

ETHICS AND PROFESSIONAL RESPONSIBILITY 2011



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With grateful thanks to Ms H Kruise who developed this course outline.

1. OVERVIEW AND PURPOSE

Ethics and Professional Responsibility is an elective course in the final year of LLB. Legal 'ethics' (in the broad sense) forms part of both the Attorneys' and Advocates' Admission Examinations. This course should go some way to preparing you to write and pass these examinations. But examinations aside, this course begins by examining the relation between practical legal training in ethics (based on articles and pupillage training) and general ethical theorising. The focus on this relation at the beginning of the course arises out of the fear that rote-learning of legal ethical rules and practice without theory lacks direction, becoming little more than a loose amalgam of reactions to specific cases.¹ The course combines both the theory of 'ethical lawyering' and the practice of lawyers governed by the various rules of the law society, general bar and case law. This structure attempts to speak to the two dimensions of legal ethics, that is, to individual and to collective responsibility – both to personal decision making and to professional regulation.

2. ASSUMPTIONS OF PRIOR LEARNING

In order to successfully complete this course, students should:

- be capable of communicating competently in written and spoken English;
- be capable of critically analyzing and extracting relevant legal information from case law, legislation and other source material;
- be aware of the influence of Constitutional principles on source material; and
- be capable of independent learning.

3. OUTCOMES

3.1 Knowledge Outcomes:

It is intended that students know and understand:

- The different approaches to legal ethics.
- The purpose and function of legal ethics.
- The sources of legal ethical rules.
- The kinds of ethical dilemmas which lawyers face.
- Some of the most important rules and principles of legal ethics.
- Typical professional negligence situations.

3.2 Skills Outcomes:

It is intended that students should be able to:

- Debate current ethical issues and think critically about existing practices.
- Apply ethical rules to practical scenarios.
- Research and write an essay on a selected topic in legal ethics.
- Present the results of the above essay to the class, and in so doing demonstrate presentation skills.

¹ See LaFollette's remarks about ethics in general in H LaFollette (ed) *The Oxford Handbook of Practical Ethics* (2003) 8.

3.3 Values Outcomes:

Reflected under 'Overview and Purpose' heading above.

4. TEACHING METHOD:

This elective course runs for 13 weeks. The course is divided into 4 sections (cf. section 5 below) which will be covered in the 2nd semester in the form of *vive voce* lectures, seminar discussions and presentations by students.

Students are expected to read ahead of the next lecture so that they may participate in the lecture and consider practical scenarios either individually or in groups. There is no comprehensive handout for the course and as such, students are expected to take their own notes during lectures and to supplement these with readings provided in the course outline. Students are expected to assume responsibility for their own learning by independent study according to guidance provided by the reading list. Throughout the course and in test and exam evaluation, problem-solving scenarios will be put before students on a regular basis.

Students are required to write a research essay on a particular part of legal ethics which is of current significance – potential topics will be handed out to students in the first two weeks of term which students may, not must, use as a basis for their project. Students may choose to work individually or in groups of two. In finalising a research topic, students must consider and complete the 'Learning Contract' document (see appendix III) and arrange a meeting with me to finalise their research topic. At this meeting, a topic proposal and a hand-in date will be negotiated. At the presentation, students must share their findings, research and own opinions with the rest of the class in the form of a presentation at a date to be arranged with me.

Students are referred to the Faculty's 'Law Survival Guide' in respect of DP requirements for attendance of lectures. Students are welcome to discuss problems with the lecturer.

5. COURSE CONTENT:

- A Lawyers and ethics:
 - A1 Introduction to theoretical approaches to legal ethics
 - A2 Institutions and sources that regulate the conduct of attorneys and advocates.
- B Duties of the lawyer – selected topics
- C Student presentations – selected topics
- D Professional Liability

6. SOURCES OF REFERENCE:

You need not purchase any book(s) for this course. Useful material will be made available for you to read on shortloan:

- the Practical Legal Education (PLT) notes on Attorneys' Practice is a primary reference.

- A useful source of reference for the whole course, but especially for attorneys' ethics is: E A L Lewis *Legal ethics: a guide to professional conduct for South African attorneys* (1982) Juta: Cape Town.
- J R Midgley *Lanyers' Professional Responsibility* (1992) Juta: Cape Town will be the main reference for section E.

