Discuss the acceptance of briefs by an advocate?

Advocates as litigation specialists: are obliged to accept the brief if they are available and able to do the work.

- The fact that the advocate’s political or religious beliefs conflict with those of the client does not justify refusal of a brief.
- Advocates generally may not accept briefs directly from clients but must be briefed by an attorney. This is called the “referral rule”.
- Direct instruction is sometimes allowed, for example, from the Legal Aid Board.
- Direct instruction for legal opinions is also allowed in some provinces. These are, however, exceptions on a strict rule.

Discuss the challenge in Rosemann v General Council of the Bar of South Africa 2004 (1) SA 568 (SCA)?

The admission requirements for the legal profession were also challenged in Rosemann v General Council of the Bar of South Africa 2004. In this case it was argued that the division of work between the professions (advocates and attorneys) and the referral rule was irrational, and as such an unreasonable limitation on the right to freely choose one’s profession (s 22 of the Constitution).

The Court once again rejected the argument and held that the freedom to choose a profession was not violated by the dual structure of the profession.
The applicant was at all times free to choose whichever profession he wanted to pursue.

Even if it was accepted that the restriction on attorneys to do the work of advocates violated section 22, the restriction remained justifiable because of the benefits which accrue to the general public from the specialisation of legal services (par [30]–[31]). SG pp 7

Discuss the lawyer’s relationship with

1. Clients (10)
2. Courts (5)
3. The public (5)

1. Rules of conduct pertaining to attorneys i.r.o their clients (10)

Attorneys should be committed to the aggressive single-minded pursuit of their client’s legal objectives, regardless of their personal opinion of the character or the moral merits of the client’s objectives.

Whilst attorneys are not obliged to accept client’s brief, an attorney should - if he does accept a client’s mandate - carry out the work with the necessary due diligence - encompassing the care, skill and commitment that may reasonably be expected from any legal practitioner including to:

- seek to balance the interests of clients with the interests of the community.
- endeavour to reach a solution by settling out of court, rather than initiating legal proceedings, if it is in the client’s interests.
- be honest in advising the client on the merits of his case and should tell a client when he is wrong, even if this might mean that the client goes elsewhere for advice.
- act fairly towards unrepresented party to a contract.
- not acquire a financial interest in the subject matter of a case which you are conducting.

- consider any possible conflict of interests and whether the mandate involves any illegality or other impropriety.

- refuse to co-operate or withdraw if dishonesty is required of the practitioner himself by the client or any party.

- once an attorney has accepted a mandate, he has to see the matter through; he may withdraw only with the client’s consent, or with good reason, such as the client’s improper or fraudulent behaviour.

- keep a separate banking account in which all money held or received by them on account of other persons must be deposited.

- honour his duty of confidentiality i.r.o confidential communications made with a view to litigation, as well as all confidential communications made for the purpose of giving or receiving legal advice or assistance, which are considered to be privileged information.

- facilitate access by the client to an advocate, should the client’s brief or circumstances require.

- This is also known as the referral rule - which includes to:
  - initiate contract between advocate and client;
  - negotiates and receives fees from the client;
  - instruct the advocate specifically in relation to each matter affecting client’s interest;
  - oversees each step advised or taken by the advocate;
  - keeps the client informed, and is present as far as possible during interactions between the client and the advocate.
2. **Rules of conduct pertaining to attorneys i.r.o the courts** (5)

   - Attorneys and advocates are **officials of the court** and should always give the courts their **due respect**.

   - They may **not mislead the court**, whether directly or indirectly, for example by making misrepresentations or false statements.

   - In **ex parte applications**, practitioners are **obliged to act in the utmost good faith** and to put **all relevant facts** to the court so that the **court may have full knowledge** of the circumstances of the case. In **motion court proceedings**, advocates should **bring to the attention of the court any deviations from the usual forms** and offer an **explanation**.

   - They should **inform the court of all the relevant case law** of which they are aware, **even if this may be to the detriment of their client’s case**.

   - They may **not abuse** court procedures or use **delay tactics**.

