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ETHICS AND PROFESSIONAL RESPONSIBILITY

2016

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 **Mr Ryan McDonald and Adv Shuaib Rahim** 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

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

LECTURE SCHEDULE AND COURSE OUTLINE

Lecture 1: Introduction – 18 July

- Handout of course documents
- Course description
- Discussion of class assessment
- Case scenario discussion for lecture 2 [*restraint of trade clause in a coffee shop – case scenario 1*]

Lecture 2: Lawyers as professionals with a monopoly over legal services (general context) – 20 July

- Role in society
 - Gatekeepers (rule of law)
 - Guardians (legal system / legal aid)
 - Guiders (not necessary litigation – ADR)
- Role rewarded by
 - Reserved work
 - Self-regulation
- Discussion of coherence between rhetorical justifications for the legal profession and the reality of legal practice?
- Prepare case scenario discussion for lecture 3 [*tax practitioner – case scenario 2*]

Lectures 3-4: Lawyers and role morality (approaches to ethical decision making) – 25 and 27 July

Prescribed reading:

W Simon 'Ethical Discretion in Lawyering' (1987-1988) *Harvard Law Review* 1083-1119.

C Parker and A Evans *Inside Lawyers' Ethics* 2 ed (2014) chapter 2 (31-54)

Recommended readings:

A Woolley and B Wendel 'Legal and Moral Character' (2010) 23 *Georgetown Journal of Legal Ethics* 1065

A Woolley 'The Problem of Disagreement in Legal Ethics Theory' (2013) 26 *Canadian Journal of Law and Jurisprudence* 181.

Table 1 (Four approaches to legal ethics)

Structure of topic:

- Role interpreted through 'role morality':
 - Neutral partisan lawyering
 - Critical lawyering
 - Moral activist lawyering
 - Relational lawyering

- Prepare case discussion for lecture 5 [*Drafting contracts in contravention of UN rules on the oil-for-food programme scenario – case scenario 3*]

Lectures 5-7: Situational and dispositional variables that affect lawyer's ability to resolve ethical dilemmas despite rules / codes / regulation – 1, 8, 10 August

Readings:

Stanley Milgram 'The Perils of Disobedience' (1973) *Harper Magazine*

Philip Zimbardo *The Lucifer Effect* (2007) chapter 17

JM Darley & CD Batson "'From Jerusalem to Jericho": A study of Situational and Dispositional Variables in Helping Behavior' (1973) 27 *JPSP* 100

Jennifer K. Robbennolt & Jean R Sternlight 'Behavioral Legal Ethics' (2013) 45 *Ariz. St. L.J.* 1107

Session structure:

- Guest speakers: Lucy Maxwell (Solicitor, Australia) and Michael Tsele (Candidate attorney, Legal Resources Centre).
- Nature of legal practice
 1. Ethical rules and standards that cannot and do not cover all scenarios
 2. Agency relationship with client
 3. Ethos of the adversarial system
 4. Pressure of modern legal practice
 5. Positions or feelings of relative status or power
 6. Cues or pressure from others
- Insight into situational and dispositional variables by means of social experimentation:
 1. The Milgram Experiment
 2. The Stanford Prison Experiment
 3. The Good Samaritan Experiment

- 4. Semmelweis's discovery of bacteria
- 5. Hannah Arendt's 'Banality of Evil'
- Prepare case discussion for next session [*Plagiarism at university – case scenario 4*]

Lectures 8-11: Current and future regulatory framework governing conduct of lawyers (aka 'the law of lawyering') – 15, 17 [Boqwana], 22, 24 August

Recommended readings (see **prescribed readings** in session structure):

- D Nicolson and D Webb *Professional Legal Ethics: Critical Interrogations* (2005) chapter 4
- M Slabbert 'The requirement of being a 'fit and proper' person for the legal profession' (2011) 14 *PER/PELJ* (available on SAFLII)

Session structure:

- Theories and justification for regulatory frameworks
- See table 2: Regulatory frameworks in the professions
 - Problems with self-regulation (role benefitting only the lawyer; regulatory capture)
 - Guest lecture by Max Boqwana on the work of the National Forum (alumnus of the law faculty, and co-chair of the National Forum set up in terms of the Legal Practice Act 38 of 2014) –**Lecture 9 (Wednesday, 19 August 2015)**
 - Current and future regulatory framework vis-à-vis conduct of attorneys:

1. Current structure: Attorneys Act and Admission of Advocates Act

a. Admission requirements impacting on ethics:

i. Attorneys:

1. Fit and proper on registration of articles (characteristics and disclosures);
2. PLT ethics examination;
3. Fit and proper at the point of being admitted (characteristics / interview / affidavit) and struck from the roll (or suspended) and readmitted.

ii. Advocates:

1. Fit and proper at the point of being admitted;
2. GCB ethics examination;
3. Fit and proper struck from the roll (or suspended) and readmitted.

Relevant case law:

Necessary disclosures:

Attorneys:

- *Ex Parte Gunguluza* 1971 (4) SA 212 (N)
- *In Re Legal Profession Act 2004*; re OG [2007] VSC 520 [Australian case]

Advocates:

- *Ex Parte Cassim* 1970 (4) SA 476 (T) at 477E-H
- *In re Rome* 1991 (3) SA 291 (A)
- *S v Mkhise; S v Mosia; S v Jones; S v Le Roux* 1988 (2) SA 868 (A)

(ss 15(1)(a) and 22(1)(d)):

Attorneys

- *Prince v President of the Cape Law Society and others* 2000 (3) SA 845 (SCA) and 2002 (2) SA 794 (CC)
- *Kaplan v Incorporated Law Society, Tvl* 1981 (2) SA 762 (T)
- *Ex Parte Postma* 1999 (3) SA 762 (T)
- *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA)

(ss 3(1)(a) and 7(1)(d)):

Advocates

- *Fine v Society of Advocates of SA (WLD)* 1983 (4) SA 488 (A)
- *Hayes v The Bar Council* 1981 (3) SA 1070 (ZAD)
- *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA)
- *In re Ngwenya v Society of Advocates, Pretoria, and another* 2006 (2) SA 88 (W)
- *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA)

b. Regulatory context impacting on ethics:

- a. Rules relating to conduct (Cape Law Society rules as an example / GCB code of ethics as an example)
- a. Disciplinary powers of the law societies/Advocates Societies/GCB and the courts: fines, suspension and striking from the roll.