Unfortunately, there is very little written in South Africa regarding the nature of ethics in the legal profession apart from the more practical book written by Hoffman (see I M Hoffman *Lewis & Kyrrou's handy hints on legal practice* (1997) Butterworths: Cape Town). However, the following international texts are extremely useful:

- K Economides (ed) *Ethical Challenges to Legal Education and Conduct* (1998) Hart Publishing: Oxford
- M Freedman and A Smith *Understanding Lanyers' Ethics* 3 ed (2004) LexisNexis: Newark
- G Hazard and D Rhode *The Legal Profession: Responsibility and Regulation* (1985) The Foundation Press: New York
- L Lerman and P Schrag *Ethical Problems in the Practice of Law* 2 ed (2004) Wolters Kluwer: New York
- D Luban *Lanyers and Justice: An Ethical Study* (1988) Princeton University Press: Princeton
- D Luban *Legal Ethics and Human Dignity* (2007) Cambridge University Press: Cambridge
- D Nicholson and J Webb *Professional Legal Ethics: Critical Interrogations* (1999) Oxford University Press: Oxford
- Y Ross *Ethics in Law: Lanyers' Responsibility and Accountability in Australia* (2005) LexisNexis Butterworths: Australia

You are advised to consult the Attorneys' journal, *De Rebus*, and the Advocates' journal, *The Advocate*, for topical ethical issues in legal practice.

7. STUDENT ASSESSMENT:

The final mark for the course is comprised of the following components:

Class work: out of 40 marks

Examination: out of 60 marks

Total: 100 marks

7.1 Class work

Students are assessed for the class work component on the basis of two pieces of work (assignment/presentation and test). The assignment / presentation will count 30% (15% for each part) and the test will count 10% of the final class mark.

Please note that no late assignments / the failure to present such assignment on the due date will be accepted for purposes of the class mark. Late assignments / late presentations will receive 0% unless the student has a valid leave of absence. The test (date to be announced) may contain:

- Problem questions which require the application of theory, law society rules and/or case law to solve practical issues;
- Case notes;
- Theory-type questions, in which students are required to describe, explain and critically evaluate the current law.

The failure to complete the class work on time will be considered a failure to perform the work of the class. This may result in the taking away of a student's DP for the course by the Dean.

7.2 Examination:

The November examination for this course will comprise a two-hour long examination paper out of 60 marks. The ethics component of this course will comprise of +-50 marks while +-10 marks will be allocated to the professional liability component.

8. GENERAL:

Please feel free to approach me about any aspect of this course. If you have a specific query, to ensure availability, please email me to arrange an acceptable consultation time for us both.

I hope that you will find this course interesting and worthwhile.

Cameron McConnachie
July 2011

Ethics and Professional Responsibility

2011

Tentative schedule of topics and cases to be discussed in class

Date	Topics and problems	Sources & materials
<p>Week 1</p>	<p>Lawyers and ethics –</p> <p>1. Introduction to the course</p> <p>2. Alternate views of the lawyer's role</p>	<p>S Pepper 'The Lawyer's Amoral Ethical Role: A Defence, a Problem and some Possibilities' (1986) <i>American Bar Foundation Research Journal</i> 613.</p> <p>G Postema 'Moral Responsibility in Professional Ethics' (1980) <i>New York Law Review</i> 63-64; 73-83.</p> <p>W Simon 'Ethical Discretion in Lawyering' (1987-1988) <i>Harvard Law Review</i> 1083-1119.</p> <p>Lewis's 'Golden Thread' and the characteristic qualities of an attorney: '<i>A practitioner must avoid all conduct all conduct which, if known, could damage his reputation as an honourable lawyer and honourable citizen</i>' (<i>Lawyers Ethics</i>)</p>

Week 2	Lawyers and ethics - 1. Discussion of alternate roles 2. Two practical examples of ethical quandaries: (scenarios to be handed out in class)	Prior reading required for hypotheticals: (1) Rule 35 of the Uniform Rules of Court (Discovery) (2) Rule 3.2 of the Uniform Rules of Professional Conduct (General Council of the Bar South Africa) (see http://www.sabar.co.za/ethics_rules.pdf)
Week 3	(A) The law governing lawyers - Institutions and sources that regulate the conduct of attorneys and advocates General: <ul style="list-style-type: none"> • E A L Lewis <i>Lawyers Ethics</i> • Quick revision of difference between attorneys and advocates (B) Admission (and re-admission) to practice as an attorney and as an advocate <ul style="list-style-type: none"> • ‘fit and proper’ person requirement • Examples of necessary disclosures 	See appendix I for ‘quick source sheet’ re: institutions and sources ‘Fit and proper’ requirement (professional and personal life) Attorneys (ss 15(1)(a) and 22(1)(d)): <ul style="list-style-type: none"> • <i>Prince v President of the Cape Law Society and others</i> 2000 (3) SA 845 (SCA) and 2002 (2) SA 794 (CC) • <i>Kaplan v Incorporated Law Society, Tvl</i> 1981 (2) SA 762 (T) • <i>Ex Parte Postma</i> 1999 (3) SA 762 (T) • <i>Law Society of the Cape of Good Hope v Budricks</i> 2003 (2) SA 11 (SCA) • <i>Cape Law Society v Reyneke</i> 1990 (4) SA 437 ECD • <i>Law Society, Transvaal v Blumberg</i> 1987 (3) SA 659 (T) • <i>Prokureursorde Transvaal v Van der Merwe</i> 1985 (2) SA 208 (T) • <i>Prokureursorde van die Oranje Vrystaat v Roodt</i> 1996 (2) SA 498 (O) • <i>Transvaal Law Society v Kleynhans</i> 1995 (1) SA 839 (T) • <i>Swartzberg v Law Society, Northern Provinces</i> 2008 (5) SA 322 (SCA)