   - They may **not act in contempt of court**

   - **Matters should be settled by the courts and not the media.** Legal practitioners may not therefore make statements to the media with regard to cases in which they are involved.

3. **Rules of conduct pertaining to lawyers’ i.r.o the public?** (5)

   - Practitioners are **officials of justice** and they should be **available to render legal services to the public**.

   - The **public put their trust and confidence** in practitioners to carry on their profession with **integrity and honour**
- **the courts must therefore ensure this** – i.o.w see to it that practitioners are persons of dignity, honour and integrity.

- Attorneys who **depart from the high standards** of professional behaviour will not go unpunished.

- **Witnesses** who are subpoenaed to appear in court are performing a **public duty** in coming to court and should be **treated with respect**. **Offensive, unreasonable or intimidating cross-examination should be avoided.**

- **Advocates and attorneys have a qualified privilege** in conducting a case in court. This privilege, which **gives them great latitude to put their client’s case**, is based on public policy to search for truth and justice. **This privilege will lapse if they abuse the legal process. Only if an advocate or attorney is able to prove reasonable grounds for making defamatory statements, and to show that this promotes his client’s case, will he be able to rely on this privilege.**

---

**Name the characteristics of an adversarial legal system?** (5)

In **the adversary system** (also called the accusatory system) **two parties face each other** in a court of law...

- e.g. the **state and the accused** in criminal cases, or
- **two private/juristic persons** in civil cases.

**The roles of legal representatives and judges are carefully separated.**

**The judge acts as an impartial “referee” who:**

- listens to **both sides** of the case and
must see to it that the various legal representatives adhere to the procedural rules (the rules of the “game”).

has to ascertain the true version of the facts, and

has to apply the law objectively to these facts.

Legal practitioners, on the other hand...:

focus on their clients’ interests, and do not really strive for justice or the promotion of the general good

act within an adversarial system wherein it is not the task of legal representatives to decide whether or not their clients are guilty or accountable (this is the task of the judge), but rather to act as a mouthpiece for their clients.

they do not try to balance the interests of all involved, or

do not attempt to ascertain the true version of the facts, or

attempt to apply the law objectively to these facts.

are not - in context of the adversary system - independent or impartial.

only listen to their clients’ version of the case, and

have to promote their clients’ interests fearlessly - regardless of the interests of other persons.

Because everybody has the opportunity to present his case and because an independent judge renders the decision, it is assumed that the adversary system will result in justice and the equal protection of everybody’s rights. The premise is of course that everyone has equal access to legal representation, and relatively equal bargaining power.
What according to you are the reasons for the loss of ethical direction within the legal profession? / ethical crisis / legal profession in ethical crisis / 4x (5)

(i) unscrupulous pursuit of money and status.

(ii) corporate lawyer, or as a market-driven seller of expertise.

(iii) the desire for wealth has eroded civic and community values.

(iv) fierce competition and commercialisation have also led to unethical, even fraudulent, behaviour as not to be left behind in the wealth race. Pierre Schlag describes lawyers as nothing other than freelance bureaucrats, willing to sell their souls to the highest bidder.

(v) This “survival morality” in a climate of lawlessness and sluggish economic environment has led to increasing competition and justification for the violation of the rules of ethical behaviour and decency.

(vi) Already in 1996 the Krugel Commission bore witness to the loss of ethical direction on the profession.

_________________________________________________________________________

“The crisis in professionalism is not restricted to law, and similar concerns have been raise in connection with other professions such as the medical profession”. Do you agree or disagree that the legal profession is in an ethical crisis? Motivate... (10)

I agree that the legal profession is in an ethical crisis and I base my opinion on the following arguments:

Legal morality declining:

The ethical ideal of the “morally good” lawyer is closely linked to the idea that legal practice is a profession, and not merely a job.
The unscrupulous pursuit of money and status is achieved at the expense of the basic values which members of their profession are supposed to profess.

Pathological desire for wealth:

The desire for wealth has eroded civic and community values and has reduced what was once an honourable profession - to market-driven sellers of expertise, solely driven by the pursuit of fame, fortune and profit at the expense of morality.

