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**ETHICS AND PROFESSIONAL RESPONSIBILITY**

**2022**

**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.<sup>1</sup> 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.

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’.<sup>2</sup>

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:

- Awareness of ethical issues that arise in practice;
- Awareness of our own values and dispositions;
- Awareness of situational pressures and behaviour modifications;
- 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);
- Implement that resolution in practice.<sup>3</sup>

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).

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<sup>1</sup> See LaFollette’s remarks about ethics in general in H LaFollette (ed) *The Oxford Handbook of Practical Ethics* (2003) 8.

<sup>2</sup> C Parker and A Evans ‘Inside Lawyers’ Ethics’ 2 ed (2014) 11.

<sup>3</sup> 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**

### **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**

For 2022 this course is taught by Dr Michelle Brotherton. The course runs for 13 teaching weeks.

Teaching methodology for this course relies upon a Freirean approach, emphasising engagement for the purposes of learning and reaching the above outcomes. In order for such engagement to occur, students need to prepare for lectures as instructed. This approach is also cognisant of the fact that legal ethics is not confined to issues in legal practice, but that legal ethical dilemmas can occur outside of the legal profession. Students are expected to read consistently throughout the term and complete the reading required for each week of the course.

There is no comprehensive handout for the course and as such, students are expected to take their own notes and to supplement these with reading provided. Students are expected to assume responsibility for their own learning by independent study and work through the reading list provided accordingly. Throughout the course and assessment, problem-solving scenarios will be put before the students on a regular basis.

Students are referred to the Faculty's Student Handbook in respect of any issues that arise. Students are welcome to discuss problems with the lecturer. If students feel uncomfortable in raising problems with the lecturer, students are welcome to discuss/write to their student representative and/or the Dean or Deputy Dean of the Faculty.

### **5. Sources of reference**

You need not purchase any book(s) for this course. Most materials are available through the Rhodes Databases, but where they are not, I will upload materials onto RUConnected.

- A useful but limited (outdated and arguably narrow-minded!) source of reference is: E A L Lewis *Legal ethics: a guide to professional conduct for South African attorneys* (1982) Juta: Cape Town.

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, there is a very useful commentary on the Legal Practice Act 28 of 2014 that is available on the Rhodes library database (LexisNexis). It is a useful resource in considering the sections of the course dealing with the Legal Practice Act's provisions, rules and code of conduct. The

commentary is: P Ellis, AT Lamey, and L Kilbourn *The South African Legal Practitioner: A commentary on the Legal Practice Act* (LexisNexis). Last updated: November 2020.

The following international texts are extremely useful especially in the context of comparing approaches to legal ethics in two foreign jurisdictions, namely Australia and the United States. Where possible I will upload excerpts of these books subject to a DALRO application:

- C Parker and A Evans *Inside Lawyers' Ethics* 2 ed (2014) Cambridge University Press: Melbourne.

- M H Freedman and A Smith *Understanding Lawyer's Ethics* (2016) 5 ed Carolina Academic Press: Carolina.

Another useful foreign text, albeit dense, is:

- D Nicholson and J Webb *Professional Legal Ethics: Critical Interrogations* (1999) Oxford University Press: Oxford

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

## **6. Student Assessment**

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

Class work: 40

Examination: 60

**Total: 100 marks**

The class work (40) is divided up as follows:

Test 15 August: 20

Assignment 29 September: 20

## 7. Course structure (topics covered)

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

Week 1	General introduction to the course
Week 2	The state of the SA legal profession and SA's current regulatory framework
Week 3	Lawyers and role morality (1)
Week 4	Lawyers and role morality (2)
Week 5	Situational and dispositional variables (1)
Week 6	Situational and dispositional variables (2)

### FORTH TERM: APPLICATION OF PRINCIPLES FROM THIRD TERM IN PRACTICE

Week 7	The fit and proper requirement: registration, admission, debarment
Week 8	The fit and proper requirement: rationalisation vs justification
Week 9	The lawyer's duty to client, court & interests of justice: conflicts of interest
Week 10	The lawyer's duty to client, court & interests of justice: disclosures
Week 11	The lawyer's duty to client, court & interests of justice: effective legal process
Week 12	Management of trust accounts & professional responsibility (malpractice claims)
Week 13	Revision

