

PROFESSIONAL ETHICS NOTES

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CHAPTER 1: **APPROACH TO RULE OR CHARACTER TEST**

- Roussouw
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ROSSOUW:

Legal Ethics: the rules of conduct recognised in respect to a particular group – comes from society – it's a practice or conduct which the community has deemed to be the right thing to do. Ethics are dependant on others for recognition.

Legal ethics must override personal morals for the greater good of upholding a justice system in which the accused is given a fair trial and the prosecution must prove guilt beyond a reasonable doubt

Morals – principles regarding what is right or wrong – stems from the individuals beliefs

DEFINITION OF LEGAL ETHICS

Wide sense: is a general relationship between law and morals = includes the study of the debate between positivism and natural law and between liberalism and communitarianism

Q: can the law be used to decide moral issues (abortion)

Narrow sense: ethical standards of professional conduct, which applies in the law.

Shows how the lawyer should behave to be a good, decent and proper lawyer

Reasons for the crisis in the legal profession:

- ❖ There is a general fear that lawyers and doctors have become unscrupulous in their pursuit of money and status at the expense of their basic values. The idea of a lawyer who saw his profession as a calling who served a public interest has been replaced with a corporate lawyer, or as a market-driven seller of expertise. They often resort to excessive entertaining of clients, kickbacks, payoffs and behaviour, which borders on bribery and corruption (e.g. Transfer fees are handed back to estate agents).
- ❖ The practice of law has become commercialised, in that is run as business for the purpose of making money

- ❖ Competition in the legal field has led to the view that the profession of law be run as a business - growing numbers of graduates and firms, a sluggish economic environment, affirmative action, the rising costs
 - ❖ Legal education – formal education doesn't prepare lawyers for the moral challenges that they will face
 - ❖ The adversarial system: advocates a competition and thus lawyers look to their clients interests, thus they do not strive for justice and don't look at the moral implications of their actions
 - ❖ **Professional ethics cannot be enforced:** The rules are not followed and the transgressors are not punished. If it just appears on paper it's hardly worth anything.
Radloff: to make the effort to report it, takes time and the law society will probably fail to do anything about it. There is a lack of trust in the law society and in the professional code.
- i) **Professional ethics serve the profession rather than the public.** The public feel the code serves to protect the interests of the legal profession while neglecting the interests of their clients. A factor that contributes to this negative perception is the difficulty of finding a copy of and understanding the code. Complaints are handled by the colleagues of the accused in the legal profession resulting in the suspicion that they will protect their colleagues against accusations by the public – professional blood is thicker than the water of service to clients.

Schlag describes lawyers as nothing more than freelance bureaucrats, willing to sell their souls to the highest bidder. Lawyers no longer conduct themselves as public servants in pursuit for the basic good of justice. The idea of a good lawyer (ethical) has completely collapsed.

Many practitioners believe that as long as it's not illegal, it's justified even if it goes against the code of professional ethics.

THE DIFFERENCE BETWEEN A BUSINESS AND A PROFESSION:

Business Person: one who trades goods or services for money in order to make a profit.

Profession: “a public statement” or “promise”. A legal professional should be worthy of public trust, and should carry out his professional duties with public-spiritedness and the highest standards of professional ethical conduct.

Although members of professions are paid for their services, they are distinguished from ordinary businesses on the basis of the following features:

- ❖ Specialised intellectual knowledge: and skills before they will be granted access to their chosen profession.
- ❖ Justice: professionals are expected to have a commitment to promoting the basic good of society.
- ❖ Committed to serving the public
- ❖ Discretion: professionals enjoy relative autonomy in the execution of their duties.
- ❖ A willingness to accept responsibility for their actions
- ❖ Professionals share a sense of common identity and an established moral community
- ❖ Self-disciplined and expected to be ethical.
- ❖ The above standards are enforced by the profession itself or by the courts or controlling body. (Attempts to restore the ethical basis).

Professional ethics – the values that should guide practitioners in a profession in the way in which they work and interact with clients and colleagues, this is Presented in 2 ways:

1. **Aspirational way** – sets the standard of conduct towards which all in the profession must strive. The tone is positive and inspiring. The Golden Rule according to Lewis is that a practitioner must avoid all conduct, which if known, could damage his reputation as a honourable lawyer and citizen.
2. **Directional form:** prescribes very definite guidelines for specific actions that need to be taken or avoided. Negative – prohibiting tone explicitly forbidding certain actions like the practitioner cannot employ someone who has been struck off the role.

NICOLSON AND WEBB: **CODE OF LEGAL ETHICS**

DEFINITION OF PROFESSIONAL CODES:

Canons are statements of unassailable norms, which express in general terms the standards of professional conduct expected of lawyers and from which ethical rules are derived.

Some of these values are integrity, objectivity, fairness, and power of judgment, dignity and respect.

They are also expressed as truthfulness, competence, loyalty to clients, and the courage to carry out professional responsibility, a desire to serve the public instead of private gain and rational decisions.

Ethical considerations guide a professional in specific situations – they set the standard of conduct towards which all professional should strive.

Disciplinary rules – are directional – they state the minimum level of conduct required from a lawyer to avoid disciplinary action.

Ethical rules – are contained in ethical codes = provide minimum standards for the ethical practice of law.

Criticism of Professional legal ethics

FORMALISM: Believed that the main problem in legal ethics is the dominance of formalism and liberalism = compared to contextualism = which reinforces the goal of encouraging a more ethical profession.

Ethical codes are made according to a formalistic ethical tradition = narrow duties which are meant to be applied in a legal and categorical way without reference to consequences and content.

= Look at the letter of ethical rules rather than the substance

- History has discouraged lawyers from focusing on morality – legal education will teach them the skill and focuses on rules and regulations.

By a lawyers role in the adversarial system and in helping their clients = it's believed that they should act ethically and ensure justice.

ADVERSARIAL SYSTEM: law always provides the correct answers = ignore the political and moral nature of the legal process.

You will achieve justice if you apply the law to the facts.

It's argued that to move away from an ethic based on formalism and liberalism to one, which requires lawyers to consider contextual factors relevant to representing their clients and its impact on others

Legal ethics needs to be contextualized:

lawyers need to look at the real life situations of their clients:

- Their needs and interests
- The impact of their action of 3rd parties
- The general public
- The environment

NICOLSON AND WEBB - 3 levels of codes:

1. Need for a general statement of values which are involved in the attorney-client relationship:
 - Good faith and trust
 - Don't do any harm to others
 - Must do good and prevent harm to others
2. Need for specific general principles which govern the attorney-client relationship:
It's based on 4 principles:
 - Loyalty: uphold the clients interests and needs and the principle of confidentiality
 - Integrity: a lawyer must know that he is morally responsible for all action taken on behalf of the client, tells the lawyer what type of conduct will ruin his reputation (Aspirational Approach)
 - Candor: Good faith requires mutual expectation of honest and open communication between the lawyer and the client
 - Informed consent: ethical presumption that a client is allowed enough information to help him in decision-making = requires the attorney to consult with the client before steps are taken on his behalf.
3. Sets out contextual factors which refer to the way in which the lawyers apply the principles: When you look at the desires and needs of the client which are affected by the legal representation = look at:
 - Financial
 - Emotional and
 - Psychological factorsContextual factors tend to reoccur in cases of the same nature = i.e. look if the case involved is:
 - Criminal defence
 - Civil litigation
 - Mediation
 - Negotiation

➤ Advice giving

So the codes will not just guide ethical decision-making but also educate lawyers as to the importance of ethics and ethical considerations.

Another important function of the code:

- Assist lawyers develop moral character
- By exposing law students to dilemmas and moral considerations which apply in different areas of practice: It's essential for lawyers to be aware of such issues before making their career choices and they are encouraged to look at such factors, such as morals, rather than simply at money, career prospects and job satisfaction.

Plan for with ethical professionalism:

1. Micro-regulation: look at client care and professional responsibility – *e.g. firms can be required to appoint a compliance officer who looks at complaints and ethical compliance.*
2. Fees: important for public access and a professional ethical image = *make sure their costs are transparent.*
3. Firms dealing with the community: a more contextual approach enables a lawyer to advise from the perspective of an independent and morally active member of the community – *this might encourage lawyers to give more creative forms of advice and assistance which benefits both the client and the community (rather than the client over the community).*
4. Demography of the profession: there are some political and empirical problems with associating an ethic of care with gender = *there is evidence that a greater amount of woman may create opportunities for developing a more caring theme among lawyers – which will affect the way that clients are treated.*
5. Adversarial system: looks at the ethical case supporting a more inquisitorial system.

Criticisms of the codes from the OUTSIDERS AND INSIDERS

To get ethics in the legal profession = code of legal ethics

The public (outsiders):

- Say that the code isn't accessible and is hard to understand = they don't know what is regarded as dishonest or unethical conduct.
- Some ethical rules are seen as protection for professionals against the public or serving the profession themselves – *rules which limit competition*
- The rules change as the times change (*the rule that practitioners who write articles may not be identified with the press (touting) no longer applies*)
- The public feels that since complaints are handled by colleagues of the accused, they will be protected from accusations from the public.
- Colleagues are reluctant to report each other and aren't willing to testify during proceedings.

Criticism from Legal practitioners:

- Are also suspicious of the code as they aren't always enforced by law societies and those who don't comply with the codes

aren't always dealt with effectively = they feel such codes should be replaced with a code of business ethics.

- They fear that trying to encourage their client to do the right thing = the client will go to someone else to carry out their wishes.
- Also the idea that the practice of law is a profession = counters the idea that legal ethics can be reduced to the “rules of professional conduct”
- A justification for the self-regulation of the profession – is that the practice of law requires complex professional judgments, the reasonableness of which can be only be judged by fellow professionals.
- Self-regulation – the conduct of the practitioner cannot be judged against a code, but by colleagues who have virtues inherent in a morally good practitioner.

The idea that ethics are just compliance with a professional code reduces the law to another business and exposes the existence of law and bar societies as no more than agencies created to protect vested interests.

All this suggests is that the introduction of a more comprehensive code of professional conduct isn't sufficient to overcome the crisis in the legal profession.

PURPOSE OF PROFESSIONAL CODES:

A professional code of ethics suggests a compliance of ethical values to provide practitioners with a framework of the ethical practice of law – code seeks to:

- Protect the professional nature of legal services by stressing the obligation of professionals to serve justice and the public
- Correct the imbalance in the relationship between professional and the client
- Maintain public confidence
- Protect the public against improper conduct or incompetence
- Provide practitioners and newcomers with morally responsible choices
- Ensure fair competition
- Discipline unprofessional behavior

WASSERSTROM:

Lawyers as professionals = some moral issues

2 moral criticisms of lawyers:

1. Lawyer – client relationship = lawyer is immoral.
2. The lawyer-client relationship is morally objectionable because its relationship where the lawyer dominates and treats the client in an impersonal way. The relationship between the two is unequal

The central feature of the profession of law is it's a special complicated relationship between the professional and the client

“Role differentiated behavior: requires one person in a particular role to put to one side his moral consideration

IMMORAL RELATIONSHIP - Role-differentiated behavior of lawyers:

where the attorney-client relationship exists – it sometimes requires the attorney to do things that an ordinary person need not do.

- Lawyers must have an indifference to the ends and consequences that in another situation (context) would be of moral significance
- When a lawyer represents a client = duty to make his expertise available to help with what the client wants to achieve =
IRRESPECTIVE OF THE MORALITY
Provided that the result he wants isn't illegal = a lawyer is an amoral technician whose skills and knowledge in respect of the law are available to his client.