Uncontrolled competition and commercialisation:

Fierce competition and commercialisation have also led to unethical, even fraudulent, behaviour as not to be left behind in the wealth race. Pierre Schlag describes lawyers as nothing other than freelance bureaucrats, willing to sell their souls to the highest bidder.

Climate of lawlessness & economic recession”

This “survival morality” in a climate of lawlessness and sluggish economic environment has led to increasing competition, a blunting of moral sensitivities and justification for the violation of the rules of ethical behaviour and decency. Already in 1996 the Krugel Commission bore witness to the loss of ethical direction on the profession.

Desire for financial success & influence:

The desire for wealth has eroded civic and community values and being financially well-off is unfortunately now the most important life goal of university students. Schlag refers to lawyers as freelance bureaucrats, willing to sell their souls to the highest bidder.
The consequences of these developing trends include:

- Job satisfaction and fulfillment has declined into anonymity, alienation and diminished collegiality and civility among their ranks.
- Practitioners make use of truth, rationality, justice and other moral values in an instrumental sense - only insofar as these values aid them to manipulate other legal actors to reach pre-determined outcomes for their clients.
- While some still adhere to a positivistic approach to ethical rules as definitive of moral responsibility, others go even further and regard these rules of professional conduct as irritating and as outdated relics of the past. They will perhaps pay lip service to these rules but ignore them in their daily practice.
- In Schlag’s description, the ethical and professional ideal of the good lawyer has completely collapsed.

What is ethics? (5)

Ethics is about what we ought and ought not to do and also about setting priorities in human behaviour.

- Ethics is not always about what is absolutely right or wrong, acceptable or unacceptable, ideal or less than ideal.
- It is also about what is the best decision in particular circumstances, what is the lesser of two evils, what is the balance between doing good and causing harm.
- Ethics is therefore about formulating the principles on which we make these sorts of decisions.
What is legal ethics?

**Legal ethics in the wide sense** refers to the relationship between law and ethics.

**In the narrow sense** it refers to the ethical standards of professional conduct applicable to the field of law.

In the narrow sense it thus deals with the *ought’s* of providing legal services for example, the question: “how ought a legal practitioner to behave in order to be a good, decent and proper legal practitioner”.

What according to you is the relation between ethics and a code of conduct?

According to Lewis, an “entirely practical” approach to the professional conduct of legal practitioners is what is required and contends that a code of rules prescribing conduct for attorneys is as much a part of the positive law as any other field of law and can be objectively described without concern for a deeper philosophy or history behind this code.

I agree with UNISA’s contention that this “practical” and positivistic approach to the ethical conduct of legal practitioners is one of the main reasons for the growing crisis in the profession.

Hence ethical philosophy suggests that ethical responsibility involves much more than, or even something completely different, to strict compliance with rules.

A legalistic or rule based mind-set leads to “role-differentiated” behaviour between lawyers and clients. Their relationship is stripped of all moral depth and public or civil responsibility.
In my opinion ethics should be the touchstone for- and incorporated in the formulation of codes of conduct for the legal profession based on a mindset of concern and care and the virtue of good judgment.

How does post-modern ethics differ from the traditional approach to legal ethics? (5)

Postmodernism is characterised by

(i) the demise of the belief in the universal validity of western morality,

(ii) the celebration of difference,

(iii) the rejection of absolutes as well as universals, and

(iv) the recognition of the need to accept uncertainty and indeterminacy as a way of life.

The traditional rule-based perspective to legal ethics - maintains that:

(i) the law is underpinned by universal rules and principles which can be applied to all situations

(ii) the law constitutes and establishes a sole, definite and authoritative point of reference in terms of which human conduct must be judged.

This is precisely what postmodern ethics denies and rejects.

“More difficult to enforce, though not less worthy of pursuit, is the maintenance of impeccable court manners – even under the most provocative circumstances.” (du Plessis “The Ideal legal practitioner (from academic angle)” Sept. 1981 De Rebus @ 425) Discuss? (5)

Legal practitioners must have impeccable court manners, even under the most provocative circumstances.
- Attorneys and advocates are officials of the court and should always act with dignity and give the courts their due respect and maintain and promote the dignity of the court.