2. Transitional and future structure: Legal Practice Act

Parts 1 and 2 of Chapter 10 of the Legal Practice Act came into effect on 1 February 2015. This brought into effect the National Forum on the Legal Profession (the transitional body which must lay the groundwork for the Legal Practice Council). It also confirms that the provincial law societies continue to carry out their functions in the interim.

In terms of Chapter 10, the national forum must make recommendations to the Minister on the following by 1 February 2017 (or by extension by the Minister):

- an election procedure for purposes of constituting the Council;
- the establishment of the Provincial Councils, their areas of jurisdiction and their composition, powers and functions.
- practical legal training requirements for the profession. the right of appearance of a candidate legal practitioner in court or any other institution.
- a mechanism to wind up the affairs of the National Forum.

One of the most important functions of the NF is to prepare and publish a code of conduct for legal practitioners, candidate legal practitioners and juristic entities; and make rules, as provided for in section 109(2).

The NF are also responsible for a variety of other functions, inter alia:

- Negotiate transfer of assets, rights, liability, obligations and staff to the Council or Provincial Councils.
- Method of complaint to the Councils, and procedures to be followed by disciplinary bodies.

a. Structure of the profession

In terms of the Act, the legal profession will be regulated by one structure, the Law Council. This Law Council is made up, in turn, of various stakeholders, including the government. Provincial councils support the Law Council, as does the disciplinary body of the council. We will discuss this structure in class.

b. Types of legal practitioners:

The Legal Practice Act changes the referral rule, namely, that advocates cannot take work off the street, by providing for three different types of practitioners (only the last of whom is **not** allowed to deal with clients directly):

- | |
|---|
| <ul style="list-style-type: none">i. An attorney with a trust accountii. An advocate with a trust accountiii. An advocate without a trust account |
|---|

In order to properly discuss the implications of such an amendment, please read the following rule and cases:

- The referral rule / The advocate's duty not to take work off the street – (URPC 5.12 at E12-12bis)
- *Society of Advocates of Natal v de Freitas and another (Natal Law Society Intervening)* 1997 (4) SA 1134 (N)
- *General Council of the Bar of South Africa v van der Spuy* 1999 (1) SA 577 (T)
- *De Freitas v Society of Advocates of Natal* 2001 (3) SA 750 (SCA)
- *Commissioner, Competition Commission v General Council of the Bar of South Africa and others* 2002 (6) SA 606 (SCA)
- *Rosemann v General Council of the Bar of South Africa* 2004 (1) SA 568 (SCA)
- *Van der Berg v General Council of the Bar* [2007] SCA 16 (RSA)

In summary, the referral rule is a time-honoured tradition in South Africa (apart from Natal at one point in time) and the courts have upheld the use of the rule as in 'the best interests of the profession and the public' for the following reasons (summary of the decision of the SCA in *De Freitas*) where the court said:

1. Although some attorneys have the same academic qualifications as advocates, **their practical schooling is different** since it is aimed at the acquisition of special skills to do different types of work. In general, advocates concentrate on the craft of forensic practice, while attorneys, with their more general skills, perform the administrative and preparatory work in litigation.
2. Furthermore, no attorney can specialise in every area of law – **ie. advocates are specialists.**
3. An attorney might also have so close or long-standing a relationship with a client, or be so involved with the detail of the client's case, as to be prevented from taking a sufficiently

detached view - advocates bring an **independent view** to bear is clearly in the interests of the client.

4. Separate **trust banking accounts** – NB any shortfall in the trust account may be recovered from the **Fidelity Fund**.

Another reason, mentioned in the *Van der Berg* case, is that the reasonable fee exercise lacks the oversight of an attorney where the advocate directly bills the client. The court in *Van der Berg* found that rule 7 of the advocates code (dealing with reasonable fees) is a consequence of rule 15 (referral rule). The court characterised the two rules as being a '**slippery slope**' in the **reasonable fees exercise**. If paid other than through an attorney, you run the risk of fees not being scrutinised by an attorney who acts as a watch dog in this regard.

However, it is clear that the drafters of the Act weren't convinced by all these reasons, but for the fact that the advocate is not required to operate a trust account. Implicit in the final version of 'types of practitioners' in the Legal Practice Act is the endorsement of Cameron JA's (as he then was) view in his minority judgment in *De Freitas* that '[t]he crisis of legal services in South Africa is too acute, and the threat this crisis represents to the administration of justice too grave, for the Courts to enforce tradition without there being compelling reason in the public interest for doing so.' (Paragraph [5] of Cameron JA's judgment at 764B.)

Cameron JA then goes on to say:

'A claim by a branch of the legal profession that a professional rule or practice exists in the public interest and should, for that reason, be enforced by the Courts must be scrutinised to ensure that it is not loosely or over-broadly made.' He ends with this prescient statement: 'A real and substantial danger to the public would result if advocates were permitted to handle public money, whether by dealing with their client's money or even taking deposits on fees in advance. **For so long as the absence of statutory trust fund protection continues, it provides a compelling reason for the Courts to enforce the referral rule in the public interest**' (my emphasis).

We will consider the potential effects of this section on the legal profession, including looking at comparable jurisdictions where, despite a statutory fusing of the profession, the profession de facto has organised itself into the historical division of attorney and advocate.