A role-differentiated lawyer has 2 jobs:

- Put his expertise at his clients disposal
- Don't break the law
-

Criminal defence lawyer:

Once a lawyer agrees to represent his client he is undertaking an obligation to do his best to defend him irrespective of his belief in the client's innocence.

BUT there are limits to what he can do:

- i.e. he cannot bribe or intimidate witnesses (he is bound by the law).

In defending the A: the attorney in representing his client might have to make use of procedures which might not seem moral and the lawyer, had it been in another context, might disapprove.

Besides criminal lawyers some clients may seek the assistance of an attorney in things they cannot do themselves:

- Dispose of property in a will
- Draw up a contract
- With the sale of a house

In each case the “role-differentiated” character of the lawyer, renders irrelevant what would have been relevant to him in some other instance.

A lawyer doesn't have to agree to represent a client BUT it's not wrong to represent a client whose aim is immoral
The role of a lawyer isn't to approve of the character of his client or the avenues provided by the law which can be used to achieve what the client aims for = his job is to provide his skill

When there is a conflict – it's resolved by a trial where both sides are represented by a lawyer whose job it is to present his client case in the best light and to expose the weaknesses in the opponent's case.

So when someone is charged with a crime there is a trial to determine if that person is guilty

- If lawyers refused to represent people who they thought were guilty (i.e. clear guilt) some people would then lose the opportunity to determine if they are in fact legally guilty = this is an infringement of S34 Constitution: *which guarantees anyone who has a dispute the right to a fair and public hearing*
- This means that the private judgment of lawyers would take preference.

The amorality of lawyers helps guarantee that every criminal has an opportunity in court.

Reason being that people may appear to be morally guilty – but aren't in fact legally guilty.

Adversarial system:

each party has a person to argue, plead and present their case.

Wasserstrom: doesn't think that the immoral behavior of criminal defence lawyers is justified.

4 NB points:

1. Arguments which support “role-differentiated” amorality can only work if there is confidence in the legal system itself (no chance of an innocent man going to jail for a crime he didn't commit) = if the institution works well = defer morality
2. Clear character traits, which a lawyer must have but which aren't clear, are the admirable ones.

With role differentiated amorality, its justified in the adversarial system where its encouraged to be competitive rather than co-operative (capitalism ethics).

3. There are special features of role differentiated behavior that distinguish it from other professions
E.g. why is it less plausible to talk critically of the amoral behavior of a doctor = who treats patients irrespective of their moral behavior, than it is to speak of the amorality of lawyers.
Doctor's behavior is role-differentiated and their task is to cure the ill.
Wasserstrom: it's good to try cure disease but its not always good to win every lawsuit.
Lawyer's behavior is also different as they make a case for their client (say things directly) and try to convince others that their case should win = the lawyer is part of the dilemma whereas in other professions they aren't.
 - If the lawyer believes in everything he does on the clients behalf = he is embracing his own point of view (i.e. his own morals
 - BUT if he doesn't believe in what he is doing = he is playing a role = hypocritical
The fact that a lawyers words, thoughts and beliefs are for sale is the reason why lawyers are looked at the way they are by the public
4. Even if the role-differentiated character of the lawyers way of thinking was justifiable – it still means that they pay a social price for the way they think and act
To be a professional – requires incorporating yourself in the behavior and thinking that shape you as a person
It's hard for ones professional way of thinking not to also dominate your entire (non-professional) adult life.

WASSERSTROM:

Criticism of the ethics of the “hired gun”

- ❖ He suggests that the idea of the hired gun can be best defended in the case of a criminal lawyer
- ❖ BUT lawyers should see themselves less role-differentiated and more subject to a moral point of view

A rule-based mindset leads to role-differentiated behavior between lawyers and their clients.
Their responsibility is stripped of morals and civil responsibility and becomes driven by the bad mans perspective.

The only thing, which is relevant to this relationship, is the lawyer's knowledge of the rules and the impact of these rules on what the client wants to achieve.

Some people think that a more moral relationship can be achieved if the legalistic mindset is disregarded.

UNEQUAL RELATIONSHIP

This relationship isn't one where there are no morals; the client is still treated with the respect and dignity he deserves.

- a. The problem could be lawyers excessive preoccupation and concern with his client – **how can a professional be so concerned with his client and at the same time maintain and approach a relationship of dominance and indifference with the same client**
- b. The problem with the impersonal relationship between them is the issue of the role differentiation of the professional
- c. Lawyers can be overly concerned with their client's interests and at the same time fail to see them as a whole person (who is entitled to be treated in a certain way).

To look at this:

One feature of this relationship is that it is **unequal** - the professional is dominant.

BUT: while the relationship exists – it's the professional who is in control.

Features of this relationship:

- a) The professional has expert knowledge which the client doesn't have
- b) The profession has its own technical language

This means that the client is in a poor position to determine how well or badly the professional performs = general the professional assesses himself.

If there is external assessment it's done by someone in the same profession (PROFESSIONS ARE SELF REGULATING)

They highly value their colleagues view.

When someone is in need of professional assistance= it generally involves a thing which is a personal interest of the client – who is too involved in the situation and needs a detached representative to look after his interests

Even if the client has the same knowledge as the professional = client would still not be objective.

- ❖ To be a professional = lengthy study and training – join an elite group because of hard work
Society treated members of a profession as members of the elite by paying them more.
 - *It's hard for someone to come out of professional training without believing that he/she is a special type of person.*

Against the belief that the relationship should become more personalized:

- The impersonality of a lawyer makes it easier for him to do a good job for the client
- Lawyers know better and know what is best for the client and it could be argued that the client wants to be treated in this way

Wasserstrom: says that a change to this impersonal relationship can be brought about by an effort to:

- Simplify legal language
- Make the legal process more directly available to lay persons

TRADITIONAL APPROACH TO ETHICS:

- LEWIS
- HOLMES
- MARKOWITZ

The contradiction of legal ethics:

- Some lawyers don't care about ethics and are only interested in positive law to govern their behavior
- Lewis: don't look at ethical philosophy as it isn't part of the rules of conduct which a lawyer must obey = practical approach to professional conduct
- UNISA: says that the positivistic approach to ethics is the main reason for the crisis in the legal profession

LEWIS: tries to reduce ethics to a code of conduct, which lawyers must comply with.

SHAFFER: what most lawyers call ethics aren't ethics at all they are just rules of administration = they don't appeal to a person conscience but to fear of punishment (positivism).

2 questions:

1. What is ethics?
2. Why does the legal profession use a narrow view of ethics?
By asking these you are looking both at ethics and at legal philosophy

Coquilette: looks at lawyer's attitudes to legal rules and rules governing the profession = lawyers have an NB moral responsibility
The legal philosophy of a lawyer will influence his understanding of his ethical responsibility.

Formalism:

- Lawyers with a formalistic approach of the law – will see if their ethical responsibilities comply with a codified set of rules = *which will say what he can and cannot do in a certain situation*
(RULES) = looks at the rule based approach to ethics
- This approach focuses on rules which can be strictly applied by the law society
The lawyer following this approach adopt the same approach as **JUSTICE HOLMES**: if you want to know what the law is look at it as a bad man – who only cares about the consequences of his action (fear of punishment) and not at the good man who looks at the reasons for his actions (conscience)

MARKOWITZ:

Says the adversarial system is part of the moral dilemma.

- Lawyers have to prefer their clients over others in a way which would otherwise be immoral
 - Sometimes have to cross examine witnesses in an aggressive way to undermine their credibility and confuse them
 - Unnecessarily delaying a case
 - Manipulating the facts
 - Making statements they don't believe
 - Pleading technical defence (prescription) even when they know their client has a moral duty to compensate

Is there any way in which a morally good lawyer can justify such conduct?

Role differentiated approach: lawyers play a role and their unethical aggressive behavior goes with that role, their conduct cannot be assessed against ordinary morals.

They look at: was their appearance in court good or bad

MARKOWITZ: states that morally good lawyers will not conform to this as:

- a) This approach looks at the lawyer playing a role and not as an independent person, who should be judged on their own moral capacities
- b) This approach forces moral lawyers to betray their own morals – which they normally have in their private lives

OR: change the professional role: this is so they don't have to go against their own private morals

Here they look at:

- ❖ Loyalty: to their clients
- ❖ Statesmanship: uphold the political culture of the community = advocates "**lawyerly virtues**" = this wouldn't amount to an abuse of people.

MARKOWITZ:

This may still have a chilling consequence for lawyer's character:

1. They must abandon certain virtues
2. Statesmanship = ability to put both sides of the case and their commitment to procedure rather than result make them unfit for moral leadership

Redescribing the role of the lawyers will only resolve the dilemma of the morally good lawyer.

He believes that lawyers are cast in the role of villains by history and they must often abandon their integrity to have a successful practice.

PHILOSOPHICAL APPROACH TO ETHICS

The idea of a good lawyer depends on the ethical perspective:

- ❖ **Rule based perspective:** sense of duty
- ❖ **Virtue based perspective:** the type of character that a person has
- ❖ **Consequentialist perspective:** the type of consequences that he effects
- ❖ **Postmodern perspective:** relationship to others beyond the rules, consequences and character

RULE GOVERNED ETHICS:

this is based on the idea that in order to judge conduct, it must 1st be established what the ethical rule is that governs the conduct.

Rules are above everything even the consequences of the conduct.

RULES:

1. Say what has to be done to be morally good
2. This rule must be accepted as a duty = there is an obligation to obey it (Hart and Austin) **Deonic Ethics**

KANT:

1st principle in an ethical situation: act in the same way that others would act in the same situation (reasonable person).

One way to treat others is with respect and never regards a person as a means to an end.

Universalising: one's actions in the belief that they are morally good and for that reason it ought to be the same action everyone else would take = imposes a duty on others to do the same.

1st principle in Deontic ethics: categorical imperative: moral goodness is the reason for the duty and everyone must accept it and obey it.

Some people do the opposite of categorical imperative = here they put ethical rules aside/ downgrade them.

When a rule is secondary = the moral goodness of the act is weakened = Hypothetical imperative.

Lawyers are members of a profession which has rules = they have to comply with the rules whether they like it or not = they have a morality of duty = failure to obey the rules amounts in punishment.

A lawyer who meets the minimum standards required = formalistic and amounts to hypothetical imperative = they only act ethically because they are trained to do so.

According to the categorical imperative: lawyers should expect more from themselves than just abiding by rules out of fear of punishment = they should obey it out of a sense of duty.

CONSEQUENTIALISTS:

Utilitarianism:

Purpose orientated theory of ethics: the only thing which is relevant in determining whether an action is right or wrong is the purpose which the action is intended to achieve.

Moral judgement = greatest happiness to the greatest number of people.

Bentham: said that usefulness is part of moral judgement and isn't a sense of duty and respect of legal rules (rule based approach).

Problem: not everything, which is useful, is necessarily right = there are things which are useful which are ethically wrong (abuse of science).

Q: whether any means can be used to achieve the greatest happiness to the greatest number?

- Sometimes the ends justify the means = *if a lawyer is convinced that his client is innocent – he may lie in court in order to vindicate his clients rights*
- Others believe that the end doesn't always justify the means

Markowitz: gives an example:

20 people are held prisoner – one is told if he kills one of the prisoners the others will be released.

Utilitarianism = kill the one for the benefit of the others – the fact that his moral integrity is in jeopardy and the murder of an innocent person is wrong is of no consequence = people are a means to an end.