	<p>Issues arising from discussion:</p> <p>1. Is s22(1)(d) of the Attorneys Act constitutional (in the light of s22 of the Constitution of South Africa, 1996)?</p> <p>2. Can a person be re-admitted on the basis that they were originally disbarred because of a ‘wrongful conviction’, alternatively, that they show remorse?</p> <p>3. Should a person who has plagiarised at university or the side-/ bar examinations be admitted to practice (or in the former case, be registered as a candidate attorney)?</p>	<p>Advocates (ss 3(1)(a) and 7(1)(d)):</p> <ul style="list-style-type: none"> • <i>Fine v Society of Advocates of SA (WLD)</i> 1983 (4) SA 488 (A) • <i>Hayes v The Bar Council</i> 1981 (3) SA 1070 (ZAD) • <i>Society of Advocates of Natal and the Natal Law Society v Merret</i> 1997 (2) All SA 273 (N) • <i>Kekana v Society of Advocates of South Africa</i> 1998 (4) SA 649 (SCA) • <i>In re Ngwenya v Society of Advocates, Pretoria, and another</i> 2006 (2) SA 88 (W) <p>Necessary disclosures:</p> <p>Attorneys:</p> <ul style="list-style-type: none"> • <i>Ex parte Maharaj</i> 1959 (4) SA 522 (N) • <i>Ex Parte Gunguluza</i> 1971 (4) SA 212 (N) • <i>Ex Parte Singh</i> 1964 (2) SA 389 (N) • <i>In Re Legal Profession Act 2004; re OG</i> [2007] VSC 520 [Australian case] <p>Advocates :</p> <ul style="list-style-type: none"> • <i>Ex Parte Cassim</i> 1970 (4) SA 476 (T) at 477E-H • <i>In re Rome</i> 1991 (3) SA 291 (A) • <i>S v Mkhise; S v Mosia; S v Jones; S v Le Roux</i> 1988 (2) SA 868 (A)