# LECTURE SCHEDULE AND COURSE OUTLINE

## WEEK 1 – INTRODUCTION

### **1. Course overview**

- a. Administrative issues
- b. Content of the course
- c. Legal practice act
- d. Class marks

### **2. The ethics course as a way to inculcate ethically-responsible decision-making process by:**

- a. Awareness of ethical issues that arise in practice;
- b. Awareness of own values and dispositions;
- c. Awareness of situational pressure and behaviour modifications;
- d. 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);
- e. Implementing that resolution in practice.

### **3. True ethical practice can never be ‘planned’ but you can prepare for it through:**

- a. Rule and obligations knowledge (eg. Obligations of the contract of mandate);
- b. Role knowledge (moral philosophy);
- c. ‘Bounds of law’ knowledge (jurisprudential theory);
- d. Knowledge of self (linked to virtue ethics / behavioural psychology)

### **4. A useful mental model for this course is Rest and Narvaez’s four component decision-making model:<sup>4</sup>**

Narvaez and Rest asks: what must happen psychologically in the minds of [lawyers] in order for them to make ethical decisions?

- a. Moral sensitivity (recognition);

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<sup>4</sup> See D Narvaez, & JR Rest ‘The four components of acting morally’ in W Kurtines & J Gewirtz (eds) *Moral behavior and moral development: An introduction* (1995) 185. <https://www3.nd.edu/~dnarvaez/documents/NARVAEZREST.pdf>.

- b. Moral judgement or reasoning;
- c. Moral motivation;
- d. Moral courage (character)

### **Reading list**

D Narvaez & JR Rest 'The four components of acting morally' in W Kurtines & J Gewirtz (eds) *Moral behavior and moral development: An introduction* (1995) 185. <https://www3.nd.edu/~dnarvaez/documents/NARVAEZREST.pdf> .

H Kruuse & P Genty 'The state's role in the regulation and provision of legal services in South Africa and the United States: Supporting, nudging or interfering?' (2018) 42 *Fordham International Law Journal* 373 (only SA sections – but useful to read whole piece for comparative purposes)

### **Prepare**

Scenario 2

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## **WEEK 2 – THE STATE OF THE SOUTH AFRICAN LEGAL PROFESSION**

### **The legal profession**

- ➔ What is a profession?
- ➔ What is the role of legal professionals?
- ➔ What are the justifications for lawyers' social role and its implications for justice?

### **The history of the South African Legal Profession**

- ➔ Previous legislations: Admission of Advocates Act & Attorneys Act
- ➔ Present legislation: Legal Practice Act
  - ➔ Current rules of the legal profession
  - ➔ Code of conduct



## **Types of regulatory frameworks**

### **Theories and justification for regulatory frameworks**

- Positives of self-regulation:
  - Preserve's lawyers' independence
  - Best placed to regulate themselves (necessary expertise)
  - 'Funnel-in' deviant behaviour for monitoring than that of external organisations
  - Positive 'dispositional' effects: use independence and power responsibly
  - Substantial cost advantages to self-regulation
- Problems with self-regulation
  - Lawyers create monopoly power over markets with resultant substantial information asymmetries
  - Law profession is subject to regulatory capture (in the service of their own interests)

### **What type of regulatory framework does the new Legal Practice Act adopt?**

- Examples:
  - Attempted transformation in the insolvency sector: *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20
  - Attempts by non-lawyers to do reserved work: *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* (74313/16) [2018] ZAGPPHC 333

## **Readings**

J Hansford 'Nelson Mandela and the role of the lawyer' (2014) 22 *New York Law Review* 1

W P Quigley 'Letter to a law student interested in social justice' (2007) 1 *De Paul Journal for Social Justice* 7

D Nicolson & J Webb *Professional Legal Ethics: Critical Interrogations* (1999) 51-59, 66, 82

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## **WEEK 3 & 4 – LAWYERS AND ROLE MORALITY**

### **1. Why obeying the rules is not enough**

South African lawyers will know from the country's apartheid history and now more recently with State Capture: compliance with a rules or a code does not necessarily lead to ethics or justice. As a result, we need to explore how role morality interacts with personal morality is needed to truly result in ethical conduct.