With regard to legal ethics = according to utility they are useful because they help lawyers who are making errors that could lead to disciplinary action

- *It helps improve the public image of lawyers*
- *Satisfies the clients need*

The requirement that a lawyer must have moral standing before admission doesn't only protect the public but also the professions interest and image.

An unethical lawyer can give them all a bad name.

VIRTUE ETHICS

KRONMAN:

Legal Ethics: Q: is a person morally allowed to destroy the character of an innocent witness through cross-examination – or can he withhold information regarding a client previous participation in past cases?

A lawyer is supposed to advance the interests of the client, within the bounds of the law.

Q: despite the impropriety are these actions allowed?

YES: this is the advantage of the adversarial system.

Kronman: doesn't look at the moral justification of what a lawyer does, BUT looks at why a person might choose law as a career.

Q: What would make someone choose to be a lawyer?

This decision makes no sense unless the life of a lawyer is moral. According to **Socrates** the life of a tyrant is attractive but involves wrongdoing = no one would choose such an amoral life.

Why would someone do (study) law?

Money and power:

This is the least desirable reason = money and prestige.

Lawyers are well compensated and have a position of prestige in the community. Most people would judge such a person as selfish.

To enter into law for money and prestige = view one's professional life as a way to accumulate things needed in your personal life. = *They treat law as a means to things that they care about.*

This can be said to be the same for everyone = we all do things not because we enjoy it, but because they are a means to an end (they make us money)

A life of a lawyer who cares about money and honor leads to a life, which is admired and regarded, with contempt.

Q: whether he has reason to care about his profession = merges with the question of whether he has reason to care about things which give his life meaning as a whole = deficient.

The deficiency lies in the attitude this encourages = what makes the idea of law unattractive is that it takes in too much of what is NB in life.

Public spiritedness

Way to justify your choice

Some people choose law because they are committed to the public good = life in public service.

1. This belief, brings thought that any lawyer who lacks public spiritedness = professional failure. It's believed that we all have basic obligations as citizens that require us to focus on matters of the community. Lawyers have these obligations but they also have a special responsibility to persevere and perfect the legal institution in society
2. This view justifies the choice of law as a career.
BUT it's a mistake to think that the only ethical defensible conception of law is one, which focuses on the common good. With people who practice law some will find fulfillment in public interest and others in politics.
It's also wrong to assume that a lawyer who isn't focused on his community responsibilities is morally inferior
3. We assume that an instrumental lawyer (who works to accumulate resources for his private life) is a person motivated by self-desire and doesn't have any feelings for the common good.
 - ❖ Even the most instrumentalist lawyer may use the money that he gets through his profession to pursue projects which aren't selfish
 - ❖ Also: a complete focus on the common good may mean that the lawyer hates his work, finds it unrewarding but does it for the values at stake = this means that he would have chosen another career

Good Judgment:

deciding on personal, moral and political problems = some people have better judgment than others and the possession of good judgment is a virtue

Deduction and intuition:

judgment = non-deductive in character

In deciding how to behave in a given situation is rarely a matter of simply deriving the appropriate conclusion from a set of rules by using the correct procedure.

A judgment is made by deductive proof alone = good or bad judgment is revealed in a situation where deductive proof is least applicable = where it's ambiguous.

- To show good judgment you must do more than simply apply the general rules
- Judgment requires a dilemma where the choice is between conflicting interests

Intuition: insight = is an understanding which we get by using the ability to reason = it's how we see things in the mind's eye, it's intellectually inaccessible = look at the nature of a religious experience, love, death, imagination, desire).

The characterization of judgment as a form of intuition is misleading because:

- If judgment is a process of reflection followed by insight – then the assessment of the judgment can never depend on the reasons given which support it = in assessing the correctness of our past decisions we look to the reasons given to justify it.

Deliberation and choice:

a person who has good judgment is someone who regularly makes the right decision = it's believed that the choices, which a person who deliberates well, make, are sound.

- Someone who is faced with a difficult personal decision must look at all the concerns and possibilities = enter his imagination and look at what his life will be like after certain decisions are made (entertain his choices)
- To entertain a set of values isn't to make them your own but to look at them – it's halfway between acknowledging them and applying them.

When someone is confronted within NB decision about his future = the greatest challenge is to discover a way of living which accommodates all the things you wish to do and be = since it's impossible to do all of them = it's more NB to find a way of life which will preserve the relation of friendship (common good).

It's through intuition, the choices we make and luck which strengthen the friendly attitude to you or encourage self-hatred.

It's the difference in the consequences of the NB choices have for the achievement or preservation of integrity that shows if you have made a good judgment or not.

A person who deliberates with sympathetic detachment wills for that reason be more likely to make those choices, which increase his chances of living a life of integrity.

Judgment and ethics:

There is a difference between the life we know and live and the knowledge obtained as a sympathetic observer (i.e. take into account view and ideas which are different from your own and give them consideration)

To deliberate well, there is a requirement of:

1. Sympathy
2. Detachment

He focuses on Llewellyn's 3 law jobs:

1. The judge
2. Counselor

3. Advocate

Adjudication (judges):

It's believed that a good lawyer has the capacity for sympathetic detachment = GOOD JUDGMENT.

- Before making a decision the judge must look at the claims of the parties in the best light (imagine what would occur for each decision)
- He must appreciate what the decision means to the parties and to those which support them = for how he makes his decision
- Judge can do this by sympathetically reviewing the case from the party's own perspective – in doing so he must also remain detached (objective) as well as being sympathetic.
- **Function** of a judge: clarify and improve the law but also maintain the bonds of the community – *he will look for a solution that makes it possible for the parties and others to live on amicable terms even after judgment has been given which puts the power of the law on one side rather than the other.*

Counseling:

judges must remain neutral but lawyers are partial to the client's interests – to do what they can do within the limits of the law.

- If a client comes to a lawyer for counseling regarding a course of action – many people believe that the client tells him what he wants to do and the lawyer after researching it tells him how the goal can be achieved = i.e. do what the client wants.
- BUT clients often come to lawyers confused and the lawyer's job is then to assist the client to determine what he wants to do and to decide on whether he really wants to do it.
- A lawyer plays a responsible role in helping the client and what is needed for this is judgment = sympathetic detachment
- Lawyer must in a sense give objective advice

- **A clever lawyer (hired gun) cannot give such advice = clients require his expertise but not necessarily his advice**

From a community aspect:

if a client wants to embark with others on a common venture (partnership) the lawyer gives this legal form = forms common wealth = must exercise sound judgment.

Advocacy:

advocates need wisdom rather than cleverness or cunning
His job begins when the clients interests have already been fixed – aim of an advocate = destroy community (contract, sentiment etc) for the sake of the interest he represents.

All an advocate needs is manipulative power, cunning and ruthlessness – he must be prepared to say things that under other circumstances he wouldn't = there are only good and bad arguments.

Q: when is an advocate going to use good judgment (sympathy and detachment)?

- He could decide at some stage to settle = for this you need more than cunning and ruthlessness you also need good judgment (practical wisdom).

Difference between wise and clever arguments:

clever argument: lawyer uses the law and other legal material to prove his client's case.

Wise argument: there must be a convergence with the cause and the community of law.

Wise arguments win cases.

In order to know what a judge is likely to say in any particular case = advocate must **imaginatively** look at the conflicting interests in the case with the same **sympathetic detachment** that a judge uses (INSIGHT).

Conclusion:

Q: why would someone choose to spend a lifetime in law?

To live in law is to submit to its discipline and to attain and use good judgment (practical wisdom) and to have good judgment = certain characteristic.

ARISTOTLE:

virtue was seen as an excellence = all ethics were virtue ethics

Aristotle:

Didn't base his idea about ethics on rules that had to be obeyed but on excellence of character.

The kind of person one should try to become and the character traits were virtuous.

When deciding how to act isn't just a question of what the rules prescribe, BUT what a person of good moral characteristic would do in the same circumstances = such a person acts with virtue in a moral crisis.

2 vices:

- Between fear and confidence, rashness is a vice of excess and cowardice a deficiency = *between the 2 lies courage – moral demand that we act in a courageous way.*
 - ❑ He believes that some virtues are essential to live a perfect life and they can only be developed by participating in the public affairs of the state.
 - ❑ A life spent pursuing your own private life- work and family = don't have the good life.
 - ❑ It's only by living the life of an active citizen that a person can develop the moral and intellectual virtues fully.
 - ❑ He says that man is a political animal (*zoon politicon*) and this is the highest level of life = to take part in public life demands courage.
 - ❑ A citizen who lived the public life = had a good life BUT only Greek men could attain such a life (active citizen).

The point of contemporary ethics is the search for a specific ethic required in order to act ethically in a given situation.

Kronman: adopted a virtue based on the ethical conduct of lawyers = he says that a life in law is valuable not because of money, status or justice = but because of the unique character that the law allows people to develop (I.e. you can learn virtue)

The virtue of lawyers: is to make good judgments

Aristotle: says that man can strive to become more virtuous and most virtue ethicists claim that virtue is inherent in all people and CAN BE DEVELOPED.

Others claim that possession or non-possession of virtues are a natural gift – it's a talent that you either have or you don't = it's something that you CANNOT LEARN = **those who don't have virtue CANNOT be expected to act ethically.**

FEMINISTS ETHICS

Carrie Menkel-Meadow

Gender difference might affect the way in which lawyers perform, make ethical decisions and enforce the law.

Essentialist (modern) feminist jurisprudence

In the context of **feminism essentialism** means that people think that all men and all women have characteristics that are innate, unchanging and universal.

In other words, they think that all women, for instance, are emotional, irrational, they talk too much and they like pink things.

Men on the other hand, are all aggressive, like beer and sports and are afraid of commitment.

They share the idea that men and women have essential characteristics that never can and will change.

Sameness feminism (a.k.a. liberal feminism)

- Starts from the viewpoint that, although men and women look the different, they are essentially the same.
- They may differ physically, but in their thoughts, actions and motivations they are the same.
- This is therefore a kind of essentialism that sees men and women as basically the same.

This kind of feminism was needed at the time when feminists were fighting for the right to vote, equal pay for equal work and equal opportunities.

Because men were the standard against which everything was measured, women had to claim to be essentially the same in order to be able to claim the same rights and privileges.

Thus they still have faith in the law and believe that the law can become neutral.

Sameness feminism was a very effective tool at the time and was responsible for many of the advances made by women.

But it was in the area of physicality that they differed and its limitations became apparent.

When the women first claim maternity leave, for example, they were denied this because men were not entitled to it.

The argument was that, if women were the same as men and had the same rights and privileges, they could not claim more rights than men had.

Difference feminism:

It was against this background that **difference feminism** was born. It was based on a very unscientific study by **Carol Gilligan** and it emphasized what it perceived of as characteristics women have simply by virtue of being a women.

This law had 2 important consequences.

1. The drafting and adoption of international documents featuring '**women rights**' is the direct result of this kind of thinking.
2. Can be seen in the theories of the so-called **relational feminist** in law. The relational feminist, of whom Carol Gilligan is the most prominent, claim that women are different from the men because of their psychological make-up. She claims that, because of their psychological development, women are essentially **different** from men.

The resultant male attitude toward others is oppositional whereas the female is attitude is relational (i.e. females reach out to others or relate to others).

Based on this, **Gilligan** states that there is a different female voice, which leads to the contrast between female ethics of care and the male ethic of justice.