The following aspects of the LPA will be of great importance in navigating the regulatory ethics framework for legal practitioners:

- One regulatory authority (LPA, Chapter 2)
- Community service (s 29)

- Legal Ombudsman (Chapter 5)
- Government capping legal fees (ss 3(b)(i) and 35)
- Multidisciplinary practices (ss 6(5)(i) and 34(9)(a)(ii))

VACATION: 27 August to 4 September 2016

What do the rules say?

- a. Attorney's duty to client (CLS Rule 14.3.2.1)
- b. Advocate's duty to client (URPC 3.1 at C.1)

What their interpretation throws up:

AVOIDING CONFLICTS OF INTEREST

Concurrent conflicts

Successive conflicts

Imputed conflicts ('chinese walls' = remedy?)

- Prince Jefri Bolkiah v KPMG (a firm) [1999] 1 All ER 517
- Kyriackou v Commonwealth Bank of Australia [2009] VSCA 241 at [22]

Suggested South African case law and scenarios:

- S v Hollenbach 1971 (4) SA 636 (NC)
- S v Jacobs and another 1970 (3) SA 493 (E)
- The Law Society of the Cape of Good Hope v Tobias and another 1991 (1) SA 430 (C)
- S v Dintwe and Another 1985 (4) SA 539 (BAA) at 541A-H
- Martin NO v Road Accident Fund 2000 (2) SA 1023 (W)
- DH Swanepoel v The State [2006] SCA 171 (RSA) para 12ff.

Public interest conflicts of interest

- Client v cause (Children's Resource Centre Trust v Pioneer Foods (50/2012) [2012] ZASCA 182)
- Retainer agreements

Lecture 14: Excursus: Prosecutors' ethics and funding by private entities? 12 September

- Guest lecture: Adv Wim Trengove, visiting professor of the Faculty of Law

Cases to read:

- Bonugli and Another v Deputy National Director of Public Prosecutions and Others (17709/2006) [2008] ZAGPHC 28 (1 February 2008)
- Porritt and Another v National Director of Public Prosecutions and Others (2015 (1) SACR 533 (SCA)

Lectures 15-16: Excursus: Example of regulatory capture and acting in one's own interest: the contingency fee litigation (aka the Bobroff litigation) 14 and 19 September

Readings:

- Lester Brickman 'Aba Regulation of Contingency Fees: Money Talks, Ethics Walks' (1996-7) 65 *Fordham L. Rev.* 247.
- SALRC Project 93 - Speculative and contingency fees (1996)
- Available on *RUConnected*:

- LSNP's ruling on CLCFAs 21 June 2002
- Adv Labuschagne opinion to LSNP 30 May 2002
- Adv Van Huyssteen opinion to LSNP 6 Nov 2002 (response by Adv Labuschagne 28 January 2003)
- Adv Labuschagne opinion to LSNP on PWC
- Adv Marcus opinion to LSNP (Nov 2004)
- Adv Trengove opinion to LSNP (March 2005)

Session structure:

Legislation and case law

- Contingency Fees Act 66 of 1997

Generally:

- *Price Waterhouse Coopers Inc v National Potato Cooperative Ltd* 2004 (6) 66 (SCA)

The Brobroff matters:

- *Law Society of South Africa and Others v Road Accident Fund and Another* 2009 (1) SA 206 (C)
- *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2013 (2) SA 583 (GNP)
- *De La Guerre v Ronald Bobroff & Partners Inc and Others* (22645/2011) [2013] ZAGPPHC 33

- Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of justice and Constitutional Development 2014 (3) SA 134 (CC)

Lecture 17: 21 September

- PUBLIC HOLIDAY – no lecture
- Prepare case scenarios 5 and 6 (aortic aneurysm & cross-examination)

Lectures 18-19: Selected duties: Duties to court – 26 and 28 September

- Attorney's duty to court (CLS Rule 14.3.2)
- Advocate's duty to court (URPC 3.2 at C.2)

Duties to court includes:

(1) Duty to act honestly, consciously and openly (conversely: not to mislead the court and to disclose material facts):

- Kekana v Society of Advocates of SA 1998 (4) SA 649 (SCA)
- General Council of the Bar v Mattys 2002 (5) SA 1 (E)
- Van der Berg v General Council of the Bar [2007] SCA 16 (RSA)

(2) Duty to act with utmost good faith towards the court

- *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA)
- *Ulde v Minister of Home Affairs and Another* 2008 (6) SA 483 (W) para 36ff (see also order of the SCA in *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA))

(3) Duty to acquaint him/herself with the rules of court and articulate the best argument available

- *PN Cele v SASSA and 22 related cases* 2009 (5) SA 105 (D)
- *Feni v Gxothiwe and Another* (2014 (1) SA 594 (ECG))

(4) Duty not to abuse the process of the courts:

- *Motswai v Road Accident Fund* 2013 (3) SA 8 (GSJ) and (2010/17220) [2013] ZAGPJHC 99 (2 May 2013) cf. *Motswai v Road Accident Fund* (766/13) [2014] ZASCA 104 (29 August 2014)

(5) Duty to disclose adverse facts?