<p>Week 4 & 5</p>	<p>Lawyer's duties to court:</p> <ul style="list-style-type: none"> • Being a good person in an adversary system (Lerman and Schrag 594-598) • The Perjury Trilemma (Freedman and Smith 159-173; 193-195') • Attorney's duty to court (CLS Rule 14.3.2) • Advocate's duty to court (URPC 3.2 at C.2) <p>Issues arising from discussion:</p> <p>1. Duty to disclose adverse facts?</p> <ul style="list-style-type: none"> • <i>Flight from Sudan</i> (Hypothetical to be handed out in class) <p>1.1 Revelation about past criminal conduct?</p> <ul style="list-style-type: none"> • <i>The missing persons case</i> (hypothetical to be handed out in class) <p>1.2 Revealing confidences to prevent future injury or death</p>	<p>Duties to court includes:</p> <p>(1) Duty to act honestly, consciously and openly (conversely: not to mislead the court and to disclose material facts):</p> <ul style="list-style-type: none"> • <i>Aaron v Law Society (Society of Advocates of Witwatersrand intervening)</i> 1997 (3) SA 750 (T) • <i>Kekana v Society of Advocates of SA</i> 1998 (4) SA 649 (SCA) • <i>General Council of the Bar v Mattys</i> 2002 (5) SA 1 (E) • <i>Van der Berg v General Council of the Bar</i> [2007] SCA 16 (RSA) <p>(2) Duty to act with utmost good faith towards the court</p> <ul style="list-style-type: none"> • <i>Pienaar v Pienaar en Andere</i> 2000 (1) SA 231 (O) • <i>Jasat v Natal Law Society</i> 2000 (3) SA 44 (SCA) • <i>Toto v Special Investigating Unit and others</i> 2001 (1) SA 673 (E) • <i>Ex Parte Hay Management Consultants (Pty) Ltd</i> 2000 (3) SA 501 (W) • <i>Ude v Minister of Home Affairs and Another</i> 2008 (6) SA 483 (W) para 36ff. (see also order of the SCA in <i>Jeebhay v Minister of Home Affairs</i> (139/08) [2008] ZASCA 160 (27 November 2008)) <p>(3) Duty to acquaint him/herself with the rules of court and articulate the best argument available</p> <ul style="list-style-type: none"> • <i>Ferreira v Ntshingila</i> 1990 (4) SA 271 (A) • <i>S v Ntuli</i> 2003 (4) SA 258 (W)
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	<ul style="list-style-type: none"> • <i>Spaulding v Zimmerman</i> 263 Minn. 346, 116 N.W.2d 704 (1962) (see R Cramton & L Knowles ‘Professional Secrecy and its Exceptions: Spaulding v Zimmerman Revisited’ (1998) 83 <i>Minnesota Law Review</i> 63) <p>1.3 Revealing inconsistent statements to the defence (as a prosecutor)</p> <ul style="list-style-type: none"> • <i>S v Xaba</i> 1983 (3) SA 717 (C) <p>2. Duty to disclose adverse authority</p> <ul style="list-style-type: none"> • <i>Ude v Minister of Home Affairs and Another</i> 2008 (6) SA 483 (W) para 36ff. (see also order of the SCA in <i>Jeebhaj v Minister of Home Affairs</i> (139/08) [2008] ZASCA 160 (27 November 2008)) 	<ul style="list-style-type: none"> • <i>PN Cele v SASSA and 22 related cases</i> (unreported case no. 7040/07 DCLD (19 March 2008)) <p>(4) Duty not to abuse the process of the courts:</p> <ul style="list-style-type: none"> • <i>Re Grunow Estates (Edms) Bpk v Jordaan</i> 1993 (3) SA 448 (OPD) • <i>Mofokeng v General Accident Insurance Co Ltd</i> 1990 (2) SA 712 (WLD) • <i>Machumela v Santam Insurance Co Ltd</i> 1977 (1) 660 (A) • <i>Maia v Total Namibia (Pty) Ltd</i> 1991 (2) SA 352 (Nm HC) <p>(5) Duty not to use coarse, lavatorial & abusive language (including irrelevant or slanderous material)</p> <ul style="list-style-type: none"> • <i>Shoprite Checkers (Pty) Ltd v Bumpers Shwarmas CC</i> 2003 (5) SA 354 (SCA) – concurring judgment of Marais JA. • D Davis, G Marcus & J Klaaren ‘The Administration of Justice’ in Joubert (ed) <i>LAWSA</i> • <i>Findlay v Knight</i> 1935 AD 58 at 71-73 • <i>Preston v Luyt</i> 1911 EDL 298 • <i>Basner v Trigger</i> 1946 AD 83 at 106-107 • <i>Glucksman v Schneider</i> 1936 AD 151 at 161-162
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	<p>3. Cross-examination (following the instructions of your client)</p> <ul style="list-style-type: none"> • Dalkon Shields litigation example (to be handed out in class) 	
Week 6	<p>Lawyer's duty to client</p> <ul style="list-style-type: none"> • Attorney's duty to client (CLS Rule 14.3.2.1) • Advocate's duty to client (URPC 3.1 at C.1) <p>Issues arising out of discussion:</p> <ol style="list-style-type: none"> 1. The different type of conflicts that can arise: <ol style="list-style-type: none"> 1.1. Concurrent conflicts 1.2 Successive conflicts 1.3 Imputed conflicts ('chinese walls' = remedy?) 1.4 Present and former government lawyers <ul style="list-style-type: none"> • <i>Prince Jefri Bolkiah v KPMG (a firm)</i> [1999] 1 All ER 517 & <i>Freshfields</i> [2004] EWCA Civ 741. • "Conflict of interests' in Hlophe case' <p>News24.com (20 August 2008)</p>	<p>Duties to client includes:</p> <p>(1) The attorney's duty when he/she represents a client and an unrepresented party</p> <ul style="list-style-type: none"> • <i>Leite v Leandy & Partners</i> 1992 (2) SA 309 (D) <p>(2) Duty to avoid conflicts of interest</p> <ul style="list-style-type: none"> • <i>S v Hollenbach</i> 1971 (4) SA 636 (NC) • <i>S v Jacobs and another</i> 1970 (3) SA 493 (E) • <i>The Law Society of the Cape of Good Hope v Tobias and another</i> 1991 (1) SA 430 (C) • <i>S v Dintwe and Another</i> 1985 (4) SA 539 (BAA) at 541A-H • <i>Martin NO v Road Accident Fund</i> 2000 (2) SA 1023 (W) • <i>DH Swanepoel v The State</i> [2006] SCA 171 (RSA) para 12ff. • Problems 1, 2 and 3 (Appendix II)