The **male ethic** is much more individualistic than the female ethic and focuses on autonomy, abstract rules, principle and rights. The **female ethic** is much more concerned with relationships and communal ties and focuses on the taking care of others.

Relational feminists therefore **criticize** the traditional (male) liberal theories for focusing too much on rights and not enough on relationships.

For them the law deals with the relationships between people. Therefore legal thinking should not be based on analysis of rights, but should be concerned with maintaining and supporting relationships. Therefore the traditional (male) ethic of justice should be replaced with a (female) ethic of care.

However, **Catharine Mackinnon's** criticism of **Gilligan** is interesting. She holds that celebrating caring as the essential female trait has 2 dangers.

1. It celebrates the same difference (from men) that was used previously against the liberation of women and to restrict women to the role of rearing children.
2. It neglects the possibility that the very values which relational feminists celebrate as the essence of femininity and womanhood could themselves be the result of stereotypes, which developed during years of male domination.

- The problem is that second-phase relational feminism is still an essential feminism.
- The essence of men and the essence of women are compared and found to be different.

Instead of the relational feminism, Mackinnon develops what she called the **dominance theory**.

She agrees that men and women are essentially different from one another.

The difference is that men have **power** and women do not.

Men are the dominators and women are the dominated.

The difference is thus the difference of power.

PRACTICE OF LAW:

those who claim that woman will make changes to the law just because of their gender say that woman may:

- Adopt a more non-confrontational and more meditational approach to dispute resolution
- Be more sensitive to the clients needs and interests
- Be more sensitive to the interests of others (clients family etc)

They believe that woman use different ethics to men in the practice of law.

Epstein: after studying woman lawyers = said that those looking for difference will find it.

- Studies have shown that woman have different motives for studying and practicing law, but these differences are diminishing as more woman are entering the profession
- Other studies say that there is no difference in why anyone decides to study law
 - ❖ Some believe that woman prefer mediation
 - ❖ Others: there is no difference – depends on the person

It's shown that woman have been subject to segregation in the workplace and are either devalued by men or stereotyped into a notion of a woman's work = family law.

LEGAL KNOWLEDGE:

woman lawyers are analyzing the law in different ways – they look at sexual harassment and porn, and expose the white male bias.

Feminist lawyers are exposing how the law disadvantages woman, even though it's framed in neutral terms.

Claims that woman might begin to think of law in a different way doesn't mean we are looking at essentialists = *"two heads are better"*

than one” look to both genders to get ideas on how to solve legal problems.

Meadow: this provides a good argument to also include groups which were traditionally disqualified from the law = minorities, gays, the physically challenged. – Disrupt the dominant thinking in order to improve the quality of judicial decision-making

Legal ethics and moral decision-making:

Looking at Gilligan’s Justice of Care – to the moral dilemma in the practice of law.

The **ethic of justice** = found in Locke, Hobbes, Rawls and Kant’s social contract theories, in which a community adopts rules (in the state of nature) and sets bound on what will be acceptable behavior. To follow ethical rules = lawyers can pursue their individual self-interest and that of their clients within the limits set by the rules.
= Adversary system

Ethic of care: makes decisions in context and tries to keep their responsibility to others = it focuses on concern for others and the reduction of harm.

Epistemological claim: there is a claim that woman and minorities know things differently from white men and this will change the way in which society produces legal knowledge and develop legal ethics. Feminists argue that by adding woman to the development of law, and legal ethics = transform the way we use and produce law.

POST MODERN ETHICS

They believe that the view of a universal morality has come to an end – cannot have one universal ethic.

Humans are confronted with diversity = the challenge is how to deal with this diversity.

The moral domain for them is uncertain.

Look at:

1. The end of a universal morality
2. Celebrate difference
3. Reject absolutes
4. Recognize the necessity to accept uncertainty and indeterminacy as a way of life – indeterminacy exists in the rules, as for every rule there is an equally valid counter rule and in society on is torn between the individual vs. the community
 - From a rule based perspective = law is based on RULES and PRICIPLES – law is a way to judge human conduct
 - This is what the post moderns are rejecting = so there is a substantive moral code.
 - To be in a open and democratic world = norms cannot take the form of rules or principles (which Kant claimed)

Here ethics aren't based on law, politics and morality BUT becomes a warning flag = ethics point us to what is not yet and what is not justice.

CHAPTER 2 **THE FIT AND PROPER REQUIREMENT**

McDowell – usefulness of good moral character

In both legal education and the profession we see the term good moral character.

- Do we believe today that good morals are a person's character OR do we say its expertise and efficiency?

“Good moral character”:

Social changes bring about increased competitive pressure and different expectations of moral character.

For lawyers a **good character is defined** as:

the professional must have virtues or traits, such as:

- Truthfulness,
- Dedication,
- High levels of competence,
- Loyalty to clients and
- The trustworthiness and courage to carry out his professional responsibilities, the desire to serve the public instead of mere striving for private gain and the disposition to make decent, rational decisions

To describe how another person will act is based on a prediction – how will they act in a future situation = this could be done if you know a person well.

BUT when you don't know someone – you approach them like a defensive driver = if that person is irresponsible they are least likely to hurt you.

A client cannot use this approach = they have to trust the professional's competence and judgment and must tell them confidential information that might be abused by a dishonest professional.

A morally good character is essential to create a trustworthy relationship.

The certification of good moral character by the profession as a part of licensing is intended to satisfy this need.

Character as a requirement for licensing:

good moral character is a requirement for admission to the profession = ask are they competent in the expertise of the profession and are they the kind of person the client can trust.

Q: should there be an attempt on entry to a professional school to determine whether the required moral character already is present in the beginner?

Good moral character is merely a formal requirement
Schools will not make character a requirement because:

1. Its hard to establish with reliable evidence
2. There is a possibility that a person character might change or improve in the course of the education
3. Person can study the law with no intention of practicing

On graduation the deans are often required to certify that the graduates have the required good character.

Good moral character – used as MINIMUM SET OF CHARACTER QUALIFICATIONS

It's a negative duty in that nothing drastically unethical is known about the candidate (the applicant has never committed a crime).

Judgments are generally subjective – decent people are reluctant to make public statements about character based on subjective judgments – denying the person the right to practice a profession for which they have prepared themselves = major penalty.

Character as a requirement for employment:

Reasons why employers could require good character:

1. They might not trust the professional certification of moral character so they want reassurance – i.e. that they will not cause any disrepute to the firm
2. If the employee gets caught in an unethical activity, the employer is building a record to protect herself by showing that she made enquiries and got reassurances.

Good character – decertification:

The difficulties of the subjective judgment disappear where there's a proceeding for terminating a practitioner's license = here we are judging acts after the fact = and can be established and proved in a legal process.

- Unethical conduct which harms others shouldn't be tolerated
- Violations of ethical codes and legal requirements by professionals do raise character questions, but aren't allowed to be the focus = the lack of moral character can be inferred from the immoral actions.

Aspirational concept:

good moral character represents a higher set of ethical expectations – it's used as a goal for ethical education.

Ethical virtues include:

- Honesty
- Compassion
- Commitment to public service

The rewards are: esteem, respect and honor.

It's not enough to meet the minimum standards of professional competence and refraining from acting in a way, which could lead to criminal prosecution = we must expect more from ourselves and others.

The teaching of good moral character will help the practitioner avoid decertification = as he will not commit any unethical acts.

It's improper to use this use of good character:

As it is a way of controlling professionals and pushing them to conformist, safe behavior = lots of successful people have traits which are termed as rebels, or eccentric.

The use of the term good ethical character could stifle innovation, difference and criticism.

McDowell: the use of a mechanism to control difference – he believes that you must retain the concept as an ethical guide.

When penalizing people or decertifying, them it should be used with caution.

Conclusion: good moral character cannot be used to predict the future moral conduct of the professional and ought to be abandoned for this use,

The profession must weed out those who have acted unprofessionally and thereby damaged their clients or others = this should be based on an objective criteria and actual wrongful acts rather than subjective judgments and predictions.

Eshete: Does a lawyer's character matter?

When a lawyer performs his professional tasks he may have to act in an immoral way – certain aspects of what lawyers do, the training that prepares them for the work the conception governing the professional activities = ropes them into this type of conduct.

Features of a lawyer:

1. Lawyer doesn't always serve the good

Doctors vs. lawyers:

Lawyers serve the interests of their client – his promotion of his clients interest have a direct consequence on the interests of others = the kind of interests that a lawyer serves make them vulnerable to wrongdoing

2. **Formal education** – doesn't prepare the lawyer for the moral dilemmas that he will face in his profession.

The main objective of professor is to teach the theoretical and practical law.

3. **Adversarial system-**

Lawyer is required to present his clients case in the best light = he must be indifferent to the moral merits of such a case

- Put the clients interests above the interests of 3rd parties and the public (justice)
- The penalties of those convicted of crimes have few defenders – prisoners are subjected to cruel, inhuman and degrading punishment = *even if we are certain that the public censure of convicted individuals is deserved – its hard to see how we can justify exposing them to such treatment*
 - *Those who have paid their penalties are also often still deprived of their liberties such as occupation and residence = if the person convicted is innocent – the punishment suffered will be even greater*
 - *Even a guilty defendant may have the desire to repent.*

Given the powerful interest and authority of the state and criminal punishment it's hard to see how they will need the assistance of the defence attorney.

In proficiently performing the duty of a lawyer one cannot avoid doing unsavory acts –effective adversary advocacy amounts to using measures that could be unacceptable from a moral point of view. It could be a person of good moral character if he resorts to these means could have feelings of regret and self-contempt – and could therefore throw themselves into the adversarial role.

This shady conduct could shape persons personal attributes. In order to step away from this and live an ordinary life they see what they are doing as acting (ROLE DIFFERENTIATION).

This argument is unconvincing:
the lawyer's effort to make the client appear innocent or a witness a liar is intended to secure judgments which affect the lives of people...

A lawyer's personal life and character cannot be immune to the harmful influences of his professional conduct.

Prince v President:

The applicant wanted to be admitted as an attorney and had fulfilled most of the requirements save for the period of community service in S2A of the Attorneys Act.

The Law Society declined to register his contract to perform community service with his principal, as they said he wasn't a fit and proper person to be admitted as an attorney – he had 2 previous convictions of possession of dagga and made it clear that he intended to continue using it.

He adhered to the Rastafarian religion – the use of dagga was used for spiritual, medicinal and ceremonial purposes.

Applicant stated that the Law Societies decision discriminated against him on the grounds of religion in terms of S15 of the constitution and on the grounds of S31 (1), which said not to be denied the right with other members of the community to practice their religion.

He also said that it infringed on S22: right freely to choose ones profession and brought about unfair discrimination against Rastafarians in contravention of S9 (3).

He brought proceedings where he wanted the decision of the council to be set aside and judgment that his community service be registered.

The Minister of Justice and the AG intervened as respondents.

The applicant contended that his possession and use of dagga was for the purposes of religious worship and was constitutionally protected. He argued that his possession was permitted under the exemption in S4 (b) of the Drugs and Drug Trafficking Act = which provided for an exemption where “possessor came into possession of the substance in a lawful manner”

As an alternative he argued that if his possession and use was prohibited by S4 (b) of the Act, that the provision was unconstitutional and invalid in that it failed to exempt possession and use for religious worship.

He argued that his possession didn't make him unfit to be an attorney.

The Minister and AG: used expert opinion to put forth that dagga is a potentially dangerous drug and looked at the UN convention (of which SA is a party) which obliged contracting states to adopt measures to regulate and control that substance strictly.