- The court should be able at all times to rely on their honesty and on the veracity of their statements. There can be no effective administration of justice without legal practitioners being scrupulously truthful in their dealings with one another and the courts.

- Their sense of integrity should guide them to keep abreast of the law and to inform the court of all the relevant case law of which they are aware, even if this may be to the detriment of their client’s case.

- They may not act in contempt of court [insulting a judge or magistrate R v Silber 1952] or mislead the court, whether directly or indirectly, for example by making misrepresentations or false statements. Contempt of court is a common law as well as a statutory offence.

- They may not conceal anything that the court requires for the administration of justice or abuse court procedures through the use of delay tactics. Ex Parte Jordaan: In Re Grunow Estates (Edms) Bpk v Jordaan 1993 – application in excess of 800 pages.

- If material facts are withheld from the court, this may lead to a decision that the attorney or advocate involved is not a fit and proper person to practise law. Ex parte Swain 1973

- In ex parte applications, practitioners are obliged to act in the utmost good faith and to put all relevant facts to the court so that the court may have full knowledge of

- **In motion court proceedings**, advocates should bring to the attention of the court any deviations from the usual forms and offer an explanation for this. *Ex Parte Satbel (Edms) Bpk: In re Meyer v Satbel (Edms) Bpk 1984*.

- **Matters should be settled by the courts** and not the media. Legal practitioners may not therefore make statements to the media with regard to cases in which they are involved.

- Legal practitioners’ duty to the court is greater than their duty towards their clients, except as regards their duty not to disclose the confidences of the client to the courts. The lawyer must subordinate his or her own interests to those of the court and the client.

---

**In what circumstances will resistance to the law (civil disobedience) be justified?** (5)

*When:* -

- The laws are immoral
- Conflict with justifiable religious beliefs
- Positive law is unjust, and not worthy of respect
- Utility: it would bring about the greatest good for the greatest number.

---

**May you as legal practitioner engage in civil disobedience?** (5)

- **Civil disobedience** is a symbolic violation of the law, rather than a rejection of the system as a whole.
- **The civil disobedient** - finding legitimate avenues of change blocked or non-existent, sees himself as obligated by a higher, extra-legal principle to contravene an oppressive law.

- **Lawyers have a duty to uphold the law** in the broader interest of their clients, the legal process and in sustaining a just and accountable legal system. They are therefore guardians of the law and trained servants of the public legal order.

- As officers of the court, attorneys must **uphold the law** and **follow legal procedures diligently**. The **oath** attorneys & advocates take on admission includes an undertaking to “be faithful to the RSA”.

- As bearers of the law they cannot deliberately contravene the law or plan to do so in future albeit to ‘civil disobedience’, nor incite or assist others to do so. This action will render such practitioners as unfit and improper persons to practice law.

- Invariably respect for the law and the commitment to individualised principles of justice, dignity and equality, care and concern for others - may come into conflict leading to an inability or resist ‘civil disobedience’. These instances may occur when:
  - The laws are immoral
  - Conflict with justifiable religious beliefs
  - Positive law is unjust, and not worthy of respect
  - Utility: it would bring about the greatest good for the greatest number.

---

**What other ethical approach do you personally think will change the legal profession for the better? Explain why you suggest that specific approach briefly?**

**Which philosophical approach to ethics could according to you solve the ethical problems in the profession?**
In my opinion ethical responsibility in the legal profession should involve much more than-, or be something completely different to strict compliance with rules – and - should aim to shape and direct the morality and moral experience of a good lawyer.

The professional ideal of the good lawyer may be recognised from different ethical perspectives including:

- his sense of duty;
- his virtues and character;
- the consequences he effects;
- his sense of absolute responsibility to “the other”,

This leaves room for an inclusive approach of all legal philosophy’s including - a rule-, virtue-, consequentialist- and post-modern philosophical approach to solve the ethical problems in the profession.