Excursus: Revealing confidences to prevent future injury or death:

- *Spaulding v Zimmerman* 263 Minn. 346, 116 N.W.2d 704 (1962)
- R Cramton & L Knowles 'Professional Secrecy and its Exceptions: Spaulding v Zimmerman Revisited' (1998) 83 *Minnesota Law Review* 63

(6) Duty to disclose adverse authority

- *Ulde v Minister of Home Affairs and Another* 2008 (6) SA 483 (W) para 36ff. (see also order of the SCA in *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA))

(7) Duty in cross-examination

‘Cross-examination, intended as a scalpel to excise the tumour of untruth, has become a bludgeon with which justice is slowly clubbed to death. We have elevated cross-examination to the status of a holy cow and forgotten its purpose. This often bloated beast has to be culled and replaced with one much leaner and more effective.’ (*S v Baleka, Delmas Treason Trial*)

- **Dalkon Shields** litigation (see case scenario 6)
 - Case scenario 7 for next two lectures [*Harken and the affidavit*]

Lectures 20-21: Excursus: When the rules run out: The Lawyer’s Trilemma (3-5 October)

Professor Monroe H. Freeman has extensively discussed the issue of the “trilemma” facing criminal defense attorneys. The three horns of the trilemma are:

1. A lawyer is required to seek the client’s trust and to find out everything the lawyer can about the client and the case so that the lawyer can represent the client effectively.
2. A lawyer is required to preserve the client’s confidential information (with some limited exceptions); and
3. A lawyer is to act with candor, to refrain from presenting evidence that the lawyer knows is false, and (in some situations) to reveal the client’s frauds.

How do you resolve this trilemma in a criminal context?

Does the same apply in a civil context?

- Case scenario 8 for next lecture [*investigation of attorney’s books of account*]

Lecture 22: Attorney's duties in respect of fees and management of trust funds – 10 October

Particular duties of the attorney:

1. Management of trust funds (ss78 & 83(9) of the Attorney's Act 53 of 1979 and CLS Rule 20)
2. Duty to his/her law society (CLS Rule 15)

(1) Management of trust funds:

- *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T)
- *Holmes v Law Society of the Cape of Good Hope and Another* 2006 (2) SA 139 (C)
- *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 SA
- *The Law Society of the Cape of Good Hope v Peter* [2006] SCA 37 (RSA)

[Liability to third parties:

- *Hirschowitz Flionis v Bartlett and another* 2006 (3) SA 575 (SCA)
- *Du Preez & Others v Zwiegers* 2008 (4) SA 627 (SCA)

(2) Duties to his /her law society

- *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA)
- *Law Society, Northern Provinces (Incorporated as the Law Society of the Transvaal) v Maseka and another* 2005 (6) SA 372

Lecture 23: Advocate's duty to obey the rules of the profession and the taking on of briefs – 12 October

Particular duties of the attorney:

1. Duty to obey the rules of the profession
2. Holding more than one brief for cases on the trial roll?

Duty to obey the rules of the profession:

- *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485 (AD) at 498A-B
- *Society of Advocates of SA (WLD) v Cigler* 1976 (4) SA 350 (T) at 354
- *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T)

Duty regarding accepting more than one brief

- *General Council of the Bar v Mattys* 2002 (5) SA 1 (E)
- *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA)

Lectures 24-25: Professional Responsibility (delictual claims based on professional negligence) – 17 and 19 October

Case law:

The care that is to be reasonably expected of the average attorney

- *Ebersohn v Prokureursorder van Transvaal* 1996 (1) SA 661 (T)
- *Bouwer v Harding* 1997 (4) SA 1023 (SE)

Duties to clients

- *Guardian National Insurance Co Ltd v Weyers* 1988 (1) SA 255 (A)
- *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A)
- *Honey and Blankenberg v Law* 1996 (2) SA 43 (A)

Responsibility for actions of employees

- *Mazibuko v Singer* 1979 (3) SA 258 (W)
- *Mashigo v Rondalia Assurance Corporation of South Africa* 1977 (3) SA 431 (W)
- *Manyeka v Marine & Trade Insurance Co Ltd* 1979 (1) SA 844 (SE)
- *Mkhomolo v President Versekeringsmaatskappy Bpk* 1984 (1) SA 342 (T)
- *S v Longdistance Pty Ltd* 1986 (3) SA 437 (N)
- *Guthrie v AA Mutual Insurance Association Ltd* 1986 (4) SA 979 (W)

Preliminary issues

- A legal practitioner is engaged in a profession which demands special knowledge, skill and learning.
- As such, the practitioner must not only exercise reasonable care but measure up to the standard of competence of a reasonable man (and woman!) professing such knowledge and skill (See *Honey & Blanckenberg v Law* 1966 2 SA 43 (R))
- This standard is set out in the *Bouwer v Harding* 1997 (4) SA 1023 (SE) and *Ebersohn v Prokureursorder van Tvl* 1996 (1) SA 661 (T) cases where it was stated that it is the duty of the attorney to display *the care that is to be reasonably expected of the average attorney*.
- In this section we need to consider what happens when an attorney does not display this care beyond a possible breach of an ethical duty to his or her client. Here we do not only consider

whether disciplinary measures may follow (either by the Law Society, the Court or both) but whether any claim arises in law as a result of the failure of an attorney to exercise the care required.

- In other words, in this part of the course, we want to consolidate the attorney's duty of care and other duties to determine when a breach of an attorney's ethical duties could lead to civil liability. Here, we are now dealing with the professional responsibility part of the course.
- In this section, we need to recognise the difference between the ethical duties and legal duties of an attorney. This is because when an attorney's ethical duties overlap (or become) his or her legal duties that civil liability can follow.
- We have seen throughout this course how ethical duties lay down the standards which are regarded by the community and members of the profession as reasonable for the profession. Some of these standards are quite strict if looked at from the layperson's point of view. Thus neglecting an ethical duty is *only an indication* of breaching an attorney's legal duty to act with a reasonable degree of care, knowledge and skill. **Thus negligence does not represent breaking a legal duty *per se*.**
- An ethical duty is not necessarily a legal duty. Codes of conduct do not intend to lay down standards and the scope of an attorney's civil liability for his professional misconduct; it may be at best an indication thereof.
- However, it is important to note that attorney's ethical and legal obligations overlap. The crux in this part of the course then is to establish when an ethical duty is also a legal duty. In this context, it is important to establish difference between the two ethical rules:
 1. Those of a **conventional** nature = regulatory in nature = rules that are primarily aimed at regulating the conduct of the members of the attorney's profession. The only legal remedy in the case of violation of the conventional ethical duty is found in the disciplinary steps that the law society concerned or the court may institute against the attorney
 2. Those which have a **fundamental** nature = they are based on the generally accepted standards of common decency and fairness. Violation of these fundamental ethical duties may constitute grounds for an action for damages.
- A fundamental ethical duty therefore has the inherent potential to also become a legal duty and naturally does not exclude disciplinary steps.

