PROFESSIONAL ETHICS SUMMARY:

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
The ethical ideal of a morally good lawyer is linked to the idea that legal practice is a profession and not just a job

- There is a fear that lawyers have become unethical in their pursuit of money and status at the expense of the basic values, which a member of the profession is supposed to have. Lawyers are willing to sell their souls to the highest bidder
- Adversarial system: the lawyers focus on the clients interests and don’t strive for justice – don’t look at the moral implication
- Problem: competition and commercialization
- Education: formal education doesn’t prepare the lawyers for the moral challenges they will face

ROUSSOW:
Looked at: the law profession v businesses

Characteristics, which distinguish law from other businesses:
1. Specialized knowledge
2. Common good – justice
3. Serving the public
4. Discretion and autonomy
5. Accepting responsibility for their actions
6. Self-discipline = ethical
7. The profession is enforced by the courts

He suggests that there are 2 ways in which the profession can stay ethical:

1. **Aspirational way:** this establishes a standard of conduct – i.e. avoid conduct, which could damage your reputation (subjective and ethical).
2. **Directional way:** follow the RULES (objective and formalistic).
NICHOLSON AND WEBB: CODES OF ETHICS

They believe that the problem with ethics is due to formalism – the focus is too much on rules.

RULES:
1. In legal education: students are taught the legal rules and not the practical application of the law
2. Adversarial system: creates the belief that rules will always provide the correct answers

According to the ethics need to be CONTEXTUALISED – using 3 levels of codes:

1. **General statement of values:** good faith is required
2. **Specific principles:**
   a. Loyalty – confidentiality
   b. Integrity – moral responsibility
   c. Candor – used with good faith
   d. Consent – consultation
3. **Contextual factors:**
   - The clients needs: emotional, financial and psychological
   - Requirements which show the lawyer what is expected of him in order to avoid removal
   - The type of case: criminal, civil, mediation

These codes help to develop moral character and helps the law student to make a more informed decision on why to study law and what field of law to go into = shows them the moral dilemmas that they might face.

This contextual approach has been criticized:
- Too hard argument: it is too hard for lawyers to be expected to know all the codes that apply to a situation
- It's too easy for a lawyer to be immoral – they already don't respect the rules that exist

The plan to make the ethics more contextual includes:

1. **Micro regulation:** compliance officer at each firm
2. **Fees:** more transparent
3. **Firms dealing with the community:** requires more creative advice giving
4. **Demography of the profession:** allow for more woman in the profession as they have an ethic of care (community based approach) rather than the male ethic of justice (individualistic approach)
5. **Change the adversarial system:** to an inquisitorial system = encourage co-operation rather than competition
CRITS OF THE CODES
Ethical rules have been criticized by both insiders and outsiders:

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<th>OUTSIDERS</th>
<th>INSIDERS</th>
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<td>• There is no access to a simple, easy to understand set of professional codes = the public don’t know what conduct is unprofessional</td>
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<td>• Some ethical rules protect the professionals against the public or serve the members of the profession</td>
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<td>• Rules aren’t universal and change with the times</td>
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<td>• Complaints are handled by colleagues</td>
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<td>• Practitioners aren’t willing to testify against one another</td>
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<td>• The codes aren’t always enforced by law societies</td>
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<td>• Those who don’t obey the codes aren’t dealt with properly</td>
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<td>• Since the codes aren’t applied they should be replaced with business rules</td>
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<td>• By trying to force their client to do the right thing, the client will go somewhere else</td>
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<td>• Legal ethics should be reduced to rules of professional conduct, this would justify self regulation</td>
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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

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.
WASSERSTROM
Looked at the concept of **role-differentiated behavior.**

It’s believed that law and morals are a contradiction.
- Laws are followed out of fear of punishment
- Morals are followed out of conscience

The lawyer-client relationship is:
- Immoral
- Unequal

**IMMORAL:**
**Role differentiated behavior:** allows a lawyer to act in a way, which might be different from their own moral beliefs.
The only requirements are:

1. Make your expertise available to the client and
2. Don’t break the law

Criminal defence lawyer: defend the client irrespective of the belief in his innocence = you might have to do something, which is immoral.
This could be justified by the fact that the A is allowed a trial (S34 and S35).
- The state has the resources to investigate crimes
- The accused’s rights are limited

**Reasons why role differentiated behavior can’t be used:**

1. This will only work if there is confidence in the legal system – i.e. a guilty man won’t be set free
2. It encourages competition rather than co-operation
3. You need to distinguish it from other professions – doctors can use it more easily as it is always justified to save a life whereas its not always best to allow all people to go free
4. Its hard for someone who uses role differentiation in his profession to stop this way of thinking from infiltrating your personal life