Section 165(4) of the Constitution of South Africa 1996 states that organs of the state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. Write notes on:

1. The need to maintain the dignity of the court and the legal process? (5)
2. The role played in this regard by legal practitioners and judges? (10)
3. Legal remedies which ensure that the dignity of the court is maintained? (5) [20]

1. The need to maintain the dignity of the court and the legal process? (5)
The judicial system, including the courts are institutions of the state, developed over centuries and culminating in the bearers of the right to freedom and equality and of the principles of justice in *ubermae fides*.

- The judicial authority of the state is vested in the courts
- The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
- No person or organ of state may interfere with the functioning of the courts.

Hence the maintenance of the dignity of the court and the legal process is a peremptory imperative sanctioned by the constitution itself.

The role played in this regard by legal practitioners and judges? (10)

**Attorneys and advocates** are officials of the court and should always act with dignity and give the courts their due respect and maintain and promote the dignity of the court.

- The court should be able at all times to rely on their honesty and on the veracity of their statements. There can be no effective administration of justice without legal practitioners being scrupulously truthful in their dealings with one another and the courts.
- Their sense of integrity should guide them to **keep abreast of the law** and to **inform the court of all the relevant case law** of which they are aware, even if this may be to the detriment of their client’s case.

- They **may not act in contempt of court** [insulting a judge or magistrate *R v Silber 1952*] or **mislead the court**, whether directly or indirectly, for example by making misrepresentations or false statements. *Contempt of court is a common law as well as a statutory offence.*

- They may not **conceal** anything that the court requires for the administration of justice or **abuse** court procedures through the use of **delay tactics**. *Ex Parte Jordaan: In Re Grunow Estates (Edms) Bpk v Jordaan 1993* – application in excess of 800 pages.

- If **material facts are withheld** from the court, this may lead to a decision that the attorney or advocate involved is not a fit and proper person to practise law. *Ex parte Swain 1973*

- In **ex parte applications**, practitioners are **obliged to act in the utmost good faith** and to put **all relevant facts** to the court so that the **court may have full knowledge** of the circumstances of the case. *Ex parte Cassim 1970* prior convictions withheld. *Estate Logie v Priest 1926* full circumstances not divulged.

- **In motion court proceedings**, advocates should **bring to the attention of the court any deviations** from the usual forms and offer an explanation for this. *Ex Parte Satbel (Edms) Bpk: In re Meyer v Satbel (Edms) Bpk 1984.*

- **Matters should be settled by the courts and not the media**. Legal practitioners may not therefore make statements to the media with regard to cases in which they are involved.
- Legal practitioners’ duty to the court is greater than their duty towards their clients, except as regards their duty not to disclose the confidences of the client to the courts. The lawyer must subordinate his or her own interests to those of the court and the client.

The ‘fit-and-proper’ imperative also applies to judges of the courts

- Section 174(1) of the Constitution provides that judges must be South African citizens who are “appropriately qualified” and “fit and proper persons”.
- They should have the moral integrity to sit in judgment of others, and should behave with the propriety expected of judges.
- They should be able to judge the impression created by their own conduct with the same rigour as they are able to judge the conduct of parties appearing before them.
- In terms of section 165 of the Constitution, judges are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- Given the power and influence they have, judges ought to be impartial and independent of government and outside financial interests.
- Court judgments should be free from outside influence. No judge may therefore accept, hold or perform any other office for profit or receive remuneration, apart from their salaries, without the permission of the Minister of Justice.
- The judiciary relies on public acceptance of its moral authority and integrity.

3. Legal remedies which ensure that the dignity of the court is maintained? (5)

In S v Mamabolo 2001 (3) SA 409 (CC), the Constitutional Court dealt with the need to preserve the integrity of the courts and judges in the interest of justice. Mamabolo was sentenced for contempt due to a critical media release against a decision of the Transvaal High Court. He appealed to the Constitutional court. [re: freedom of speech & fair trial]
The conviction and sentence were set aside citing that the matter would have been different if department officials intended to defy the bail order and proclaimed such defiance to the world at large.

