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ETHICS AND PROFESSIONAL RESPONSIBILITY

2015

COURSE GUIDE



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1. OVERVIEW AND PURPOSE

Ethics and Professional Responsibility is a compulsory 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 considers the relation between practical legal training in ethics (based on articles and pupillage training) and general ethical theorising. This focus 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 Thus, 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.

As you would have seen in the first course letter, 2015 is the first year that this course is a compulsory part of the LLB. In preparing you to enter into and/or understand the changing legal system and the ethical obligations of its members, we believe this course will be vital for your future practice / studies / any other profession you enter into. The course follows the lead of Evans and Parker, whose approach is to 'accept that lawyers must first know where they fit in relation to social theories of ethics... because lawyers must operate as everyday "judges" inside fairly well-defined roles, as part of the justice system'.² The aim of the course is thus to focus on a variety of real-life studies to help you develop **an ethically-responsible decision-making process** which requires a variety of different steps:

1. Awareness of ethical issues that arise in practice;
2. Awareness of our own values and dispositions;
3. Awareness of situational pressures and behaviour modifications;
4. Making choices between the range of standards and values that are available to help resolve those ethical issues (including professional conduct rules but not exclusively so);
5. Implement that resolution in practice.³

To this end, the course is designed to deal with both regulatory aspects, but also psychological aspects through the method of group discussion of case scenarios with reference to ethical 'resources' (see additional documents at the end of this guide).

I hope you find the course both interesting and fulfilling. Most importantly, I hope that you are able to implement the principles learnt in this course into your professional lives in the future. I regard this course as a useful stepping stone to your impending career whether it involves you becoming a legal practitioner or not.

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

² C Parker and A Evans 'Inside Lawyers' Ethics' 2 ed (2014) 11.

³ Based on Parker and Evans 13 and K E Goodpastor 'The Concept of Corporate Responsibility' (1983) *Journal of Business Ethics* 1, 7-9.

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

In addition to those outcomes included under the 'Overview and Purpose' heading above:

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.
- Lessons from social and behavioral psychology for legal practitioners
- 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.
- Assess the impact that situational pressure and individual behaviour has on practice.
- Apply ethical rules to practical scenarios.

3.3 Values Outcomes:

Reflected under 'Overview and Purpose' heading above.

4. TEACHING METHOD:

This course is taught by **Mrs Helen Kruise** and runs for 13 weeks. The course will take the form of two lectures weekly. The course is divided into a variety of topics which will be covered in the 2nd semester in the form of *vive voce* lectures, and group discussion.

Students are expected to read ahead of the next lecture (and prepare case scenarios) 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 guide. 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.

The topic of professional responsibility is partially covered by an assignment which will be handed out separately.

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. 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 and you will be referred to articles – mainly on the Hein-on-Line database:

- the Practical Legal Education (PLT) notes on Attorneys' Practice is a primary reference.
- A useful but limited (outdated) source of reference is: E A L Lewis *Legal ethics: a guide to professional conduct for South African attorneys* (1982) Juta: Cape Town.
- J R Midgley *Lawyers' Professional Responsibility* (1992) Juta: Cape Town is useful for the professional responsibility section.

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 & Kyrou'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 Lawyers' 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 *Lawyers 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
- C Parker and A Evans *Inside Lawyers' Ethics* 2 ed (2014) Cambridge University Press: Melbourne. You are advised to consult the Attorneys' journal, *De Rebus*, and the Advocates' journal, *The Advocate*, for topical ethical issues in legal practice.

Most required readings not listed above are accessible through Hein-on-Line or the lecturer will make her private copies available.

6. STUDENT ASSESSMENT

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

Class work: out of 50 marks

Examination: out of 50 marks

Total: 100 marks

6.1 Class work

Students are assessed for the class work component on the basis of two pieces of work (research paper/presentation and test). The professional responsibility task will count 40% and the test will count 10% of the final class mark.

Please note that no tasks submitted later than the due date will be accepted for purposes of the class mark. Late tasks will receive 0% unless the student has a valid leave of absence. The test 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. COURSE STRUCTURE (TOPICS COVERED)

THIRD TERM: CONTEXT OF MAKING ETHICAL DECISIONS AS A LAWYER IN SOUTH AFRICA

1. General introduction to the course
2. Lawyers as professionals
3. Lawyers and role morality
4. Situational and dispositional variables
5. South African regulatory framework
 - a. Present: Attorneys and Advocates Act
 - i. Fit and proper
 - ii. Rules
 - iii. Discipline
 - b. Future: Legal Practice Act
 - i. National forum (transitional arrangements)
 - ii. New code of conduct
 - iii. Debate on new type of legal practitioner

FOURTH TERM: SELECTED TOPICS

6. Prosecutors' ethics and funding by private entities?
7. Regulatory capture (contingency fees regulation)
7. The Lawyer's Trilemma (Harksen scenario)
8. Selected duties to client
9. Selected duties to court
10. Duties specific to the attorney role
11. Duties specific to the advocates rule
12. Professional responsibility (malpractice claims)