The court looked at Canadian authority – which defined the main aim of religious freedom as being: the right to entertain such religious beliefs as a person chooses, to declare his beliefs openly and without fear of reprisal and to worship, practice or teach = BUT this right to religion is subject to limitation – which is necessary to protect the public safety, order, health, morals and the freedom of others.

The prohibition against the use and possession of dagga had the effect of restricting the rights of Rastafarians to practice their religion, but in view of the court the right was outweighed by the evils which the legislature wanted to combat in enacting S4 – the right to practice their religion was subordinate to the provisions of the Act.

As to the question of the applicant's fitness to be admitted as an attorney – the provisions of the Attorney's Act made the law society make such a decision.

Its decision would only be set aside if it could be shown that the Law Society hadn't applied its mind to the relevant issues in accordance with the requirements of the Attorneys Act and the requirements of natural justice, had acted mala fide or its decision was so unreasonable as to warrant interference by the court.

On the facts the court found no basis for the existence of these grounds.

The application was dismissed and no order to costs was made.

CERTIFICATION AND DECERTIFICATION

The decision on whether a person is deemed to be fit and proper to practice law is a discretionary value judgment that is given to the court

Certification:

- Onus on the applicant to prove he is fit and proper
- This is a subjective test, as an applicant can prove despite previous wrongdoing that their character has changed
- All misconduct or previous disciplinary hearing against
- S15 Attorneys Act: court can only enroll a person if in the courts discretion they are a fit and proper person
- S3 Admission of Advocates Act: person who wants to be admitted needs to satisfy the court that they are over 21 and are a fit and proper person

Decertification:

- Onus on the person applying for decertification (law society)
- Objective test
- Ex post facto
- S22 Attorneys Act: states that a practicing attorney can be struck off the roll – if in the discretion of the court such person isn't a fit and proper person to continue to practice as an attorney
- S7 Admission of Advocates Act: allows for the removal or suspension

This character requirement = underlies the moral basis of the law. The reason for this requirement is that lawyers are entrusted with matters relating to:

- Affairs
- Honor
- Property
- Money
- Confidential information
- Lives of their clients

Good character has been criticized as being ambiguous and this creates the potential for arbitrary and discriminatory application – which reflects the subjective beliefs of the person applying the criterion.

Whether someone is a fit and proper person is essentially a discretionary value judgment on the part of the court.

HOW THE FIT AND PROPER REQUIREMENT HAS BEEN CHALLENGED IN THE PAST

Kleinhans: the court was called upon to comment on the constitutionality of the provision to remove unfit and improper people – it was argued that this power violated S26 of the Interim constitution (right to free economic activity) the court rejected this argument – and said that the standards set for the legal profession = competence and integrity are a valid limitation to this right.

The court stated that although its judgment must be made on all the facts before the court – it will in the end be based on the general impression formed by the court = the court has an inherent common law power to regulate legal professions.

The qualification for admission = infringes the right to choose ones trade and profession = should clearly be related to the public's interest.

Tvl Law Society v Machaka:

The constitutionality of the power of the court to strike someone off the roll was challenged – it was argued that a fit or proper person requirement violated the right to dignity, equality and freedom, the right not to be subjected to cruel, inhuman and degrading treatment and right to choose ones trade and profession.

Court held that the screening process prevented the abuse from criminally minded attorneys.

Rosemann: it was argued that the division of work between advocates and attorneys and the referral rule was irrational = infringed the right to freely choose ones profession.

The court rejected this argument and held that freedom to choose ones profession wasn't violated by this.

There are difficulties when applying the criteria = between the personal and professional life of the professional

- The fitness of a lawyer who has embezzled funds is suspect
- But his sexual indiscretions may not have such a negative effect

The American Bar Association – doesn't distinguish between the professional and the personal conduct = a lawyer must at all times comply with the rules.

In SA the matter isn't settled – the purpose of ethical rules are to regulate the attorneys conduct in both his professional and personal life = the rationale for this could be that in his professional life the attorney may do something which brings the profession into disrepute.

Its also been argued that the past conduct and history of the applicants aren't an indication on whether they will be a threat in the future – its not necessary to prevent future problems by denying the admission to people who are seen as a risk = the problem should rather be remedied after it occurs.

It's suggested that the requirement that lawyers must prove that they are fit and proper people for the legal profession opens the door to a more ethical profession.

HOW THE FIT AND PROPER REQUIRMENT WAS ABUSED:

Mahatma Ghandi: applied to be admitted as an advocate at the High court (natal) – his application was opposed by the law society because he was of Indian origin and wasn't a fit and proper person to practice law.

Madeline Wookey: wanted to enter her clerkship – the law society refused to register her articles because she was a woman. AD relied on Roman-Dutch law in which they excluded: deaf, blind, pagans, Jews, person who denounced Christianity and woman.

Apartheid – Bram Fischer: was struck off the roll of advocates because he opposed apartheid = grave injustice and he was reinstated in 2003

This didn't mean the end of the abuse of the requirement for a fit and proper person = Prince.

Modern history of the legal profession has been marred by the arbitrary exclusion of people belonging to certain groups = based on race, sex, religion.

CHAPTER 3: **A SHIFT FROM VIRUTE TO RULES**

A shift from virtue to rules:

Initially the character test was applied (look at virtues) = Q: does the political motive of a crime reflect a bad character?

In apartheid – more emphasis was placed on the practitioner's duty to obey the law, regardless of his political motives.

2 approaches – used in striking an attorney off the roll:

1. Virtue – ethical = look at the moral character of the practitioner and ask whether the offence discloses a dishonorable character
2. Rule-ethics = look at the objective duties of the legal practitioner who is an officer of the court = must obey all the laws of the land

Ex Parte Krause: at the outbreak of the war Krause was a practicing advocate – he was taken as a prisoner of war by the British troops and released on parole in England, where he got permission to practice. While in England he wrote a number of letters to someone in Johannesburg in which he suggested that a writer of newspaper articles describing Boer forces, as outlaws should be killed. On the basis of these letters = he was convicted in England of an attempt to incite murder – after his conviction he was debarred.

When he came back to SA after the war and the expiry of his term = he resumed his practice as an advocate – he then applied to be admitted as an advocate under the new Transvaal.

The court decided in favor of his admission. His application to be reinstated in England was denied.

In Tvl it was held as a general rule, persons with previous convictions couldn't be admitted to the profession. However it wasn't the mere previous conviction that mattered but whether the conviction reflected negatively on his personal honor.

- In most cases a criminal conviction = dishonorable character
- BUT when a criminal offence was committed with a political motive – generally doesn't reflect negatively on the person's moral character.

Incorporated Law Society, Transvaal v Mandela:

Facts: Mandela – practicing attorney was convicted and sentenced to imprisonment with hard labour for 9 months.

The law society then applied for his name to be removed from the roll of attorneys.

Mandela had participated in the defiance campaign against the apartheid government and as such violated a number of apartheid

laws, including the Suppression of Communism Act- for which he was convicted.

His aim was to abolish laws, which differentiated between European and non-Europeans = he wanted:

- ❖ Social and political changes
- ❖ Repeal of pass laws
- ❖ Repeal of laws which segregate races

Its believed that an attorney is expected to observe the laws more strictly than another – BUT the fact that he deliberately disobeyed the laws doesn't disqualify him from practicing in his profession = this isn't an attorney committing an offence in his professional capacity – the offence committed has nothing to do with his practice as an attorney.

Q: the court had to decide was whether Mandela's conviction shows that his character is dishonorable.

His intention was to bring about changes to unjust laws – the method of getting such a result was unlawful and he was punished. His offence wasn't of a personally disgraceful character.

The court confirmed the fact that an attorney who has been convicted of a crime = prima facie evidence of misconduct.

The fact that he deliberately disobeyed the law doesn't necessarily disqualify him. Usually removal will follow where the offence is related to his professional capacity.

Mandela was found to be a fit and proper person and wasn't struck off the role. The application was dismissed.

Matthews's v Cape Law Society:

This case brought an end to the investigation of the character of politically motivated legal practitioners – from then on struggle lawyers could only rely on the old character test.

Facts: the commission refused to register Matthews's articles because he has 2 previous convictions under the Suppression of Communism Act.

The court rejected the **character approach** adopted in Mandela and Krause = *the Mandela judgment focused on the question whether the offence reflected negatively on the person honor of the person involved.* Court said that the real question was NOT whether participation in the Defiance Campaign disclosed a lack of integrity, honesty and honor BUT whether it could be reconciled with the duty of an attorney to uphold all the existing laws of the land = an officer of the court cannot contravene the law or incite others to do so, even if the motive for doing so is political.

This duty is based on the fact that every legal practitioner must swear an allegiance to the state and the law.

Apartheid has shown us that this RULE BASED approach to professional conduct might be too narrow = what if the laws are unjust?

This question was raised in the TRC inquest – the apartheid government made use of laws to implement its racist policies. It was argued before the TRC that lawyers didn't shirk their duty to obey the law when they served the administration of justice under apartheid – this was rejected by the TRC who found that by participating in the legal system and leaving it intact, lawyers legitimized the apartheid government. The TRC found that lawyers who remained obedient to apartheid laws betrayed the ultimate purpose of law. The duty to uphold the law cannot be understood as just upholding positive law, but is a duty to hold the legal system accountable = look for the moral ideal of a just law.

Society of Advocates of SA v Fischer:

Fischer was a practicing advocate – he challenged what he considered the unjust laws of the land – he was arrested and charged with contravening the Suppression of Communism Act. He applied for bail, which was granted, but he didn't return to stand trial.

The court found that deliberately misled the court when he applied for bail in that he stated: he had no intention of:

- ❖ Leaving the country
- ❖ Avoiding prosecution

They believed that his contempt of court amounted to dishonest conduct and that it reflected negatively on his character. The court stated that it's an attorney's duty to uphold the law = it would be inconsistent for the court to allow him to remain on the roll when he is defying the laws and inciting others to do the same. Instead of appearing in court he wrote a letter stating – that he can no longer serve the law as he did for the last 30 years, he can only serve it the way he is now (by defying it).

The Bar council instituted proceedings to have him removed from the roll of advocates – he defended this on the ground that his political conscience didn't permit him to do otherwise.

He was struck off the roll and sentenced to life imprisonment – where he died of cancer in 1975.

Rice v Society of Advocates of SA: Fischer's daughters brought an application that his name be reinstated on the advocates roll in terms of the Reinstatement of Enrolment of Certain Deceased Legal Practitioners Act = which was made in honor of those struck off the role on account of their opposition of apartheid.

It was found that an injustice was done to Fischer and he was reinstated as a member of the bar in 2003.

VIOLENCE

Incorporated Law Society, Natal v Hassim:

Hassim was convicted of assisting with the recruitment of people in SA to undergo military training as part of the armed resistance to apartheid – in contravention with the Terrorism Act.

At trial evidence was led on his moral character, good name and integrity as an attorney – evidence was also led that he personally opposed violence and had assisted in the recruitment out of loyalty to his political beliefs.

The court tried to reconcile character and rule approaches by using the character approach in Mandela and Krause = whether the offence was of a personally disgraceful nature.

The court found that an attempt to conspire with others to violently overthrow the government was disgraceful behavior.

The court never looked at the fact that the offence was unrelated to his profession that his good name, honesty and integrity as an attorney was undisputed and that his desire was to get a democratic change of SA.

His name was struck off the roll of attorneys.