	<p>2. Possible problems surrounding contingency fee arrangements</p> <ul style="list-style-type: none"> • R Kiser, M Asher, B McShane 'Let's not make a deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations' (2008) 5 <i>Journal of Empirical Studies</i> 551-591 	<p>(3) Independence and control in and over a case</p> <ul style="list-style-type: none"> • <i>R v Matonsi</i> 1958 (2) SA 450 (AD) at 456A-457F and <i>S v Majola</i> 1982 (1) SA 125 (A) and <i>S v Louw</i> 1990 (3) SA 116 (A) • <i>Carolus and another v Saambou Bank Ltd; Smith v Saambou Bank Ltd</i> 2002 (6) SA 346 (SE) • F Coetzee 'Eis teen regslui' <i>Die Volksblad</i> 6 June 2009 <p>(4) Contingency fee arrangements</p> <ul style="list-style-type: none"> • Contingency Fees Act 66 of 1997 • <i>Price Waterhouse Coopers Inc v National Potato Cooperative Ltd</i> 2004 (6) 66 (SCA) • <i>Law Society of South Africa and Others v Road Accident Fund and Another</i> 2009 (1) SA 206 (C) • Problem 4 (Appendix II)
<p>Week 7</p>	<p>Particular duties of the attorney:</p> <p>1. Management of trust funds (ss78 & 83(9) of the Attorney's Act 53 of 1979 and CLS Rule 20)</p> <p>2. Duty to his/her law society (CLS Rule 15)</p>	<p>(1) Management of trust funds:</p> <ul style="list-style-type: none"> • <i>Law Society, Transvaal v Matthews</i> 1989 (4) SA 389 (T) • <i>Holmes v Law Society of the Cape of Good Hope and Another</i> 2006 (2) SA 139 (C) • <i>Summerley v Law Society, Northern Provinces</i> 2006 (5) SA 613 SA • <i>The Law Society of the Cape of Good Hope v Peter</i> [2006] SCA 37 (RSA)

	<p>Issues arising out of discussion:</p> <p>1. Incompetence rather than intention regarding the operation of trust funds</p> <ul style="list-style-type: none"> • <i>Summerley v Law Society, Northern Provinces</i> 2006 (5) SA 613 SA • <i>The Law Society of the Cape of Good Hope v Peter</i> [2006] SCA 37 (RSA) <p>2. Liability to third parties</p> <ul style="list-style-type: none"> • <i>Hirschowitz Flionis v Bartlett and another</i> 2006 (3) SA 575 (SCA) <p><i>Du Preez & Others v Zniegers</i> 2008 (4) SA 627 (SCA)</p>	<p>(2) Duties to his /her law society</p> <ul style="list-style-type: none"> • <i>Lambert v Incorporated Law Society</i> 1910 TPD 77 at 79 • <i>Hurter v Hough</i> 1987 (1) SA 380 (C) • <i>Law Society of the Cape of Good Hope v Budricks</i> 2003 (2) SA 11 (SCA) • <i>Law Society, Northern Provinces (Incorporated as the Law Society of the Transvaal) v Maseka and another</i> 2005 (6) SA 372 (BH) at 378ff • Problem 5 (Appendix II)
Week 8	<p>Particular duties of the advocate:</p> <p>1. Duty to obey the rules of the profession</p> <p>2. The referral rule / The advocate's duty not to take work off the street – (URPC 5.12 at E12-12bis)</p>	<p>Duty to obey the rules of the profession:</p> <ul style="list-style-type: none"> • <i>Olivier v Die Kaapse Balieraad</i> 1972 (3) SA 485 (AD) at 498A-B • <i>Society of Advocates of SA (WLD) v Cigler</i> 1976 (4) SA 350 (T) at 354 • <i>General Council of the Bar of South Africa v Van der Spuy</i> 1999 (1) SA 577 (T)

	Issues arising out of discussion: <ol style="list-style-type: none"> 1. Freedom of trade? 2. Obeying the rules of an organisation that you are not part of? 3. New Legal Services Sector Charter? (http://www.doj.gov.za/LSC/legal_charter.htm) 	Duty not to take work off the street <ul style="list-style-type: none"> • <i>Society of Advocates of Natal v de Freitas and another (Natal Law Society Intervening)</i> 1997 (4) SA 1134 (N) • <i>General Council of the Bar of South Africa v van der Spuy</i> 1999 (1) SA 577 (T) • <i>De Freitas v Society of Advocates of Natal</i> 2001 (3) SA 750 (SCA) • <i>Commissioner, Competition Commission v General Council of the Bar of South Africa and others</i> 2002 (6) SA 606 (SCA) • <i>Rosemann v General Council of the Bar of South Africa</i> 2004 (1) SA 568 (SCA) • <i>Van der Berg v General Council of the Bar</i> [2007] SCA 16 (RSA)
Week 9	Selected topic: Client vs cause in public interest litigation <ul style="list-style-type: none"> • Hypothetical scenario to be handed out in class 	<ul style="list-style-type: none"> • Readings to be announced
Week 10 & 11	Student presentations & test	

