, it shall prepare a written report containing its recommendations as to the findings to be made in respect of the charges against the member and (where applicable) an appropriate sentence. The report shall be furnished to the member and to the Council.
- (b) At the time of furnishing its report to the member, a sub-committee not having plenary powers shall in writing request the member to notify the secretary whether he/she accepts the sub-committee's recommendations and/or whether he/she wishes to address the Council before the latter makes its decision.
- (c) If the member accepts such sub-committee's recommendation and does not wish to address the Council, the record of the proceedings need not be placed

before the Council, but shall be handed to the Administrative Officer for safekeeping. In all other instances the record shall be placed before the Council together with the sub-committee's report.

(d) A member wishing to address the Council as aforesaid shall be given at least one week's notice by the Secretary of the date of the Council meeting at which the matter will be considered.

13. A member who fails, without satisfactory explanation, to respond timeously to a complaint and/or to comply with a request by a disciplinary sub-committee may be found guilty of misconduct on this ground.

D. COSTS

14. In terms of the Cape Bar Council Constitution, in imposing a sanction a disciplinary sub-committee/the Council may require a member to pay the Council's costs. In that event, the nature and amount of the costs should be specified.

15. Conditions which may be attached to sanctions (for instance, in suspending a sanction) may include matters such as payment of costs incurred by a complainant pursuant to lodging a complaint and attending any disciplinary proceedings or an apology.

E. APPEAL

16. When members and/or complainants are advised of the outcome of disciplinary procedures taken in terms of these guidelines or in terms of the Constitution of the Cape Bar, the Bar Council shall advise such member and/or complainant of the rights of appeal available to them in terms of clauses 6(b), 6(c) and 6(d) of the Constitution of the General Council of the Bar as read with paragraph 33 of the Constitution of the Cape Bar. A copy of those provisions should be repeated in or annexed to the letter of advice of the outcome of disciplinary procedures to the relevant member and/or complainant.

EXTRACTS FROM THE CONSTITUTION OF THE CAPE BAR

30. If the Bar Council, or a committee with delegated powers as aforesaid, having conducted an enquiry into the professional conduct of a member, decides that the member has been guilty of unprofessional conduct or a breach of the Uniform Rules or the Cape Bar Rules or the provisions of this Constitution or any other rules referred to in clause 27 or conduct unbecoming an advocate, it may, subject to such conditions as it may deem fit-

- (a) caution or reprimand or censure such member; and/or
- (b) impose a fine not exceeding R10 000,00 (or such other maximum amount as the Bar Council may in future determine in the light of any future change in the value of money); and/or
- (c) **[deleted at General Meeting held on 10 May 2000]**
- (d)
 - (i) suspend such member's membership for a period not exceeding six months or suspend such suspension; or
 - (ii) expel the member from membership of the Cape Bar or suspend such expulsion; and/or
- (e) order the member concerned to pay the costs incurred by the Bar Council for purposes of such enquiry;
- (f) order the member concerned to pay the reasonable accommodation and travelling costs of complainants and their witnesses incurred in respect of:
 - (i) pre-enquiry consultations and preparation with the Bar Council's nominated prosecutor(s); and/or
 - (ii) attending the enquiry; and/or
 - (iii) testifying at the enquiry:

provided that no actual suspension or expulsion from membership shall take effect unless ratified by the Bar Council itself.

The effect of a suspension of membership in terms of this Constitution shall, save as may otherwise be determined by the Bar Council in any case, be that during the period of the suspension the member concerned:

- (i) shall not hold himself or herself out as a practising member of the Cape Bar;

- (ii) loses all the privileges of membership of the Cape Bar, including the use of all facilities provided by the Bar Council;
- (iii) shall not practise from or occupy the chambers allocated to him/her;
- (iv) shall not hold a brief or act professionally in any way with another member of the Cape Bar or any advocate who is a practising member of a constituent or associate Bar of the General Council in any matter.

A suspension of membership in terms of this Constitution shall not relieve the member concerned of any obligations attached to membership, including payment of Bar dues, levies and other charges to be paid by members, rental of chambers, payment of floor and/or group dues and compliance generally with the provisions of this Constitution.

30.bis Publication to members of findings in disciplinary matters using the electronic communication system of the Cape Bar shall take place as a matter of course, and, except in exceptional circumstances, the member shall not be named in the publication. No results of any disciplinary proceedings will be circularised to members until such time as the *dies induciae* within which to lodge an application for leave to appeal have expired or the appeal proceedings have been determined, save in exceptional circumstances.

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- 33.
- (a) In any disciplinary proceedings the decision, finding or sentence (hereinafter "the decision") of the Bar Council or of a committee with delegated powers and the reasons for the decision shall be furnished to the member and the complainant in writing within seven (7) days of the date of the decision.
 - (b) There shall be no automatic right of appeal by a member or complainant to the General Council against a decision of the Bar Council or committee with delegated powers in any disciplinary proceedings.
 - (c) Application for leave to appeal shall be made in writing within two (2) weeks after the date upon which the written decision with reasons was furnished to the member or complainant by the Bar Council or committee with delegated powers.
 - (d) The application for leave to appeal shall be lodged with the Secretary of the Bar Council. The application shall state and motivate the grounds

upon which leave to appeal is sought and shall, if lodged outside the period specified in (c), be accompanied by a written application for condonation, setting forth the reasons for the non-compliance.

- (e) The application for leave to appeal shall be heard by the Bar Council or the committee with delegated powers (alternatively a committee consisting of at least three senior Counsel) within three (3) weeks after the application for leave to appeal was lodged, on a date, time and place to be decided by the Bar Council or the committee. The period of three (3) weeks may in exceptional circumstances be extended by the Bar Council.
- (f) The Bar Council or the committee shall deliver a written decision with reasons for its decision to grant or refuse the application for leave to appeal within two (2) weeks of the hearing of the appeal.
- (g) If leave to appeal be granted by the Bar Council or the committee then the member or the complainant shall appeal to the General Council in terms of and subject to the relevant provisions of the Constitution of the General Council relating to appeals.
- (h) If leave to appeal be refused by the Bar Council or the committee, the member or the complainant may apply for leave to appeal to the General Council in terms of and subject to the relevant provisions of the Constitution of the General Council relating to applications for leave to appeal.
- (i) This clause shall not affect the right of appeal of any person whose application for membership has been refused by the Bar Council as provided for in paragraph 5.