Ex Parte Moseneke:

The character approach wasn't followed

The applicant was previously convicted of sabotage and sentenced to 10 years. His conviction was due to his struggle against apartheid. At the age of 14 he attended meetings as a PAC member – this was the only offence of which he was convicted = he wasn't involved in any sabotage.

Both the Security Police and the SA Law Society were satisfied that he had disassociated himself with his political affiliations.

The court said that the serious offence of which the applicant was convicted would render him an unfit person BUT since he had undergone a complete and permanent transformation his character has been reformed to such an extent that he was now a fit and proper person and his application for admittance as an attorney was successful.

The court here assumed that the commission of a political offence reflects negatively on a person's character.

Natal Law Society v Maqubela:

the applicant applied that the respondent be removed from the roll of attorneys as he was convicted of high treason = unfit.

Maqubela had participated in a conspiracy, which resulted in explosions, which caused damage and injured people in Natal. He was sentenced to 20 years.

He argued that the offence was a political offence – must look at the motive behind it and look at the fact that it was unrelated to his profession (Mandela)

He participated in the offence in order to bring about a change in SA – which couldn't be done by a constitutional means at the time.

Held: the offence of high treason was a common law offence = don't look at motive (might be an extenuating factors).

The acts were dishonorable and disqualified him from practicing as an attorney. Application was granted.

The political exception recognized in Mandela and Krause wasn't considered

Prince v President, Cape Town Law Society:

Prince applied to the Law Society to have his articles registered – this was refused as he had 2 previous convictions of possession of dagga and he intended to keep using it in the future.

Prince opposed this decision on 2 grounds:

1. The prohibition of use and possession in S4 of the Drugs and Drug trafficking Act was unconstitutional in so far as it didn't make an exception for religious purposes
2. His contravention in the past didn't prove that he lacked the character traits which would make him a fit and proper person to practice law

Both were rejected by the High Court – the court had to determine whether the unlawful use of dagga for religious purposes reflected badly on his character.

APPEAL:

SCA: after being requested to do so refused to follow the character approach developed in Krause and Mandela on the ground that Prince's facts were materially different.

The court preferred the Rule/ Duty approach and looked at an attorneys objective duty to comply with the law = DUTY TEST HAS BEEN CARRIED OVER TO THE NEW SA.

CONSTITUTIONAL COURT:

In the 3 judgments delivered in the Prince case, the possibility is raised that Prince might still be a fit and proper person to practice law in spite of his previous convictions.

Sachs: judges the defiance of Prince against the politics of open democracy and of the reasonable accommodation of differences = Prince shouldn't be forced by inflexible laws to make a choice between his conscience and his career = from this perspective Sachs believes that in spite of his open defiance, he has shown himself to have principles in willing to sacrifice his career for his beliefs. His religious use of dagga therefore doesn't make him an unfit person. In the past the Law Society has excluded honorable people because their beliefs brought them in conflict with the law (Mandela). This suggests that the **character approach** should be used.

It's argued that if this character approach is used rather than the rule based approach = there is a danger of civil disobedience= if each person were to decide which laws he is going to obey = makes the country ungovernable.

OTHER CONSTITUTIONAL CHALLENGES OF THE FIT AND PROPER REQUIREMENTS

Kleinhans: said that this requirement violated his right to free economic activity = the court found that it was a valid limitation in terms of S36. Was a reasonable and justifiable limitation, in an open and democratic society, based on human dignity equality and fairness – taking into consideration the limitation of the rights and the reason

Machaka: said that the fit and proper requirement violated the following rights:

- Dignity
- Equality
- Freedom
- The right to choose one's profession

The court held that it was a valid limitation in terms of S36, as it prevented the abuse of the law by criminally minded attorneys; the fit and proper judgment is one, which is made to protect the public and maintain public confidence in the legal profession

CIVIL DISOBEDIENCE:

If it's argued that the character test be used today rather than the rule based approach – there is a danger of civil disobedience – each person can decide which laws they are going to obey

Thus the state would become ungovernable

On which grounds would a legal practitioner decide to disobey?

- ❖ **If the laws are immoral** = it's a matter of individual conscience on whether to obey them or not
- ❖ **If it based on religious beliefs** = this is the idea that one should obey God and not man
- ❖ **Positive laws are unjust** = appeal is made to natural law and mans reason – according to Locke: the function of government is to equally protect the individuals rights and act in everyone's interests = civil disobedience would be allowed if the state failed to fulfill this function
- ❖ **Utility** = disobedience to the law is a way to bring about the greatest happiness to the greatest numbers

CHAPTER 4 **CIVIL DISOBEDIENCE – PEACEFUL OPPOSITION OF THE LAW**

Conscience against the law

Le Roux:

Ghandi:

SATYAGRAHA: GANDHI:

Looks to reconcile the litigating parties and re establish an amicable relationship between them = looked to alternative dispute resolution. Introduced a value of public spiritedness and political action into the Indian community.

Experiences in SA were at an appearance in court he was told to remove his turban, when he refused he was removed from the court. He was forcibly removed from a train because he was Indian. When he applied to be admitted as an advocate at the Supreme Court of Natal it was opposed by the law society because he was Indian.

He heard of proposed legislation, which would remove the rights of Indian people to vote. Organized a petition in terms of which the Indian community opposed the bill. The legislation was passed. Gandhi refused compensation for his public work and he combined his legal practice with his political activities.

He founded the Natal Indian Congress which resisted apartheid, called the Satyagraha movement. Tvl government gave notice that a proposed ordinance in terms of which Indians were required to register and carry a certificate of registration at all times or face imprisonment or deportation. Indian community participated in a non-violent campaign of civil disobedience, in which they would not register. The Black Act came into operation – few Indians registered – leaders of the community including Gandhi, were brought before the court tried and sentence.

Jan Smuts reached a compromise with Gandhi agreeing that if Indian community would register he would have the Black Act repealed. Gandhi and other prisoners were released and registrations were done Jan Smuts didn't repeal the Act. After that many discriminatory laws were deliberately but peacefully disobeyed.

Great march was organized in protest of special tax to be imposed on Indian labourers and the illegality of Muslim and Hindu marriages. Gandhi was arrested charged and sentences – Jan Smuts renegotiated – agreement in terms of which the Satyagraha movement would stop and the Indian Relief Act would be passed. The act came into operation

MANDELA:

IN 1944 joined the ANC and helped form the youth league, 1951 completed articles and opened a firm with OR Tambo (1st black firm in SA)

- ANC and others organized a campaign of civil disobedience - Defiance Campaign: in which discriminatory laws weren't obeyed, passed through European only entrances, disobeyed pass laws, broke curfews – Mandela and others were arrested and convicted for organizing the campaign.
- Thereafter the law society applies to the Supreme Court to have Mandela struck off the roll, for not being fit and proper – the application was dismissed
- Congress of the People made a policy document called the freedom charter – leaders were again arrested and charged with treason – trial continued for 4 years and all A were then acquitted
- At the close of the trial the shooting incident in Sharpeville took place and a state of emergency was called. Mandela was forced to go underground to avoid arrest. He was captured in 1962 and charged with enactment and sentenced to 6 years imprisonment
- In 1963 the police raided a farm in Rivonia and arrested a number of underground leaders. In the Rivonia trial Mandela was brought from prison and charged - the court found him guilty of sabotage and sentenced to life

Bram Fischer: studied at Oxford, came home to SA and became interested in communism – he joined the Johannesburg Bar and established himself = he also joined the Communist Party of SA. He was arrested and charged under the Suppression of Communism Act.

He applied for bail which was granted and he failed to appear = the Bar Council instituted proceedings to have him removed and it was granted.

Fischer and Mandela practiced law at a time when the resistance campaigns lead to a confrontation between the defenders and challengers of the apartheid regime = thousands of people were arrested for breaking apartheid laws.

Majority of lawyers sanctioned the abuse of the courts by continuing with their legal practices as if the problem didn't exist.

Mandela and Fischer understood that their professional duty was to actively oppose apartheid laws, which meant:

- **Using their knowledge, skill and influence as a lawyer to assist in the organization of political resistance**

After SA became a democracy, a Truth and Reconciliation Committee was created to look at the injustices of the past.

They found that the legal community was to blame = through their active support or their silent inaction = their actions legitimized the apartheid regime.

Ghandi, Mandela and Fischer all tried to oppose apartheid in SA – they turned against the law to which they had sworn allegiance. They all claimed that they were doing their duty as a lawyer, to serve justice = *looked at law as it ought to be*.

All 3 of them practice law not for money, status or power but as an integral part of an active political life directed to the public good.

Through their skills these liberation lawyers turned politicized courts into sites of resistance.

CHAPTER 5

PROFESSIONAL CODES

The Attorneys Act regulates ethics for attorneys – this governs the law societies, which governs the members of the legal profession.

The law society intends to regulate:

- Protect and promote the legal profession
- Protect the individual lawyer
- Protect the interests of the client

The Supreme Court Act has rules regarding the admission of advocates.

S7 Admission of Advocates Act:

suspension of advocates from practice and the removal of their names from the role of advocates:

- a) Subject to the provisions of the law, a court on application can suspend a person from practice as an advocate or order that his name be struck off the roll
- b) Subject to the law, an application for the suspension of any person from the practice as an advocate or the striking of his name off the roll = may be made by the General Council of the Bar of SA

S7 gives power to the court to regulate and control the practitioners within its jurisdiction = in exercising this power the court takes account of the rules of conduct of advocates = BUT the court isn't bound by these rules and remain the final arbiters of ethical rules of conduct.

Disciplinary proceedings are sui generis and aren't subject to the strict rules of civil litigation.

The court takes into account the cumulative effect of allegations as well as the circumstances- they look at the seriousness of the disciplinary measures and the effect such measures could have on the advocate = proceedings may cause irreparable harm to the legal practitioner.

The court decides whether a lawyer is a fit and proper person on a balance of probabilities = it's in the courts discretion to either suspend or strike the practitioner off the roll.

When the Bar Council of SA brings an application asking for the removal of an advocates name from the roll in terms of S7 = it acts in execution of its duties = they must bring evidence of the advocates misconduct.

Such an application is brought in the public's interest, the professions interest and the courts.

Because the consequences of the hearing are serious – the council must do a proper investigation.

High court rules – any person admitted to practice as an attorney must take an oath/ affirmation before the registrar of the court – that they will be faithful to the Republic (S13 of the Supreme Court Act).

At present the bar and the side bar are divided – only in Natal may a legal practitioner practice as both an advocate and attorney = this may change if the Legal practice Bill becomes law: this provides that:

- A statutory legal practice council, which has 24 members is appointed and selected by the Minister = they decide which practitioners are to be admitted and removed from the profession
- The recognition of paralegals as legal practitioners
- A merging of bar and side bar

It's feared that the independence of the law societies might be weakened by this Act, that the members of the profession might consider themselves less protected and their professionalism might be compromised by lowering the standards.

CHAPTER 6

THE GOOD LAWYER

ASPIRATIONAL ETHICAL VALUES:

the onus to prove that he is a fit and proper person to practice law rests with the person applying to be admitted as an attorney – apart from his knowledge of the law, a fit and proper person should have integrity: - reliability

- Honesty
- Ability to withstand temptation

Fine v Society of Advocates of SA:

it was held that Fine wasn't a fit and proper person and his name should be left off the roll after he acted fraudulently by signing a letter sent to the lessor of property, indicating that he had sufficient funds on behalf of a foreign lessee to cover rental for the 1st 6 months of the lease, when this wasn't the case.