Week 12	Professional negligence <ul style="list-style-type: none"> • Introduction: difference between ethical duties and legal duties • Duties to clients • Responsibility for actions of employees 	The care that is to be reasonably expected of the average attorney <ul style="list-style-type: none"> • <i>Ebersohn v Prokureursorder van Transvaal</i> 1996 (1) SA 661 (T) • <i>Bouwer v Harding</i> 1997 (4) SA 1023 (SE) Duties to clients <ul style="list-style-type: none"> • <i>Guardian National Insurance Co Ltd v Weyers</i> 1988 (1) SA 255 (A) • <i>Mouton v Die Mynwerkersunie</i> 1977 (1) SA 119 (A) • <i>Honey and Blankenberg v Law</i> 1996 (2) SA 43 (A) Responsibility for actions of employees <ul style="list-style-type: none"> • <i>Mazibuko v Singer</i> 1979 (3) SA 258 (W) • <i>Mashigo v Rondalia Assurance Corporation of South Africa</i> 1977 (3) SA 431 (W) • <i>Manyeka v Marine & Trade Insurance Co Ltd</i> 1979 (1) SA 844 (SE) • <i>Mkhomolo v President Versekeringsmaatskappy Bpk</i> 1984 (1) SA 342 (T) • <i>S v Longdistance Pty Ltd</i> 1986 (3) SA 437 (N) • <i>Guthrie v AA Mutual Insurance Association Ltd</i> 1986 (4) SA 979 (W)
Week 13	Revision	

Appendix I

Quick source sheet for institutions and rules that regulate the conduct of attorneys and advocates

Attorneys:

(1) Attorneys Act 53 of 1979 (as amended) specifically ss 15(1)(a) and 22(1)(d).

- Deals with variety of matters but most importantly, it deals with qualifications and admission requirements for attorneys.
- Also deals with the manner in which trust accounts are held, the attorneys fidelity fund, the law councils and their councils in SA, the work which may only be performed by attorneys etc.

(2) Regulations promulgated under Attorney's Act

- What constitutes 'appropriate legal experience' for purposes of admission (one would look at regulations when preparing admission docs and payment in respect thereof).

(3) Rules of various law societies (and attorney's duties towards his or her law society)

- Rules of the four provincial law societies are promulgated in terms of s74 of the Attorney's Act: The Law Society of the Cape of Good Hope Rules: GG 5255/76 and specifically:
 - Rule 14 (professional conduct)
 - Rule 15 (disciplinary)
 - Rule 20 (investment practice rules)
 - Rule 21 (pro bono services)www.capelawsoc.law.za

(4) Rulings of the Council

The Cape Law Society publishes these rulings in their annual yearbook. These rulings deal with a variety of matters, especially regarding allowances, sharing of fees with persons other than legal practitioners, contingency fees, dealing with public and trust monies etc. Please note that **s19 of the Judicial Matters Amendment Act 66 of 2008** amends s72 of the Attorney's Act so as to allow the Council to impose fines of up to R100 000 for unprofessional, dishonourable or unworthy conduct (up from R10 000). In the case of candidate attorneys, the maximum fine that may be imposed has increased from R2000 to R20 000.

(5) Court decisions

(6) Common law

(7) Interpretation of ethical rules by textbook writers (Lewis etc)

(8) Foreign influences

- International bar association
- International code of ethics

- English Bar association
- The Law Society: Solicitors' Practice Rules and Codes and the professional conduct of solicitors

(9) The public interest

- For examples: issues relating to competitive practices, Road Accident Fund matters, conduct of lawyers in high profile cases etc.

(10) The Legal Services Sector Charter

Importance of Act and rules?

In *Die Prokureursorde van the Oranje Vrystaat v Schoeman* 1977 (4) SA 588 (O), the court stated:

‘An attorney who does not take the trouble of familiarising himself with the Act and the Rules and who, as a result lands on the wrong track, cannot expect much sympathy or punishment.’

Importance of the role of law societies?

As early as 1903 the Full Court in *Incorporated Law Society v Dagg* 1903 TS 583 at 589 expressed the view that, as a general rule, action for unprofessional conduct should be taken against a practitioner by the Law Society and not by the Court on its own initiative.

In *Kaplan v Incorporated Law Society, Tvl* 1981 (2) SA 762 (T), the court saw the law societies as ‘guardians’ by stating that the law societies are:

‘[I]nstitutions which right from the beginning of their existence had an important and significant part to play in assisting the Courts to regulate and discipline the profession for the protection of the prestige, status and dignity of the profession and the public interests in so far as they are affected by the conduct of members of the profession.’