**UNEQUAL**
**Lawyer-client relationship:** is believed to be unequal = a client is treated as a means to an end.
This relationship is unequal due to the fact that:

a) The lawyer has professional knowledge and uses technical language
b) The legal profession is self regulating

Wasserstrom: to change this impersonal relationship:
- Simplify legal language
- Make the legal profession more accessible
TRADITIONAL APPROACH TO ETHICS

**LEWIS:** didn’t look at ethical philosophy – the purpose of his book was to set out the rules of condition which an attorney is required to obey. It amounts to a code of rules = positive law

He wanted to reduce ethics to a code of conduct which a lawyer must obey. He discussed legal ethics without any reference to ethics/morals = this approach is a formalistic philosophy

**Coquilette:**
1. Lawyers with a positivistic approach to law, understood his ethical responsibility as a question of complying with a codified set of legal rules = RULE based approach
2. Formalistic attitude, looks to the minimum standards and rules which could be enforced by law societies = he looked at it from the bad man approach of Justice Holmes

**UNISA:** the crisis in the legal profession today could be attributed to the use of rule.

**Shaffer:** lawyers don’t obey the rules out of conscience but out of fear of punishment.

**Justice Holmes:** **bad man approach:** believes that you should approach the law like a bad man, who obeys the law out of fear of punishment rather than a good man who obeys the law due to his conscience.

Role differentiated behavior = HIRED GUN – you need a lawyers skills not his ethical beliefs.

**MARKOWITZ:**
Believes that the adversarial system is part of the crisis in the legal profession.
Lawyers often employ **SHARP PRACTICES** including:
- Examining witnesses aggressively
- Delaying cases
- Manipulating facts
- Making statements that they don’t believe

To justify the use of these practices they make use of role-differentiated behavior = they focus on the argument in court and not on the moral issue of the case.

To prevent this it’s suggested that the professional role be redescribed = make lawyers more moral in their private and professional lives.

There are 2 ways to look at legal ethics:
1. The lawyer client modes: inhumane system
2. Moral context: environment where one can be more human – with being a moral (Menkel-Meadow) or Virtuous (Kronman) person
PHILOSOPHICAL APPROACH
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:
Rules must be accepted as a duty = Deonic ethics

**KANT:** look at an ethical situation like a reasonable person would – he deems that there should be a universal ethic.
This is approached in 2 ways:

a. **Categorical imperative:** conscience = obey the laws out of a sense of duty (correct approach)
b. **Hypothetical imperative:** use RULES = obey the rules as failure to do so would amount in punishment

**POSTMODERNs:** say that there can't be one universal ethic
VIRTUE ETHICS

KRONMAN

Q: why does someone decide to study law?

1. Power and Money: people are a means to an end = problem with this is that a person has no time for a personal life – what you do for a living determines what type of person you will be.
2. Public spiritedness: practice of law to serve the common good

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.
- **Counselling**: 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

According to Kronman: to successfully represent your client, put yourself in the position of the judge (sympathetic detachment = good judgment).

There are 2 types of arguments:
- **Clever argument**: use the law to prove the clients case
- **Wise argument**: look at the case from the judges 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.
ARISTOTLE
Look at virtue and not at rules.
- People DEVELOP virtue by participating in public affairs – the public life is the good life but it is reserved for Greek men.

Kronman: can learn virtue = good judgment.
Aristotle: virtue is inherent in all people and it can be developed by participating in politics.
Others: virtue is a natural gift, you are either born with it or not – you CANNOT learn it.

FEMINISM
MENKEL-MEADOW
Difference feminism:
Gilligan believed that woman and men had a different ethic
- WOMAN: ethic of care: focus on the community and relationships, more focused on ethics
- MEN: ethic of justice: look at the individual and rules (more comfortable with the HIRED GUN)

Woman could bring a more community based approach to the law.

McKinnon: Dominance Theory = men dominate and woman are dominated – the difference is the difference in power.

Law practice: woman are more non-confrontational and sensitive to the needs of others and their clients.

There is still segregation in the workplace - family law is still seen as a woman’s work.

Legal knowledge: Women analyze law differently:
- They include all minorities to disrupt the dominant male thinking.
- Woman in their studies focus on ethics rather than rules – while men are more comfortable with the rule based hired gun approach.
CONSEQUENTIALIST APPROACH:

UTILITARIANISM:

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. Is the result useful?

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).