Swain v Society of Advocates, Natal:

The conduct of Swain was in breach of his duty of good faith as required – in his evidence Swain had demonstrated that he was reckless and had no sense of responsibility towards the truth = it was found that he wasn't a fit and proper person to be admitted in the practice as an attorney.

He appealed but the Appeal court upheld the judgment = advocates have to maintain high standards of integrity and honesty and should avoid any criminal conduct, but also avoid misconduct and unprofessional conduct = they should be truthful and act with integrity.

Vassen v Law Society of the Cape of Good:

The court held that the fact that an attorney is a pillar of society and works for the poor without pay was no substitute for honesty, reliability and integrity.

Vassen's appeal against his removal from the roll was dismissed by the court – the court also held that it may suspend or struck off any attorney who wasn't a fit and proper person, including one who has not yet commenced practicing or has ceased to practice.

In acting on behalf of the client, the lawyer must be honest to the client, the court and society in general.

DU PLESSIS: THE IDEAL LEGAL PRACTITIONER

Qualities:

1. Integrity: impeccable honesty (cannot be corrupted)
 - ❖ Some people believe that a lawyer is a business man whose 1st duty is to make money = this is wrong
 - ❖ Legal practitioners are officers of the court = should uphold the same requirements that a judicial officer has to.
 - ❖ The ability to disclose to the court facts, evidence and legal argument which is detrimental to their clients = integrity
 - ❖ Counsel also has a duty to keep certain communication confidential = all of this doesn't mean that a lawyer cannot assist a dishonest client =
 1. He can give the client legal advice and
 2. If something dishonest is required from him, he must withdraw from the case

Integrity cannot be taught

2. Objectivity:

Fairness and impartiality

- Judge/magistrate = apply the Audi alteram partem and nemo iudex as par of natural justice.
- Integrity and objectivity are **inborn qualities** BUT they can be practiced and improved

3. Dignity:

They must conduct themselves in a dignified way and maintain and promote the dignity of the court.

The crime of contempt of court:

- Shouting at witnesses
- Intentionally/negligently reflecting on the judges judicial ability
- Carelessly phrasing your application for a judge to withdraw from the case

Dignity requires the lawyer NOT to sell his services:

- Adverts
- Touting
- Sharing fees with non-practitioners are prohibited

4. Power of judgment:

- ❖ Requires that matters be judged objectively

- ❖ The skill of decision making/ judgment = **inborn quality**
BUT can be trained and improved

5. **Knowledge** = requires a sound knowledge of the law

6. **Capacity for hard work**

7. **Respect for the legal order:**

- ❖ *Fischer = by skipping his bail = disrespect for the legal order and the legal procedure*
- PROBLEM: political cases = purpose was for the change of unjust laws BUT there is a difference between a politically based motive for defying the laws and on which is used to incite chaos (violence)

8. Law Societies:

- ❖ Are ways for the people to lodge their objections against certain unprofessional conduct
- ❖ Its done to:
 1. Improve the law
 2. Promote the law
 3. Administration of justice
 4. Practice of the law

9. Equity:

Aristotle: describes this as the rectification of the law in so far as it's defective on account of its universality
Equity – capacity to relate the objectives of legal order as an order of justice

ADD IN KRONMAN GOOD JUDGEMENT NB!!!!!!!!!!!!!!!

KRONMAN

Character traits:

Deduction and intuition: when deciding how to behave doesn't depend on the rules = there must be a choice between conflicting interests

Deliberation and choice: requires that someone look at all the possibilities, and consider values which aren't your own

Deliberate with sympathetic detachment = GOOD JUDGMENT.

Llewellyn's 3 Law Jobs:

Adjudication: OBJECTIVE, a judge is required to consider both sides and improve the law = find the best solution for the community.

Counseling: SUBJECTIVE/OBJECTIVE. Client comes to a lawyer confused in order to get advice. The lawyer must sympathetically detach himself and give the client objective advice.

Advocacy: SUBJECTIVE, his job only begins when a course of action has already been decided

There are 2 types of arguments

Clever argument: use the law to prove the clients case

Wise argument: look at the case from the judge's position = needs of the community

Wise arguments win cases. To do what a judge does = imaginatively look at the conflicting interests with sympathetic detachment.

REASON why people study law = to get good judgment.

CHAPTER 7 **DIRECTIONAL RULES**

THE LAWYERS RELATIONSHIP WITH THE LAW AND THE STATE:

Fine v Society of Advocates of SA:

S7 of the Admission of Advocates Act provides that:

1. In disciplinary proceedings against an advocate, a court must 1st decide whether or not the advocate the advocate is a fit and proper person to continue practice
2. Decide whether to suspend him from practice or order his name struck off the roll

Appeal court will only interfere with the exercise of this discretion on the grounds of material misdirection/irregularity or the decision is one, which a reasonable court wouldn't make.

- Lawyers must respect the law of the state – they are guardians of the law and servants of the public legal order.
- The oath they take on admission includes an undertaking to be faithful to the Republic.
- Judges must act in the interests of justice: They must uphold the law and follow legal procedures

Behrman: an attorney who tried to corrupt a policeman and was found guilty of bribery, corruption and defeating the ends of justice was removed from the roll.

Lawyers cannot contravene the law or encourage others to do so = they mustn't help their clients break the law or act in a dishonorable way – even if it is to their client's advantage.

BUT: They can however advise their clients how to organize their affairs so that they limit their liability and to use loopholes in the law (avoid paying taxes).

Once a lawyer has exhausted all the lawful means to bring about a change in the law or an unjust situation – can he then go to civil disobedience (Mandela) or the violent breaking of the law?

There has been some confusion as lawyers must uphold the law but must also ensure there is justice = in certain circumstances a lawyer may feel morally compelled to defy the law = he must be careful as civil disobedience may bring about removal or suspension. (Prince)

Personal life – he must be an honorable citizen and should act morally in his personal relationships:

Kleynhans: an attorneys conduct – giving gifts to the magistrate having his case and previous conviction (malicious damage to property and being drunk in public) = isn't the image of a legal practitioner and he wasn't a fit and proper person to practice.

THE LAWYERS RELATIONSHIP WITH THE CLIENT:

Integrity = he must put the admin of justice and the interests of clients above his own interests = balance between the client and the community:

REFERRAL RULE

Advocates don't accept briefs from clients but must be briefed by an attorney

An attorney initiates a contract between an advocate and her client, negotiates and receives the fees from the client, keeps the client informed and is present during the interaction between the advocate and the client

- **Attorneys** take care of matters such as investigating the facts and discovery and inspection of documents
- **Advocates:** are litigation specialists – they prepare and present the clients case in court

Reason: there is no fidelity fund for advocates = all attorneys must keep a separate banking account in which all money held by them on account of others must be kept – any shortfall in the account may be recovered from the fidelity fund in proper circumstances = fees may only be paid through an attorney.

If advocates were allowed to take public money it might cause a prejudice.

The Attorneys Fidelity Fund is a statutory body established and regulated by the provisions of the Attorneys Act.

Its objective is to protect the public against loss as a result of the theft of trust funds by practitioners. The protection provided by the Fund encourages the public to use services provided by legal practitioners with confidence.

The Fund derives its income principally from interest earned on practitioners' trust accounts, which enables the Fund to offer valuable financial support to the profession. It values the active involvement of all practitioners in the maintenance of a sound Fund.

- **Statutory client protection fund** it serves to protect trust creditors against loss by reason of theft, of money or property entrusted to a practitioner.
- Although not an insurer, given the above definition, is in

the **nature of an insurer.**

- It is a **service provider** functioning as a component of the organized attorneys' profession.

In common with similar client protection funds elsewhere, the Fund is a fund of last resort. If, therefore, it is apparent that stolen money or property can be recovered from another source, the Fund will require a claimant to first exhaust all available legal remedies against the third party, i.e. a surety under a court bond with respect to insolvent or deceased estates, the practitioner who stole the money, and/or the practitioner's partners

ADVERSARIAL SYSTEM

Lawyers must try settling disputes rather than initiating legal proceedings

Judicial officer is impartial, objective party: JO control the court and assess the evidence presented and admissible in court.

The competition ensues between the state and the defence

The parties develop and present their arguments, submit evidence, call and question witnesses

LAW SOCIETY:

Maintains the constitution, as well as the independence, objectivity and integrity of lawyers.

Look at the interests of the public

Develops and trains attorneys.

It's a body for the attorney's profession in SA. Complaints re an attorneys conduct are made to the law society (ethical behavior, account of money)

The Law Society's control over attorneys' conduct is limited to their professional conduct as distinct from their competence. A complaint, which the Society can investigate.

- Failure to reply to correspondence,
- Failure to account for clients' money,
- Breach of confidence,
- Conflict of interest and
- Dishonesty.

BUT: if the complainant says that he/she wants compensation because the attorney has been negligent, then that is not a complaint, which the Society can investigate. Such a complaint concerns legal issues which only a Court and not the Society can decide on.

If the conduct of the attorney is such as to render the attorney unfit to practise as an attorney then the Society will apply to the High Court to have the attorney suspended from practising as an attorney

or to have the attorney's name struck off the roll of attorneys.

The Society does not have the power to order an attorney to pay compensation to a complainant. Only the Court can make such an order.

The Society does not take sides, but seeks at all times to act fairly and impartially.

REFUSAL OF THE CLIENTS MANDATE:

Before the mandate is accepted the lawyer must consider whether he has the knowledge and ability to do the work

ADVOCATES: are obliged to accept the brief if they are available and able – the fact that his political/ religious beliefs are in conflict with the clients doesn't justify his refusal

Conflict of interest: Lawyers mustn't acquire a financial interest in the case – they should consider any conflict of interest = if there is a conflict the mandate should not be accepted.

Lawyers shouldn't have a financial **interest** in the case of the client
And such mandate may be refused if the client requires from the lawyer some sort of **illegality or fraud**

If the mandate is accepted he must carry out the work with the skill and care expected from the average attorney = he may be found negligent if he didn't exercise the skill and care required.

Client admits guilt: the advocate must still present the clients case, leaving it to the state to prove the element of the crime.

TERMINATION OF THE MANDATE:

generally a lawyer who has accepted the client's mandate must see it through, but can withdraw:

- With the clients consent
- Improper behavior by the client
- Clients fraudulent behavior
- The client doesn't pay
- The client doesn't follow advice
- Personality clash

Such withdrawal must be proper in order to allow the client to make other arrangements

DUTY OF THE LAWYER

Cannot: advise the client to act in a dishonest way = if the lawyer is required to act dishonestly = he can withdraw from the case.

- This means that the lawyer may be required to do something, which is immoral but not unlawful = this could be against the lawyer's moral integrity.
- The lawyer controls and conducts the client's case and acts independently in the discharge of his professional duty = he cannot be liable for lack of skill but can be held liable for fraud or malicious intent.

Once the mandate has been accepted the lawyer must carry out the work with due care, skill and diligence, expected from an average lawyer – act in the best interests of the client

Liability:

Attorneys: The lawyer client relationship, and the duty of the lawyer are created in terms of contract.

The client could claim in terms of breach of contract damages for professional negligence

Advocates: act independently in the discharge of his/her professional duty. They CANT be held liable for errors of fact or law or lack of skill – but may be held liable for fraud or malicious intent

DUTY OF CONFIDENTIALITY (PROFESSESIONAL PRIVILEGE):

Lawyer cannot divulge confidences/communications made to him by the client in the course of their relationship – whether oral or in writing and even if the client admits that he committed the crime. Its established in SA that confidential communications made with the view to litigation, as well as communications made with the purpose of giving and receiving legal advice = **Privileged information.**

Common law privilege applies to both criminal and civil matters.