Advocates:

- (1) Admission of Advocates Act 74 of 1964 (as amended) – specifically ss 3(1)(a) and 7(1)(d).
- (2) General Council of the Bar and The Uniform Rules of Ethics (available on www.sabar.co.za)
- (3) Rules of Practice in the Eastern Cape Division of the Supreme Court of South Africa (now Eastern Cape High Court)

Problem questions re: conflicts of interest, contingency fee arrangements and attorney's duty to his or her society

Problem 1:

Mr Groenewald of Humansdorp is missing. His wife suspects that he has been murdered. She contacts you to try find him. You suspect that your acquaintance, Piet, a car mechanic is involved. You contact him and ask him whether he knows anything. Piet informs you that the police are at his door. He hasn't told you anything over the phone except to ask you whether he should co-operate fully with the police.

Problem 2:

Two clients of your firm, namely, W and D want to conclude a deed of sale with each other. They ask you to draw up the deed of sale. In particular, they want you to draft a clause in the agreement to the effect that the purchase price will be payable to the purchaser D upon registration of transfer (to be registered by your law firm). They insist that they want you to act for them in this matter. W, in the meantime, wants you to register a bond over the property that he is in the process of selling to D, prior to the registration.

Discuss what you should do in the circumstances with reference to any conduct rules or case law which govern the matter.

Problem 3:

One of the biggest law firms in South Africa (Clifford&Latens) merges with another medium-sized law firm (Braun&Major). You are a director at the CL. It is clear that CL and BM represent clients who are litigating against each other or have conflicting interests in the commercial sphere. In a meeting of the directors, the following proposal is made to the directors to resolve the apparent conflict of interests:

- The new law firm will rely on the so-called 'chinese walls' approach.
- This involves establishing procedures to prevent information in the possession of one practitioner from being communicated to other practitioners in the same office – quarantining legal practitioners who have dealt with client X from those practitioners who are now dealing with client Y.
- This proposal will resolve any conflict of interests because the firm can guarantee that, in following the above procedures, no confidential information from X will be used in acting for Y.
- In these circumstances, it is argued that it would not be improper for the law firm to accept a retainer from both X and Y.

Problem 4:

You are the in-house legal advisor to the Eastern Cape Pineapple Co-operative Board. You are tasked with investigating certain irregularities allegedly committed by the Board's erstwhile general manager, Peter Pine. In the course of your investigation, you find several irregularities committed by Pine which caused huge financial loss to the Board. In your opinion, the independent auditor to the Board, Andrew Apple and Co, should have picked up on these irregularities which occurred over a 10-year-period. You include your findings in a report to the Board and, as a result of this report; the auditor firm resigns. In order to recoup the losses suffered by the Board, you suggest that Andrew Apple and Co be sued by the Board for breach of contract. It is your opinion that the auditor failed to carry out audits properly in accordance with the relevant common-law and statutory rules. The Board is under severe financial stress and cannot finance the proposed litigation against the auditor. One of the members of the Board suggests that the Board approach a reputable law firm on the basis that it will litigate on behalf of the Board on a 'no win, no fees' basis. In addition, he suggests that the law firm should share a percentage of the profits.

Prepare a memorandum to the Chairperson of the Board in which you advise whether such an approach is permissible and if so, any legal requirements that need to be met.

Problem 5:

The Cape Law Society has received several complaints about the non-payment of Road Accident Fund awards and dishonoured cheques by Pam, an attorney practising for her own account in Grahamstown. In addition, there are several allegations by estate agents that Pam has spent monies in her trust account for her day-to-day business expenses. After correspondence between Pam and the Law Society, the Law Society decides to send an auditor to Grahamstown to inspect Pam's books (in terms of s70 of the Attorney's Act 53 of 1979). Pam objects to this, stating that the actions by the Law Society (*viz.* inspecting her financial records) amounts to administrative action as contemplated in section 1(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). As such, she submits that the Law Society has to comply with the requirements of PAJA, in particular, that she be afforded a hearing before the Society inspects her books.

Discuss whether the Law Society must afford Pam a hearing before inspecting her books. In the course of your answer, discuss the general duty of an attorney in handling trust money.

Learning contracts

What is a learning contract?

- A document used to assist in the planning of a learning project
- A written agreement negotiated between a learner and a teacher/lecturer/facilitator that a particular activity will be undertaken in order to achieve a specific learning goal or goals
- An agreement negotiated between students and staff regarding the type and amount of study to be undertaken and the type and amount of assessment resulting from this study.

The idea of a learning contract is based on the ideas of educators such as Malcolm Knowles that:

- as autonomous human beings, adult learners should be encouraged to take more responsibility for their own learning and to use their existing skills and experiences as the basis for new learning
- they should be allowed, in formal educational settings, to learn things which are of importance to them.

A learning contract can be adapted for different contexts or purposes. It can provide a way of managing the negotiation of learning activities in a negotiated curriculum. The use of learning contracts highlights the participant's responsibility in facilitating her or his own learning process and contributing to the course. From the start we want you to examine your role in facilitating learning and how you are going to contribute to the process. We would particularly like to use the learning contracts to guide the *process* of learning.