In summary:

- An ethical duty pertains firstly to the relationship between the law society and its member. The ethical rule regulates the member's conduct vis-à-vis the court his client and his opponent.
- Some ethical duties are conventional in nature (only regulating) whilst other duties are fundamental in nature (potential to become legal duties)
- The most NB question = when is an ethical duty also a legal duty?
- Only after it is established that an attorney has a legal duty may his actions attract civil liability.

What then is an attorney's legal duty?

- This **legal duty** is usually derived from the contractual agreement with a client and his liability is based on a **breach of contract**. Thus, if an attorney negligently provides professional services to his client in terms of an agreement, the client has a contractual action at his disposal.
- Thus we can say that the relationship of attorney and client is a **contractual one**. This relationship imposes on the former the duty to exercise due skill and care in the conduct of the latter's affairs.
- Midgley quotes Jackson and Powell to show that the parties agreement can be regarded as the '*fons et origo* of the solicitor's duties'.
- No such contractual legal duty exists in regard to a non-client and the attorney's liability in such an instance can only be based on the *lex Aquilia*. It is therefore necessary that it should be established in the first instance whether a legal duty existed towards the non-client i.e. whether the attorney's conduct was potentially delictual towards the non-client. After this has been established the second requirement is to establish guilt – the absence of *culpa* and *dolus* = no guilt exists.
- An attorney's liability towards his client is therefore based on a breach of contract and his liability towards his non-client is based on the *lex Aquilia* which requires one to establish a legal duty and to establish either *dolus* or *culpa*. The problem of causality is of course connected to this, but it is not of importance at the moment.

Attorney's contractual duty to a client?:

Since civil liability could arise from a breach of contract, we first need to look at the terms of the contract which could be breached.

A contract of mandate governs the lawyer–attorney relationship so one must determine the nature of contractual duties which the law implies. The obligations of the mandatory or agent are usually:

1. To perform the task
2. To obey instructions
3. To exercise care and diligence
4. To advice and impart information
5. To account
6. To show good faith

In assessing civil liability, it is often that it is the breach of the duty to exercise care and diligence that = professional negligence.

The duty to exercise care, skill and diligence is therefore a duty not to be negligent. For a breach to occur, fault on the part of the lawyer must be established.

Questions for discussion (see case summaries and past exam questions)

Question 1

An attorney is retained to issue summons on behalf of his client. The attorney employs a legal secretary to do all her typing. The secretary, who has a serious drug problem, forgets to type out the summons and one month later the claim prescribes. The client sues the attorney for the amount claimed in the summons.

Question 2

Thabo Ngwenya is an attorney in a one-person firm of attorneys in Grahamstown. Due to a heavy work-load Thabo instructs counsel to draw up a summons and do various other work in a particular matter concerning his client, Mary Watts. When the matter gets to court it transpires that the inexperienced advocate instructed by Thabo was relying on a municipal bye-law which severely weakens Mary's case. The court finds against Mary who then sues Thabo, her attorney.

Question 3

You regularly do work for John Kinley as his attorney. You and John are playing a round of golf at the Grahamstown Golf Club. John asks you what you think about a new investment opportunity for a new housing estate on the Highlands Road. You reply that if you had the available capital you would jump at it yourself. Eight months later John sues you for the money he lost in the said investment, it having transpired that the scheme was fraudulent.

Question 4

An attorney is retained to issue summons on behalf of his client. The attorney receives the instruction only two weeks before the matter will prescribe. On the last day before the matter will prescribe the attorney finalises the summons and hands it to his messenger for issuing, service and filing. The messenger has a number of deliveries to attend to on that day and gets to court too late for the summons to be issued. The claim prescribes and the client sues the attorney for the amount claimed in the summons.

CASE SCENARIOS:

Case scenario 1 (restraint of trade clause)

You are a lawyer in practice in Cape Town. You are approached by your regular client who owns a franchise of coffee shops, Starbeans, in CT. He describes to you his experience of employing people, training them, mentoring them in the art of being a barista; only for them to leave Starbeans, and set up their own boutique coffee shop or be snapped up by the client's competitors.

He asks you to amend his contracts of employment to include a restraint of trade clause. He wants the clause to read: should x leave Starbean's employ, he/she may not act as a barista or any similar line of work, as employer or employee, in the Eastern Cape Province for a period of 10 years.

You know – from precedent – that the restraint of trade clause is not enforceable given its breadth. However, your client instructs you to include the clause in the contract anyway, given that most employees will not seek legal advice on the issue, and he is happy to deal with the fall-out if there is a challenge.

Case scenario 2 (tax practitioner)

Suppose an experienced tax practitioner has conceived a new tax avoidance device. She herself is convinced that it is improper, but may be – at a stretch – a reasonable basis for the device. There is no substantial authority for the basis of the device, and she believes that it is 'more likely than not' that the device is ultra vires.

Case scenario 3 (Oil-for-food contracts)

The Australian Wheat Board was established by the Australian Government in 1939 to buy all wheat from Australian farmers in order to collectively market and sell it domestically (for a fixed price) and internationally (at global market prices). In 1989 the Wheat Board was reformed, lost its statutory monopoly on selling wheat within Australia, and had to compete for Australian wheat sales; however, it retained the exclusive right to market and sell Australian wheat internationally. In 1997 and 1998 the Wheat Board was reformed again to become a private company, ABW limited, with the right to manage and market the export of Australian wheat, and to veto the possibility of competition from others. Wheat growers became shareholders and the company listed on the stock exchange.