The privilege belongs to the client and involves 2 things:

1. The client can refuse to answer any question which requires him to disclose any of the information he has shared with his legal advisor and
2. The client can prevent the legal advisor from disclosing any such information.

S201: restricts the scope of privilege to a greater extent than common law does, but doesn't replace the common law.

The act repeats that without consent of the accused, a legal advisor can't give evidence on what is discussed between them in connection with the case.

Requirements:

1. The legal advisor must act in a professional capacity – privilege doesn't apply if he was just giving advice to a friend
2. The communication must be made in confidence –
3. The communication must be aimed at getting legal advice – lawyer hears a confession from client during consultation =

privileged – lawyer hears confession during an interview with a witness = not privileged

4. The communication mustn't have been made with the intention of furthering a crime.

This privilege belongs to the client; it must be claimed in court and doesn't arise automatically.

The attorney in claiming it must act in the clients interests and not his own.

Exception to privilege:

- Where the legislation provides for an exception
- Client gives his consent: express or tacit

An attorney cannot withhold access to a document in his possession if the client would have been liable to hand it over had it been in the client's hands.

Communications made between friends isn't protected.

Advocates cannot cross over to the opposition after getting information related to the clients case = abuse of confidential information.

FEES

MUST BE Reasonable fee – looking at:

1. The time and labour required
2. Charges of similar counsels
3. The amount involved in the controversy and the NB of the client

Johan van den Berg: the Bar council of SA brought an application against VDB – they asked for his name to be removed from the roll in terms of S7 of the Admission of Advocates Act.

It was stated that he didn't act as required while acting on behalf of a client (German Harksen, who misrepresented people to invest in a scheme which didn't exist).

The council alleged that he was guilty of unprofessional conduct – which was based on:

1. Assisted with a statement H made under oath – while he knew of suspected that the statement was false.
2. He accepted a brief directly from H, and accepted not to investigate the existence of certain entities/persons = assisted in suppressing the truth
3. He took control of H's international investment fund- he made false statements in notarial deeds alleging that he was in possession of the necessary letters of credit, which would pay creditors of the investment scheme.
4. He got exorbitant fees.
5. He made false statements under oath to the DPP.

- The court found that he hadn't been properly briefed by an attorney
- He would get money from his client without having any trust account and was involved in the financial affairs of his client = lose the ability to act in the best interests of the client
- The fees he charged were high and weren't properly reflected in his fee book

Court ordered his name to be removed from the roll.

Summerly v The Law Society of the N.Province

Was an appeal – the court a quo in terms of S22 of the Attorneys Act, May at the instance of the law society – strike the attorney off the roll or suspend him.

The application involves:

1. Looking at if the law society on a balance of probabilities has proved the offending conduct
2. That its determined in spite of the misconduct, that the attorney is still a fit and proper person to keep practicing as an attorney
3. That the court decides whether the person who has been found not to be a fit and proper person deserves the penalty of being struck off the roll, or suspension

Striking off is reserved for attorneys who have acted dishonestly = he will not be readmitted unless the court is satisfied that he has reformed.

The court found that S couldn't look after the trust account and the court ordered his name to be struck off the roll.

On appeal: SCA found that his conduct didn't involve dishonesty and didn't reflect on his integrity.

His mismanagement of the trust money was not so that he could use the money for himself, but was due to the fact that he lacked experience in accounting.

They decided that he should rather be suspended for a year and stopped from practicing independently for another 2 years.

DE FREITAS CASE:

The applicant applied to appeal directly to the CC against the judgement of the Natal HC on 2 issues:

1. Constitutional challenge to the Act which enables interested parties to bring disciplinary hearings against an advocate
2. Constitutional challenge to the referral rules

The Society for Advocates Of Natal: a voluntary association brought an application to strike DF off the role, alleging that he acted unprofessionally, in that he violated the referral rule. DF argued that the referral rule violated his constitutional right to practice his profession

Independent Association of Advocates SA (IAASA), a voluntary body of which DF was a member- was allowed to intervene in the proceedings – it asked the court for an order declaring that the referral rule was NOT applicable to its members, but that if it did apply it would be struck down as unconstitutional

The HC upheld the referral rule: it held that a violation of this rule amounted to unprofessional conduct, which justified disciplinary hearings against an advocate. DF was found guilty and suspended from practice for 6 months.

The Referral rule regulates the relationship between advocates and attorneys and their role in the legal profession
It's a rule on which court procedure is formulated
There are statutory checks and balances to protect the public in their dealings with an attorney, but no such protection would exist for the public in dealing directly with an advocate
The court held that the referral rule was reasonable and justifiable and in the interests of the profession and the public

PTA SOCIETY OF ADV V SENTSHO:

An application was made to strike the respondents name off the role or suspend him from practice as an advocate (S7 Admission of Adv Act) – alleging that he was not fit and proper to practice.
S wasn't a part of the society and is therefore not subject to their disciplinary proceedings – the applicants were acting in terms of public interest

Alleged that S:

- Acted on behalf of the public without being briefed by an attorney
- Took instructions directly from the client
- Received payment without the involvement of an attorney
- Signed court pleadings and notices as if he were an attorney (fraud)
- Unprofessional

In terms of the constitution everyone has freedom of association (S18) and right to practice their trade, occupation or profession (S22), but such rights are subject to the limitation clause.

An advocate has a choice to join an association and be bound by their codes, BUT above all the profession is regulated by law

The court found that the respondent name be struck off the roll and he pay the costs of the application

DOES AN ADV NEED TO BE A MEMBER OF A BAR COUNCIL: no: advocates can practice independently or choose to be a member of the Bar after completing their pupillage. Adv can also choose to be part of the independent association of advocate SA (IAASA): they wont be bound by the rules of the General Council of the Bar, BUT the court has inherent disciplinary powers over practitioners in the case of misconduct or unprofessional conduct

LAWYERS RELATIONSHIP WITH OTHER LAWYERS:

Should treat each other with courtesy and fairness = honesty. They must adhere to the professional guidelines for conduct – failure to do so proves a lack of integrity, which makes them unfit to practice.

They shouldn't advertise (unless authorized by the professional rules lawyers shouldn't solicit business.

LAWYERS RELATIONSHIP WITH THE COURT:

- Treat the courts with respect
- They cannot mislead the court- by making false statements.
- He cannot conceal anything the court requires for the administration of justice.
- If material facts are withheld by the attorney, this may lead to a decision that the attorney or advocate involved is not a fit and proper person to practice law (*Swain/ Meret*)

In Ex parte applications – lawyers must use good faith and put all the relevant facts before the court = so court had full knowledge. (Priest)
In motion court: advocate must bring to the courts attention any deviation from the usual form and explain such deviation

- They mustn't abuse court procedure or use delay tactics.
- The court and not the media must settle matters = lawyers cannot make statements to the media with regard to cases they are involved with.
- Their duty to the court is greater than their duty to the client = except with regard to confidential information.
- Professional dignity means that they cannot sell their services.

JUDGES:

S174- judges = SA citizens who are qualified and fit and proper people

S165: judges are independent and subject only to the law = impartial and independent of government.

NO judge may hold office or get profit or remuneration, apart from their salary, without the permission of the minister of justice.

Impeachment/removal of judges: S177:

A judge may be removed if:

- JSC finds that he suffers from:
 - Incapacity
 - Gross incompetence
 - Gross misconduct
- The NA can call for the removal of the judge with a 2/3 majority
- The president can remove a judge on adopting a resolution
- The president, on the advice of the JSC can suspend a judge

Professional standards are enforced through the judge president and in terms of S180 national legislation can provide for training programmes for judges and procedure to deal with complaints. All complaints re judges are referred to the judicial service commission.

Resignation of judges

Retirement of judges:

CC judges are appointed for a non-renewable term of 12 years, and must retire at the age of 70; other judges must retire at the age of 75

DIGNITY OF THE COURT:

Freedom of expression: public have a right to have opinions about judgments and make these opinions public = debate is part of democracy and it's an NB check and balance on the court and its unelected judges.

BUT statements, which are harmful to the public or undermine the judiciary aren't allowed and amount to contempt of court.

Contempt of court: the unlawful and intentional violation of the dignity, repute or authority of the judicial body or the interference with the administration of justice.

CC held that while freedom of expression is recognized = public interest and the admin of justice justifies keeping the offence of scandalizing the court.

Contempt of court is: the court must be able to attend to the proper admin of justice – with no public confidence in the system and in the integrity of judges = justice will be obstructed.

The rule of law requires that the dignity, authority and capacity of the courts must be maintained.

S v Mamabolo: M, was a media spokesman for the Department of Correctional Services – was found guilty of contempt of court when he made a report where he criticized an order of the court = calling the judges decision a mistake.

He was tried by the judge who presided in the original case and convicted and sentenced.

M appealed to the CC on the grounds that his freedom of speech (S16) and his right to a fair trial (S35) have been infringed.

CC found that his right to a fair trial had been infringed by the summary process and that his comments in the process didn't impair the dignity of the court = conviction and sentence was set aside.

LAWYERS RELATIONSHIP WITH THE PUBLIC:

Lawyers render services to the public.

The community should be shown that lawyers who do not comply with the standards of professional behavior will not go unpunished.

Reyneke: the attorney was found guilty of contravening the Insolvency Act and statutory perjury = such misconduct makes his integrity questionable and makes him unfit for the practices of law.

Witnesses: who are subpoenaed to court are performing a public duty in coming to court and should be treated with respect = cannot be intimidated.

Roman Dutch law states that lawyers have a **relative privilege** in court = they can put their client's case forward and they shouldn't be hampered in their pursuit for justice.

But this may be abused = slander 3rd parties.

If the privilege is abused by making false statements, or slanderous statements unconnected to the case = exceeded his privilege and may be liable.

Defamatory statements made during judicial proceedings, apply to all participants.

To be protected the defendant must prove that what was said was relevant to the proceedings.

The plaintiff must prove that the statement wasn't supported on reasonable grounds and therefore exceeds the limits of the privilege

Judicial officer will exceed this privilege if he acts with malice in executing his functions

PROFESSIONAL CODES:

Once admitted into the profession, as fit and proper by the court – the lawyer must follow specific rules of conduct

ATTORNEYS ACT:

Governs the establishment of law societies, which will lay down binding rules for members of the legal profession on their register
They are there to:

- Promote and protect the profession
- Protect the lawyer
- Protect the interests of the client

SUPREME COURT ACT:

Has rules regarding the admissibility of the advocate and their conduct. Admission of Advocates Act: has the power to make rules, which includes the power to make rules in terms of the Supreme Court Act to give effect to the Admission of Advocates Act

THE LEGAL PRACTICE ACT – which has been promulgated and has partially have come into force, as published in the government gazette in February 2015

In terms of this Act all legal practitioner will be part of and thus accountable to the same body – thus dissolving law associations into the Legal Practitioners Board – this Act will bring about significant changes regarding the referral rule, thus making it obsolete, in that advocates can render legal services in expectation of a fee

- On the receipt of a brief from an attorney or
- On the request from a member of the public.

An advocate can render such legal services if he/she has a fidelity fund certificate and has notified the council

This and other such changes to the regulation of the legal practice will affect the practice of law once the full act has been put into force