### **2. Philosophical foundations of the lawyers' approaches to decision-making (read with Table A)**

- the ethics of duty or deontology
- utilitarianism or consequentialism
- virtue ethics
- African communitarianism

### **3. Role interpreted through 'role morality'**

- Neutral partisan lawyering
- Critical lawyering
- Moral activist lawyering
- Relational lawyering
- African communitarian lawyering

## **Readings**

F Mnyongani 'Duties of a lawyer in a multicultural society: a customary law perspective' (2012) 23 *Stellenbosch Law Review* 352.

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

T Metz 'Towards an African moral theory' (2007) 15 *Journal of Political Philosophy* 321

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

## **WEEK 5 & 6: SITUATIONAL & DISPOSITIONAL VARIABLES THAT AFFECT LAWYERS' ABILITY TO RESOLVE ETHICAL DILEMMAS DESPITE RULES / CODES / REGULATION**

### **1. Nature of legal practice**

- a. Ethical rules and standards that cannot and do not cover all scenarios
- b. Agency relationship with client
- c. Ethos of the adversarial system
- d. Pressure of modern legal practice
- e. Positions or feelings of relative status or power
- f. Cues or pressure from others

### **2. Insight into situational and dispositional variables by means of social experimentation:**

- a. The Milgram Experiment
- b. The Stanford Prison Experiment
- c. The Bystander Effect
- d. The Third Wave
- e. Hannah Arendt's 'Banality of Evil'

→ Philosopher Hannah Arendt → witnessed trial of Adolf Eichman, one of the architects of the holocaust.

→ she suggests that evil does not come from malevolence or a delight in doing wrong. Instead, the reasons people act in such ways is that they fall victim to failures of thinking and judgment.

→ the idea that evil is banal does not strip evil acts of their horror. Instead, refusing to see people who commit terrible acts as "monsters", brings these acts closer to our everyday lives, challenging us to consider how evil may be something of which we are all capable.

### **Readings**

JK Robbennolt & JR Sternlight 'Behavioral Legal Ethics' (2013) 45 *Ariz St LJ* 1107

D Narvaez & JR Rest 'The four components of acting morally' in W Kurtines & J Gewirtz (eds) *Moral behavior and moral development: An introduction* (1995) 185.  
<https://www3.nd.edu/~dnarvaez/documents/NARVAEZREST.pdf>

R A Prentice 'Behavioral ethics: Can it help lawyers (and others) be their best selves?' (2015) 29 *Notre Dame Journal of Law, Ethics and Public Policy* 35.

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

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TERM 4

## **WEEK 7: FIT AND PROPER REQUIREMENT IN THE LEGISLATION AND RULES OF THE LEGAL PROFESSION**

### **1. Application for admission and enrolment as legal practitioners: being fit and proper**

("Section 24(2) of the LPA: The High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she- .... (c) is a fit and proper person to be so admitted; ...")

### **2. Fit and proper at the point of registration:**

Submit information to the LRC before the practical vocational training contract is entered into (to rule 22), inter alia,

**Candidate Attorneys:** "22.1.1.2 proof to the satisfaction of the Council that he or she is **a fit and proper person** to serve as a candidate attorney under a practical vocational training contract and has satisfied all the requirements for the degrees referred to in sections 26(1)(a) or (b) of the Act."

**Pupils:** "22.2.1.2 proof to the satisfaction of the Council that he or she is **a fit and proper person** to serve as a pupil under a practical vocational training contract and has satisfied all the requirements for the degrees referred to in sections 26(1)(a) or (b) of the Act."