The majority of Australian wheat is exported. Indeed, by 2006 AWB was one of the largest exporters of wheat in the world, averaging AUD\$4 billion annually about 16% of world wheat trade and 3% of Australia's total exports. Among the fifty or so countries to which Australian wheat had been exported was Iraq. But trading was suspended in 1990 when the United Nations Security Council imposed trade sanctions on Iraq in response to its invasion of Kuwait. Food trade was allowed in 'humanitarian' circumstances, but Iraq had no hard currency to buy wheat even for humanitarian purposes. In 1995 the United Nations set up the Oil-for-Food Programme to soften the impact of the sanctions. It allowed Iraq to sell its oil, keep the income in a United Nations escrow account and use that income to buy humanitarian goods, including wheat, to alleviate famine and hunger caused by the trading sanctions. Only contracts favourably reviewed by the UN could be paid for from the

escrow account. By 1999 about 10% of Australia's annual wheat export was going to Iraq, and this represented about 90% of all wheat sales to Iraq. AWB was the largest single exporter of any humanitarian item to Iraq.

In 1999 Iraq introduced a requirement that AWB pay a fee for the transportation of the wheat from the Iraqi port to the inland silos. These fees were factored into the wheat price in the official contract documentation that was given to the United Nations for approval of payments from the escrow accounts. The price to be paid for the wheat coming out of the account was inflated by the amount of the transportation fees. The Cole Royal Commission later found that these amounts were 'port charges', particularly to a Jordanian trucking company, and that AWB executives knew this.

Between November 1999 and March 2003, the Iraqi government headed by Saddam Hussein, obtained US\$224 million in fees by this means. Although these payments breached UN resolutions and the provisions of the Oil-for-food Programme, they did not directly amount to a breach of Australian law. The UN resolutions applied to the Australian state, not to private companies, and the Australian government had not legislated to make it an offence for private companies and individuals to act in breach of the UN trading sanctions on Iraq.

Nevertheless, as the Cole Royal Commission later found, these payments were essentially corrupt payment (or 'kickbacks') to ensure Iraq maintained its contract with AWB for Australian wheat under pressure from the Hussein regime. They were also akin to money laundering because they allowed the Iraqi regime to access some of the income it had obtained from selling oil under the Oil-for-Food Programme to use for its own purposes, rather than only for humanitarian purposes approved by the UN.

Around the same time, Australia, together with the US and UK, was accusing Iraq of possessing weapons of mass destruction and preparing to invade in March 2003. Weapons of mass destruction were never found and the US, UK and Australian governments were heavily criticised for their stance on Iraq, and even for breaching international law conventions and UN Security Council resolutions by invading Iraq.

In mid-2000, after an inquiry by the UN into AWB's payment of trucking fees the Australian Wheat Board commissioned accounting and auditing firm Arthur Anderson to investigate the existence of any unethical or illegal conduct in AWB. Arthur Anderson's 2001 report pointed out that the culture of AWB required review as far as ethical dealing was concerned, and that the payment of trucking fees in Iraq was of concern. The UN did not follow up on its inquiry about the trucking fees until 2005.

AWB employed several in-house lawyers. These lawyers did not settle the contracts that included the surcharges and so it is unclear when they found out about the surcharges. But one of the lawyers did meet regularly with the executives responsible for the contracts to sort out any legal issues that arose, and one was present at the meeting that discussed the Arthur Andersen report. Imagine that you are that lawyer. In mid-2002, AWB executives approach you with an urgent problem. A few weeks ago the Iraqi Minister for Trade halved the amount of wheat Iraq planned to buy from Australia because of their concern that Australia was supporting the United States' pro-invasion stance on Iraq. Now Iraq has alleged that a shipment of wheat from AWB is contaminated with iron filings and is seeking US\$2 million in compensation. An AWB delegation in Iraq has already agreed to

pay the compensation rather than lose the remaining contracts, and Iraq has now responded to the offer by reinstating its original order.

The problem, however, is how to structure the reinstated contract so as to conceal from the UN Oil-for-Food scheme. You are well aware that AWB, your client, is under tremendous pressure to maintain its sales of wheat to Iraq, as the sale of wheat to Iraq has been portrayed in the media by the government as a huge success story for Australian wheat growers and the Australian economy. Indeed the Prime Minister himself congratulated the AWB on its success in exporting wheat to Iraq. The success of the privatisation of AWB on its success has been largely supported by their success in regaining wheat contracts with Iraq under the Oil-for-Food Programme. You are also aware of the trucking fees and the fact that they too are essential to maintaining AWB's exports to Iraq. The executives of AWB tell you that it is your job to write a contract for them that enables the contract they have already entered into to go ahead.

Case scenario 4 (Alleged plagiarism)

You are in your second year of articles and have asked local attorney, Mark Nettleton to settle your papers for admission to practice as an attorney of the High Court of South Africa.

He settles these court papers and forwards them to you for signature. Whilst reading the papers, you wonder whether you should disclose a situation that arose during your 3rd year of study at Rhodes University in your BCom degree, something that was ancient history, and in your mind, a bit unfair. You recall that you did not disclose it when applying for articles with the Cape Law Society simply because you forgot about the whole event. While thinking about it, you draft paragraphs for inclusion in your affidavit:

'1. In late July 2010, I was accused of colluding with another student on an assignment for the subject of Marketing Planning and Strategy. I spoke to the Topic Co-ordinator and Head Lecturer and stated that I did not collude with the other student. They did not accept my reasoning for why the assignments were similar.

2. My reasoning for why the assignments were similar was that it was a mere coincidence. The assignment was based on the findings of a group project completed a few weeks earlier, I was in the same group as the other student. The assignment called for developing a marketing strategy based on the product research in our group subject. There were only two possible strategies that could be used.