Basic structure of this learning contract:

1. Set out the topic for your research project;
2. Set out your learning objectives or goals;
3. Set out the resources available to you to achieve these objectives;
4. Set out the evidence which will be produced to indicate the objectives have been achieved;
5. Note the criteria which will be used to assess this evidence

These categories have been adapted. Note the last category (assessment criteria) has been established for the research project. Learning contracts are negotiated between learner and lecturer. You may want to revisit your learning contract and come back to it before and after your presentation to see how your thoughts have changed or developed and what new developments have taken place.

<p>LEARNING CONTRACT BETWEENAND CAMERON MCCONNACHIE IN THE COURSE: ETHICS AND PROFESSIONAL RESPONSIBILITY</p>
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1. Set out a proposal for your research project in the space provided below:
2. What are your goals or objectives in researching the chosen topic?
3. What resources are available to you and what strategies will you adopt in order to achieve these objectives?
(Think about resources very broadly, including the usual legal resources such as legislation, case law, codes of conduct etc, as well as interdisciplinary resources. Think of any past and current experiences as resources for learning, including your time at the Legal Aid Clinic as well as any vacation or other work experience. When thinking about your project, think about whether you will be able to contribute to the group learning process).
4. What evidence will you produce to demonstrate that you have met the outcomes of the research project and your own goals?

Assessment Criteria for Research Project

Criteria	Highly Competent		Competent		Not yet competent/Does not meet minimum criteria		Unacceptable	
Content 20%	Appropriate and accurate Relevant theory and/or case law Detailed coverage		Mainly appropriate and accurate Minor inaccuracies Some relevant theory and/or case law Sufficient coverage		Some irrelevant and/or inaccurate content Key theory and/or case law absent		Superficial Much irrelevant, inaccurate content No theory or case law	
Understanding of relevant concepts 30%	Familiarity with and clear understanding of relevant concepts Appropriate use of terminology Good integration		Moderate understanding of relevant concepts Some inappropriate use of terminology Moderate integration		Confusion regarding relevant concepts Sparse use of terminology Some understanding but unclear		Vague and confusing Lack of use of terminology Conceptual misunderstanding and gross errors	
Insight 30%	Clear insight Critical argument Sound reasoning Ability to apply theory and/or case law		Moderate argument Reasoning fairly clear Superficial application of theory and/or case law		Rote repetition Weak argument Some understanding but reasoning unclear Little attempt to apply theory and/or case law Uncritical		Conceptual misunderstanding Off the topic Confusion No insight	
Structure 10%	Structured layout Well organised Clarity of thought Grammatically sound		Mainly well structured Moderate organisation Few grammatical errors Thoughts reasonably clear		Not well structured Weak organisation Grammatical errors Thoughts unclear		No introduction and/or conclusion Many grammatical errors No development of a logical, coherent argument No organisation	
Presentation 10%	Evidence of effort spent on presentation Well referenced and accurate		Moderate attention to detail Moderate referencing		Not well referenced Little evidence of proof-reading Reference sources not acknowledged		Poor referencing No evidence of proof-reading Gross errors	
Overall comment	Excellent	Very Good	Competent	Satisfactory	Just below standard	Weak	Very weak	Little of relevance
Overall mark	85 – 100%	75 – 85%	65 – 75%	50 – 65%	45 – 50%	35 – 45%	25 – 35%	0 – 25%

**Assessment Criteria for Research Presentations
(Ethics and Professional Responsibility)**

Content 30%	<ul style="list-style-type: none"> • Appropriate and accurate reflection of law and / or description of issue • Relevant theory and / or case law • Detailed coverage • Evidence of preparation prior to presentation (ie. evidence of adequate adjustment of assignment to a conference-type setting).
Delivery 30%	<ul style="list-style-type: none"> • Did presenter simply read from his / her notes? • Did presenter exhibit confidence in his / her thesis? • Was the general delivery style appropriate in respect of: posture, use of gestures, eye contact, pace / speed, volume (clearly audible?), voice modulation (monotone not great), articulate, economy of words, projection of confidence, actually listening to questions asked? • Did the presenter make habitual use of eg “OK...” or “Right...”?
Structure 30%	<ul style="list-style-type: none"> • Was there logic in the presentation? (ie. easy to follow, well set out, golden thread etc.) • Was the presenter able to integrate questions asked during the presentation with structure? (ie. ability to move about the presentation if necessary)
Etiquette 10%	<ul style="list-style-type: none"> • Did the presenter introduce his / her topic to the audience in a way that is appropriate to a conference-type setting? • Did presenter refer to cases, authors, etc, appropriately? • Was there an appropriate rounding off? • Did presenter manage the allocated time appropriately?
Overall mark 100%	<ul style="list-style-type: none"> • Combination of above categories

With grateful thanks to Ms H Kruise who developed this course outline.