BUT: 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.
POST MODERN APPROACH:
They believed that there was no such thing as a universal ethic. There are differences in society and the challenge is how we deal with those differences = the moral domain is uncertain

Indeterminacy is a way of life

Can you have law in postmodern times?
- Rule based approach: law consists of universal rules and principles which can be applied in all situations = this is what the post moderns reject
- There is no moral code for the post modern period as the difference in each situation or person can’t be captured through universal/ general rules

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 law: for every rule there is an equally valid counter rule, and in life: one is always torn between the individual and the community
FIT AND PROPER

McDowell: Good moral character

When a person is to be certified the onus is on the applicant to prove that they are fit and proper.
REASON: if a person doesn’t know someone they must approach them like a defensive driver – the problem with this is that a client can’t do this – they have to trust the professional.
This is why they require good moral character as a requirement for licensing.

Q: should good moral character be a requirement for the study of law?
NO:
  1. Its hard to establish
  2. Persons character might change or improve
  3. He may have no intention of practicing law

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<tr>
<th>Certification:</th>
<th>Decertification:</th>
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<td>• Onus on the applicant to prove he is fit and proper</td>
<td>• Onus on the person applying for decertification (law society)</td>
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<tr>
<td>• Subjective test</td>
<td>• Objective test</td>
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<td>• Ex post facto</td>
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Eshete: does a lawyer’s character matter?

1. Lawyer doesn’t serve the public good (lawyer v doctor)
2. In legal education students are taught the rules
3. Adversarial system – looks at the interests of the client

Fit and proper requirement:

- S15 Attorneys Act: courts have a discretion to only admit fit and proper people (onus on applicant)
- S22 Attorneys Act: person will be struck off if in the courts opinion they are no longer fit and proper
- S3 Admissions of Advocates Act: to be admitted an applicant must be 21 and a fit and proper person

Whether someone is a fit and proper person = discretionary judgment by the court.
CC: CHALLENGES BASED ON THE BOR

Kleinhans: said that this requirement violated his right to free economic activity = the court found that is was a valid limitation in terms of S36.

Machaka: said that the fit and proper requirement violated the following rights:
  - Dignity
  - Equality
  - Freedom
  - The right to choose ones 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

PAST DISCRIMINATORY USE OF THE FIT AND PROPER REQUIREMENT

Problems in the past with the courts discretion:

Gandhi: was found not to be a fit and proper person because he was Indian.

Wookey: the court refused to register her articles because she was a woman.

Roman Dutch law: found the following not to be fit and proper: Jewish, Pagan, anyone who denounced Christianity, Blind and deaf people and woman

Fischer: was struck off the roll as he opposed apartheid

People in the past have been excluded on an arbitrary basis.
A SHIFT FROM VIRTUE TO RULES

Q: does a political motive mean that a person has a bad character?

2 tests:
1. **Character test:** look at the moral character of the lawyer – does it affect his job, what was the motive (subjective)
2. **Rule ethics:** look at the lawyer’s duty to obey the law – objective = look at the rules: the fact that a lawyer swears allegiance to the law of the Republic

**CHARACTER TEST:**

**Krause:** wrote letters stating that a newspaper writer who said that the Boer forces were outlaws should be killed = was convicted of an attempt to incite murder.

Q: does the conviction reflect negatively on his moral character, does it have anything to do with his practice as an attorney?

**POLITICAL MOTIVE.**

**Mandela:** was convicted in terms of the Suppression of Communism Act. The conviction had nothing to do with his practice as a lawyer, the motive was political.

According to the character test – this action didn’t reflect badly on his character as a lawyer.

**RULE BASED APPROACH:**

**Matthews:** the courts changed to the rules based approach – they refused to register his articles because he had 2 previous convictions under the Suppression of Communism Act.

The court looked at the fact that an attorney has a duty to uphold the law that he swore allegiance to = don’t look at the motive.

**Fischer:** was arrested and charged in terms of the suppression of communism Act – he applied for bail and it was granted based on his standing as a lawyer, he absconded = RULE BASED = don’t look at the political motive, look at his duty to uphold the law.

**Rice**

**TRC:** apartheid lawyers, by obeying the laws were legitimizing the apartheid government = the rule-based approach is too narrow when the rules themselves are unjust.

Gandhi, Fischer and Mandela 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 = achieve justice = look at the law as it ought to be.

**VIOLENCE- RULE BASED APPROACH**

**Hassim:** armed resistance to apartheid – rule based approach = didn’t look at the fact that the action was political and unrelated to his practice as an attorney.