### **3. Fit and proper at the point of being admitted:**

(1) "17.2 An application for admission .... must be accompanied by an affidavit by the applicant setting out the following information supported, where applicable, by documentary evidence: ...

(2) (a) **For admission as an attorney:** Attach a supporting affidavit by the applicant's principal containing the following information:

**(b) For admission as an advocate:** Attach a supporting affidavit by the applicant's training supervisor containing the following information:

17.2.14 confirmation that the applicant is a **fit and proper person** to be admitted, including a statement as to whether-

17.2.14.1 the applicant has any previous criminal convictions or has any criminal investigations pending. If there have been any proceedings as contemplated in this sub-rule, or if any such proceedings are pending, the applicant shall set out full details thereof;

17.2.14.2 the applicant has been subjected to previous disciplinary proceedings by the Council or any law society, university or employer, or whether any such disciplinary proceedings are pending. If there have been any proceedings as contemplated in this sub-rule, or if any such proceedings are pending, the applicant shall set out full details thereof;

17.2.14.3 the estate of the applicant has been sequestrated, provisionally or finally, or whether there is any application for the sequestration of his or her estate which is pending; where the estate of the applicant has been sequestrated, the applicant must state whether or not he or she has been rehabilitated."

"17.4.5 confirmation that in his or her view the applicant is a **fit and proper person** to be admitted and enrolled as an attorney."

"17.5.3 confirmation that in his or her view the applicant is a fit and proper person to be admitted and enrolled as an advocate.

#### **4. Fit and proper at the point of being disciplined by the LPC and/or struck off the Roll by the court: misconduct (not being fit and proper)**

- Chapter 5 of the LPA (disciplinary proceedings)
- Power of the courts to strike legal practitioners from the Roll

#### **Three-fold fit and proper enquiry utilised by the courts:**

- a. Has the law society established the offending conduct upon which it relies (on a balance of probabilities?); (FACTUAL INQUIRY)
- 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? (DISCRETION)

#### **NB points:**

**Approach** = what is required for the protection of the public in the future, NOT what constitutes an appropriate punishment for a past transgression (*Van der Berg*)

**2nd stage** = partly value judgment, partly objective fact (*Kekana*)

**3rd stage** = appeal court does not apply its discretion, only whether the decision-maker has correctly gone about his/her inquiry (*Kekana, Fine*)

### Readings

M Slabbert ‘The requirement of being a “fit and proper” person for the legal profession’ (2011) *PELJ* 209

*Re Legal Profession Act 2004; re OG, a lawyer* [2007] VSC 520 → plagiarism

*Ex Parte Gunguluza* 1971 (4) SA 212 (N) → cheating

*Ex Parte Cassim* 1970 (4) SA 476 (T) at 477E-H → previous convictions / full disclosure

*Ex parte: Mdyogolo* 2017 (1) SA 432 (ECG) read with H Kruuse ‘Ex Parte Mdyogolo 2017 (1) SA 432 (ECG): Character and carelessness’ (2018) 135 *SALJ* 249. → dishonesty / character defects

*Mtshabe v Law Society of the Cape of Good Hope* 2014 (5) SA 376 (ECM) read with *Mphatswe v Law Society of the Free State* [2017] ZAFSHC 208. → parole

*Johannesburg Society of Advocates v Edeling* [2019] ZASCA 40 (29 March 2019) → serious dishonesty & proof of reformation

*In re Ngwenya v Society of Advocates, Pretoria, and another* 2006 (2) SA 88 (W) → wrongful conviction but reformed?

*Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) → dishonesty

*Van der Berg v General Council of the Bar* [2007] SCA 16 (RSA) → protection of the public

*Fine v Society of Advocates of SA* (WLD) 1983 (4) SA 488 (A) → no danger to public or to good name of profession

*Prince v President of the Cape Law Society and others* 2000 (3) SA 845 (SCA) and 2002 (2) SA 794 (CC) → previous convictions and the mores of society

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## **WEEK 8: FIT AND PROPER REQUIREMENT – RATIONALISATION VERSUS JUSTIFICATION**

*General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA)

**Lessons from *Geach*:** (‘There are rational forces that we think drive our dishonest behaviour – but they don’t. And there are irrational forces that we don’t think drive our dishonest behaviour – but do’ (Ariely supra))

a. Rationalisation

- b. Psychological distance
- c. Group think / Regulatory capture
- d. Effect of a 'reminder'

### **Reading:**

M van Eck 'Ethical and professional duties in the use of recycled legal instruments: a trio of cases: *Cele v The South African Security Agency* (2008) 7 BCLR 734 (D), *Sibiya v Director-General: Home Affairs* (2009) 3 All SA 68 (KNP) & *Tekalign v Minister of Home Affairs* 2018 3 All SA 291 (ECPJ' 2020 TSAR 354.

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## **WEEK 9: THE LAWYER'S DUTY TO CLIENT, COURT, AND INTERESTS OF JUSTICE**

### **Code of conduct (see also Rule 40):**

3 Legal practitioners, candidate legal practitioners and juristic entities shall –

3.1 maintain the highest standards of honesty and integrity;

3.2 uphold the Constitution of the Republic and the principles and values enshrined in the Constitution, and without limiting the generality of these principles and values, shall not, in the course of his or her or its practice or business activities, discriminate against any person on any grounds prohibited in the Constitution;

3.3 treat the interests of their clients as paramount, provided that their conduct shall be subject always to: 3.

3.1 their duty to the court;

3.3.2 the interests of justice;

3.3.3 observance of the law; and

3.3.4 the maintenance of the ethical standards prescribed by this code, and any ethical standards generally recognised by the profession; ....

### **Avoiding conflicts of interests**

#### **Code of Conduct: general provisions para 3**

3 Legal practitioners, candidate legal practitioners and juristic entities shall – ...

3.5 refrain from doing anything in a manner prohibited by law or by the code of conduct which places or could place them in a position in which a client's interests conflict with their own or those of other clients; ...

## **Code of Conduct: Conflicts of interests involving legal practitioners para 58 & 59**

### **2.2 Concurrent conflicts**

### **2.2 Successive conflicts**

- *Wishart and Others v Blieden NO and Others* 2013 (6) SA 59 (KZP) read with *Wishart v Justice P Blieden NO* 659/13 [2014] ZASCA 120.

### **2.3 Imputed conflicts**

- Chinese walls as a remedy?: *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517
- ‘Typhoid Mary’ & Chinese Walls?: *Halewood International Ltd v Addleshaw Booth & Co* [2000] PNLR 788.
- H McVea “‘Ad Hoc’ Chinese Walls’ (2002) 2 *Journal of Corporate Law Studies* 24.

### **Case law**

*Robinson v Van Hulsteyn Feltham and Ford* 1925 AD 12

*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* 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.

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## **WEEK 10: DISCLOSURES AND NON-DISCLOSURES BY LEGAL PRACTITIONERS (RULES 57-59)**

### **1. Legal professional privilege:**

Requirements for claiming privilege (*Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC)):

1. The legal adviser must have been acting in a professional capacity at the time;
2. The adviser must have been consulted in confidence;
3. The communication must have been made for the purpose of obtaining legal advice;



4. The advice must not facilitate the commission of a crime or fraud; and
5. The privilege must be claimed

**Read:** K Wagner & C Brett 'I heard it through the grapevine: The difference between legal professional privilege and confidentiality' (2016) Aug *De Rebus* → <http://www.derebus.org.za/heard-grapevine-difference-legal-professional-privilege-confidentiality/>

### **Criminal intention & professional privilege?**

*Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W)

*South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ)

*A Company and Others v Commissioner, South African Revenue Service* 2014 (4) SA 549

*Myeni v Organisation Undoing Tax Abuse NPC and Others* [2019] ZAGPPHC 565 (2 December 2019)

### **2. Duty to disclose adverse facts**

Information gathering by counsel? → *Van der Berg v General Council of the Bar* [2007] SCA 16 (RSA)

Revealing confidences to prevent future injury or death? → R Cramton & L Knowles 'Professional Secrecy and its Exceptions: Spaulding v Zimmerman Revisited' (1998) 83 *Minnesota Law Review* 63

### **3. Duty to disclose adverse authority**

*Ulde v Minister of Home Affairs and Another* 2008 (6) SA 483 (W) para 36ff.

*Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* 2018 (1) SA 200 (SCA) paras 54-62

### **4. The Lawyer's Trilemma: when there is no rule or the rule is inadequate**

Professor Monroe H. Freeman has extensively discussed the issue of the "trilemma" facing criminal defense attorneys. We will be discussing this trilemma in the light of the *Harksen* case. 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.

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## WEEK 11: COMMITMENT TO AN EFFECTIVE COURT PROCESS (PARA 60)

### 1. Litigating a 'hopeless' case

N Whitear & H Kruuse 'Legal practitioners' ethics in resource-scarce institutions: A discussion of *PM Mashishi v Mdlala and Others* [2018] 17 BLLR 693 (LC); (2018) 39 ILJ 1607 (LC)' (2019) 40 *Obiter* 383

*Mavundulu Community v The Minister of Agriculture, Rural Development & Land Reform and Others* (LCC125/2008) LCC (PMB) (25 May 2020)

### 2. Regulatory capture & contingency fees

*Law Society of the Northern Provinces v Bobroff and Others* [2017] ZAGPPHC 704

<https://www.news24.com/fin24/companies/fugitive-bobroff-attorneys-ex-secretary-jailed-on-multiple-charges-of-fraud-and-theft-20200719>

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## WEEK 12: MONEY MATTERS – DUTIES IN RESPECT OF FEES AND MANAGEMENT OF TRUST FUNDS

### 1. Management of trust funds generally

*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)

*S v Macheka* 2020 (1) SACR 189 (FB) paras 19-26

### 2. 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)

### **3. Professional responsibility (delictual claims based on professional negligence)**

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 person professing such knowledge and skill.

This standard is set out in *Bouwer v Harding* 1997 (4) SA 1023 (SE) and *Ebersohn v Prokureursoder van Tvl* 1996 (1) SA 661 (T) 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*.

- There is a difference between ethical duties of an attorney and legal duties of an attorney
- Breaching 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.
- Negligence does not represent breaking a legal duty *per se*.

It is important to differentiate between two kinds of ethical rules:

1. Those of a conventional nature → regulatory nature

These are rules that are aimed at regulating the conduct of the members of the 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 or the court may institute.

2. Those which have a fundamental nature

These are based on the generally accepted standards of common decency and fairness. Violation of these fundamental ethical duties may constitute grounds for an action of damages.

A fundamental ethical duty therefore has the potential to also become a legal duty.

### **When is an ethical duty also a legal duty?**

#### **1. An attorney's legal duty**

- a) A legal duty is 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.

b) An attorney's duty to a non-client can only be based on the *lex aquilia*.

## **2. An attorney's contractual duty to a client**

- a contract of mandate governs the lawyer-client relationship
- the obligations of the mandatory or agent usually are:
  - to perform a task
  - to obey instructions
  - to exercise care and diligence
  - to advise and impart information
  - to account
  - to show good faith
- when considering civil liability, it is often the breach of the duty to exercise care and diligence that amounts to professional negligence.

### **Readings**

#### **RE: care that is to be expected of the average attorney**

*Mlenzana v Goodrick and Franklin Inc* 2012 (2) SA 433 (FB)

#### **RE: duties to clients**

*Guardian National Insurance Co Ltd v Weyers* 1988 (1) SA 255 (A)

*Sibanyoni v du Toit-Smuts and Mathews Phosa Attorneys and Others* [2016] ZAGPPHC 163 (2 March 2016)

#### **Re: Responsibility for actions of employees**

*Mazibuko v Singer* 1979 (3) SA 258 (W)

*Guthrie v AA Mutual Insurance Association Ltd* 1986 (4) SA 979 (W)

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