3. They advised that I could go the Plagiarism Committee to defend the matter but based on my reasoning, they were of the opinion that our appeal would be rejected. They also said that if I went to the Plagiarism Committee there would be a mark on my record. If the matter was dealt with by the Topic Co-ordinator and Head Lecturer, they would not put a mark on my record.

4. I decided to take the penalty of receiving a zero for the assignment and they said that the matter would not be taken further.'

However, when you email the other student implicated in the events described above, and attach your proposed paragraphs, he phones you. He is very unhappy with the way you have worded the

paragraphs and states: ‘You shouldn’t have put in collusion or plagiarism because that is not what happened.’ The other student tells you that he is firmly of the view that the decision of the lecturers involved were wrong and that they bullied both of into not defending the matter at a Plagiarism Committee hearing because of the lack of substance in their allegations. He recalls the events which were that you had talked about the assignment in some depth together but had never copied from each other. He tells you that he is being admitted in the Cape Provincial Division next week and he has not disclosed the event since it was never decided by a formal university committee.

What do you do?

Case scenario 5 (aortic aneurysm)

A person is in a horrible accident on a construction site, and sues the construction company for his injuries. You act for this construction company and it is fairly clear that there was negligence on their part. You advise the company to concede this, but advise that you will contest quantum. They are asking for R500 000 for his injuries, temporary loss of future earnings and general pain and suffering. You ask for an independent examination of the person by your medical expert. Your medical expert finds, apart from the manifest external injuries, that the plaintiff has an aneurysm of the aorta. The medical expert reports this to you. He also reports that the claim is consistent with injuries of this type, but for the existence of the aortic aneurysm, which could push the claim up to R1.2 million if the plaintiff can show the aneurysm was caused by the accident, a likely scenario.

Prior to the close of pleadings and the discovery of any documents, you are contacted by the plaintiff’s lawyers and asked whether you would consider settling the matter since the plaintiff wishes to get on with his life, and he is running out of funds. They ask for a settlement of R420 000. It is obvious that their medical expert did not pick up the aneurysm.

How would you advise your client? Do you settle on this amount? Would it make a difference whether your client (the construction company) had not paid their public liability insurance timeously, and so would have to cover this from the company’s profits (note: an aortic aneurysm if found in time can usually be repaired with surgery, but left unchecked it will most likely result in the fatality of the carrier).

Case scenario 6 (cross-examination of witnesses)

The HA Bobbins company is a manufacturer of an intrauterine contraceptive device (IUD) that caused thousands of injuries to users, including stillbirths, hysterectomies, sterility, and even death. There is no question that the products unsafe design could allow bacteria to accumulate in the uterus, causing the injuries. However, the injuries could be exacerbated in some cases by certain kinds of sexual activity. This is not likely in most cases, but possible in some.

Accordingly, the judge supervising litigation in the consolidated nationwide product liability action has allowed inquiry into claimants’ sexual history, as long as the questions are “reasonably likely to lead to the discovery of admissible evidence.”

The manufacturer has been besieged by both groundless and meritorious claims. In general, its practice has to settle the valid claims for a fair amount, but to contest vigorously the doubtful cases. In the course of defending these actions, the manufacturer has learned that aggressive questioning of women about their sexual practices tends to motivated many of the claimants to settle early, for comparatively small sums. Thus, in cases it judges without merit, the manufacturer has directed its lawyers to probe the sexual histories of the women maintaining the claims. The lawyers conducting cross-examination in the early cases relating to this claim have learned that they can linger over the subjects for a long period of time, ask many different varieties of the same question, use explicit terminology, and focus on particularly embarrassing details, such as extramarital affairs. The result of that mode of questioning is generally to humiliate the witness and sometimes to intimidate her into settling the case for less than she otherwise would be able to obtain by way of settlement of judgment.

What would you, as the defence lawyer do? How far should you go in questioning them about past sex partners, sexual practices, and similar subjects?

Case scenario 7 (Harksen and the affidavit)

1. Mr Jürgen Harksen arrived in South Africa from Germany in 1993 to seek relief from what Harksen described as ‘mounting pressure’ from his European creditors. The creditors concerned had paid substantial sums of money to Harksen in the belief that the moneys would be invested with large returns. Harksen led them to believe that they were assured of being repaid because he was the beneficiary of a large fortune – Harksen placed it at about DM1.85 billion – that was invested in a fund known as SCAN 1000 that was held in trust. But when investors sought to recover their money there was none to be had and Harksen fobbed them off with various explanations for why the trustees were unable to release the necessary funds. Although Harksen did not admit it, it is likely that there was no fund, there was no trust, and there were no trustees.
2. One creditor, Mr Siegfried Greve, pursued his claim against Harksen by applying for Harksen’s sequestration in March 1995. Other creditors later intervened to support the application. In his founding affidavit Greve alleged that there was no SCAN 1000 fund, no trust, and no trustees. Harksen disputed those allegations, and in support of his assertion that the fund and the trust existed he produced what purported to be affidavits of three of the alleged trustees (Mr Hans-Josef Siegwart, Mr Ove Unri Johannson, and Mr Lars-Peter Arnemann) that purported to have been attested before a Swiss official.
3. Enquiries that were made by the attorney for an intervening creditor revealed, amongst other things, that the Swiss official had never encountered Johannson and Arnemann, and that the attestations to their affidavits had been forged.
4. These facts were brought to the attention of Harksen’s legal representatives and there was naturally some consternation. The upshot was that counsel representing Harksen, accompanied by an attorney, travelled to Switzerland, intent upon meeting with the alleged trustees, obtaining an explanation for the forged attestations, and securing authentic affidavits. In Switzerland they met Siegwart when he told them that the affidavits had indeed been signed by

Johannson and Arnemann respectively but admitted that he had forged the attestation and obfuscated why he had done so.