**Maqubela:** convicted of High Treason – he argued the character test stating: it had nothing to do with his profession and that it was done with a political motive = court used the rules based approach.
TODAY:

Prince:
The court refused to register his articles as he had 2 previous convictions of possession and intended to continue using.

On appeal: he requested the character test and the court said it wasn’t a political motive.

CC: Sachs, minority judgment: constitution requires the tolerance of differences and the fact that he was willing to sacrifice his studies for his religion showed a good character.

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

Civil disobedience could occur on the following grounds:

1. If laws are immoral
2. If it’s based on religious beliefs
3. If positive laws are unjust
4. Utility

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 laborers and the illegality of Muslim and Hindu marriages. Gandhi was arrested charged and sentenced – 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
THE GOOD LAWYER

Du Plessis: the ideal legal practitioner

1. Integrity:
   - Communication confidential
   - He can give the client legal advice
   - If something dishonest is required from him, he must withdraw from the case
   Integrity can't 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:
   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

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 sipping his bail = disrespect for the legal order and the legal procedure.

8. Law Societies:
   - Are ways for the people to lodge their objections against certain unprofessional conduct

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
**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 in that 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. Lawyers should 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.

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.

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  - 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.
DIRECTIONAL APPROACH
Ethical rules = directional in nature = they state the minimum level of conduct/character requirements below which no lawyer can fall without being subject to disciplinary action they include:

LAWYERS RELATIONSHIP WITH THE LAW AND THE STATE:

- Lawyers must respect the law of the state
- The oath they take on admission includes an undertaking to be faithful to the Republic.
- *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 – even if it is to their client’s advantage.
- 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).

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 hearing 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.

LAWYERS RELATIONSHIP WITH THE CLIENT
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.

**LAW SOCIETY**
Maintains the constitution, as well as the independence, objectivity and integrity of lawyers. It’s a body for the attorney’s profession in SA.
Complaints re an attorneys conduct are made to the law society
Their 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.

**MANDATE**
*Mandate need not be accepted if:*

1. **Conflict of interest:** this includes a financial interest in the case
2. **Fraud, illegality:** it’s suggested by the client that the lawyer should participate
3. **Competence:** where the lawyer is unsure of his ability

*Mandate can be terminated if:*

1. There is improper conduct on the clients behalf
2. Client deliberately commits fraud
3. Personality clash
4. Client doesn’t accept the lawyers advice
5. Failure to provide funds
An attorney who wants to withdraw must have the client’s consent, or a good reason (client's improper behavior) – withdraw in time so that the client can make alternative arrangements.

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

**Duty of Confidentiality (Professional Privilege):**
He 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.

Professional privilege plays a role: for it to exist the following requirements must be met:
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.

= **Privileged Information.**

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

**Exception to privilege:**
- Where the legislature gave an exception
- Client gives his consent

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

**FEES:**
Reasonable fee – look 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

**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 respondent’s 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 pupilage. Adv can also choose to be part of the independent association of advocate SA (IAASA): they won’t 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 THE COURT:

Ex parte applications –
- Lawyers must use good faith
- Put all the relevant facts before the court
- Court must have full knowledge.
  - Meret case

Procedures:
Conduct themselves in a dignified manner= they cannot mislead the court-
by making false statements.
He can’t 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)
They mustn’t abuse court procedure or use delay tactics.

Media: Matters must be settled by the court and not the media = lawyers
cannot make statements to the media with regard to cases they are involved
with.

Judges and the integrity of the court:
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.
Judicial independence: functional and personal:

Functional: it is the capacity of the judiciary to interpret and apply the law;
therefore no other functionary can usurp this power (Harris case: where
parliament set up a High court of Parliament which could override the decisions
of the AD)

a) JSC plays an NB role in the appointment of judges
b) S176 provides that judges of the constitutional court are
   appointed for a non-renewable term of 12 years – but they
   must retire at the age of 70. Other judges may serve office until
   the age of 75 or until they are discharged from active service in
   terms of an act of parliament = judges enjoy security of tenure
   so there is no need for them to seek favour from politicians to
   make sure that they keep their jobs

c) S177: removal of judges:
A judge may be removed if:
  - JSC finds that he suffers from:
    o Incapacity
    o Gross incompetence
    o 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

d) S176 provides that the salaries, allowances and other benefits of judicial officers may not be reduced.

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

DIGNITY OF THE COURT
Freedom of expression and the 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.

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.

LAWYERS RELATIONSHIP WITH THE PUBLIC:
The community should be shown that lawyers who do not comply with the standards of professional behavior will not go unpunished.
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.