5. Counsel prepared fresh affidavits for the signature of the three deponents, having been assured by Siegwart that Johannson and Arnemann would soon arrive to sign them (they were said to be in the vicinity of the Mediterranean and in New York respectively). Days went by, the two men did not arrive, various explanations were offered by Siegwart, and when it became apparent that, in the words of counsel, 'the whole issue had become ridiculous', counsel and his attorney packed up and left.
6. While returning to South Africa counsel prepared a memorandum recording his impressions of what had occurred. He recorded that Swiegart had been obstructive, dishonest and fraudulent, and had never intended that Johannson and Arnemann would appear. He went on to record the following:

'It is our duty to satisfy ourselves whether Jürgen Harksen has any knowledge of the attitude adopted by Siegwart and/or Siegwart, Johannson and Arnemann, and whether Johannson and Arnemann in fact exist. If Harksen is in any way whatsoever part of this scheme to mislead the Court including the representation that there is a trust of which they are trustees, and this is a scam, we have no option but to withdraw. If we are not satisfied that Jürgen Harksen is a part of this unacceptable conduct and behaviour of Siegwart and/or Siegwart, Johannson and Arnemann, we have no right to withdraw from our mandate.'

7. In the following sequestration proceedings, counsel asked for the offending affidavits to be struck out and Harksen was finally sequestered in October. Whether counsel ever discussed his experience in Switzerland with Harksen, and if so what Harksen said, does not appear from the affidavits.
8. In April of the next year Harksen's provisional trustees brought an application aimed at recovering certain property that was believed to belong to Harksen. In the founding affidavit it was again alleged that SCAN 1000 and the trust were fictitious.
9. In order to defend the claim and in following his client's instructions, Harksen should depose to an answering affidavit in which he once more asserts that there is indeed such a fund, and that there are indeed trustees who are administering the fund.

What would you - as counsel - do in these circumstances?

Case scenario 8 (investigating books of account)

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.

Table 1: Four approaches to Legal Ethics

Legal Ethical Type	Social Role of Lawyers	Relationship to Client and Law
Adversarial Advocate (The traditional conception)	Lawyer's ethics are governed by role as advocate in adversarial legal process and complex legal system: Partisanship, loyalty and non-accountability.	Lawyer's duty is to advocate client's interests as zealously as possible within the bounds of the law (barest obligation to legality) – let the chips fall where they may. Extends beyond adversary role to ensuring client autonomy in a complex legal system as required by the rule of law.
Responsible Lawyer (Officer of the court and trustee of the legal system)	Lawyers' ethics governed by role of facilitating the public administration of justice according to law in the public interest.	Duties of advocacy are tempered by duty to ensure integrity of and compliance with the spirit of the law; to ensure that issues are not decided on purely procedural or formal grounds but substantive merits. Lawyer is responsible to make law work as fairly and justly as possible. May need to act as gatekeeper of law and advocate of legal system against client.
Moral Activist (Agent for justice through law reform, public interest lawyering and client counselling)	General ethics, particularly social and political conceptions of justice, moral philosophy and promotion of substantive justice define lawyers' responsibilities.	Lawyers should take advantage of their position to improve justice in two ways: (1) Public interest lawyering and law reform activities to improve access to justice and change the law and legal institutions to make the law more substantively just (in the public interest): (2) Client counselling to seek to persuade clients of the moral thing to do or withdraw if client wants something else.
Ethics of Care (Relational lawyering)	Social role of lawyers is irrelevant. Responsibilities to people, communities and relationships should guide lawyers (and clients) as everybody else.	Preserving relationships and avoiding harm are more important than impersonal justice. The value of law, legal institutions and institutional roles of lawyers and others are derivative on relationships. People and relationships are more important than institutions such as law. The goal of the lawyer-client relationship (like all relationships) should be the moral worth and goodness of both lawyer and client, or at least the nurturing of relationships and community.

(sourced: C Parker and A Evans *Inside Lawyers' Ethics* 2 ed (2014) 32)

Table 2: Regulatory frameworks in the professions

From your **voluntary self-regulation** which suggests a 'social construct' whereby professions undertake to regulate their own professional standards and ethics in exchange for the collective and autonomous control of their market and members and all the other advantages of professional status



To **coerced self-regulation**, professions have only acted in the face of government threats to impose statutory controls



To **mandated regulation** by government requiring professional bodies to operate within designated frameworks



To frameworks that are sanctioned by government reserving the power to sanction systems and rules designed and proposed by the professional bodies [**regulation that is sanctioned by government**] (sourced: Nicolson and Webb, chapter 4)

(source: derived from D Nicolson and D Webb *Professional Legal Ethics: Critical Interrogations* (2005) chapt 4)

Sources of ethical conduct found in legislation and other regulatory or policy instruments

Attorneys:

(1) Attorney 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 experiences' 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.co.za)

14.3 General Principles

Members shall at all times-

14.3.1 Maintain the highest standards of honesty and integrity

14.3.2 Treat the interest of their clients as paramount, provided that their conduct shall be subject always to-

14.3.2.1 their duty to the court;

14.3.2.2 the interest of justice;

14.3.2.4 the observation of the law...

(4) Ruling 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 R 100 000 for unprofessional, dishonourable or unworthy conduct (up from R 10 000). In the case of candidate attorneys, the maximum fine that may be imposed has increased from R 2000 to R 20 000.

(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.

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)

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 on 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 society 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.’

Court’s decision-making process?

- a. Has the law society established the offending conduct upon which it relies (on a balance of probabilities?);
- b. In the light of the misconduct established, is the attorney concerned ‘a fit and proper’ person to continue to practise as an attorney’?
- c. If no, does the person deserve the penalty of being struck from the roll or will an order of suspension from practice suffice?