The decision inter-alia highlighted various remedies available to the courts - being:

- **Summary judgment** for the common law crime of ‘*contempt of court*’ (also known as “scandalising the court”) which includes the unlawful and intentional violation of the dignity, repute or authority of a judicial body, or interference in the administration of justice in a matter pending before it.

- **Disbarment from practice** as an attorney or an advocate.

- **Removal from office** - of a judge, magistrate or judicial official.

- **The limitation of rights** in terms of s 36 of the Constitution) guided by the importance of the interest involved read with 165(4) of the Constitution which provides that organs of state must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.

---

Law is practised as a profession and is not merely a job. What distinguishes a profession from other jobs, businesses or trades? 4x

Law is practised as a profession and is not merely a job. Bruce Ackerman referred to the law as a “calling” based on “…a sound moral character is essential to professionalism.

- A legal professional’s conduct should justify the trust placed in you by your clients, adversaries, and the courts and the whole of society.
Lawyers find their social role permeated by ethics from which may be inferred that a lawyer should be *worthy of public trust*, and carry out his professional duties with public-spiritedness and the highest standards of ethical conduct.

**Complimentary hereto - the following requirements are also set for professionals:**

**Professionals:**

- are required to have *specialised intellectual knowledge* and skills before they will be granted access to their chosen profession
- are expected to have a *commitment to promoting the basic good of society*. i.e. the basic good is justice.
- are expected to have a *commitment to serving the public* in matters related to their particular field.
- enjoy *relative autonomy and discretion in the execution of their duties* and do not blindly accede to their clients or other authorities.
- should have a *willingness to accept personal responsibility for their actions* and for maintaining public confidence in their particular profession.
- share a sense of *common identity* and an established moral community.
- are *self-disciplined and abide by a code of legal ethics* based upon what the best thinkers in their particular profession regard as proper conduct for a member of that profession.

The above standards of *professional conduct are enforced by the profession itself or by the courts*, taking into account the views of the controlling body of the particular profession.
What are the functions / purpose of a Code of Ethics? 3x

The purpose of ethical rules of professional conduct at the side-bar has been stated to be to “regulate an attorney’s conduct not only in his professional career but also in his personal life” while such a rule does not apply to members of the bar.

In general, a professional code of ethics suggests a compilation of ethical values to provide practitioners in the legal profession with a framework for the ethical practice of law.

A code of legal ethics generally seeks, among other things, 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 the professional and the client
- maintain public confidence
- protect the public against improper conduct or incompetence by prescribing and guaranteeing the standards of skill, learning and conduct required
- provide practitioners and newcomers with the broad parameters for making morally responsible choices in testing situations
- ensure fair competition between legal practitioners
- discipline unprofessional behaviour

Attorneys and advocates are officials of the court and should always give the courts their utmost respect and promote the dignity of the court. Discuss? 4x
- Attorneys and advocates are officials of the court and should always act with dignity and give the courts their due respect and maintain and promote the dignity of the court.

- The court should be able at all times to rely on their honesty and on the veracity of their statements. There can be no effective administration of justice without legal practitioners being scrupulously truthful in their dealings with one another and the courts.

- Their sense of integrity should guide them to keep abreast of the law and to inform the court of all the relevant case law of which they are aware, even if this may be to the detriment of their client’s case.

- They may not act in contempt of court [insulting a judge or magistrate R v Silber 1952] or mislead the court, whether directly or indirectly, for example by making misrepresentations or false statements. Contempt of court is a common law as well as a statutory offence.

- They may not conceal anything that the court requires for the administration of justice or abuse court procedures through the use of delay tactics. Ex Parte Jorda: In Re Grunow Estates (Edms) Bpk v Jorda 1993 – application in excess of 800 pages.

- If material facts are withheld from the court, this may lead to a decision that the attorney or advocate involved is not a fit and proper person to practise law. Ex parte Swain 1973

- In ex parte applications, practitioners are obliged to act in the utmost good faith and to put all relevant facts to the court so that the court may have full knowledge of the circumstances of the case. Ex parte Cassim 1970 prior convictions withheld. Estate Logie v Priest 1926 full circumstances not divulged.
- **In motion court proceedings**, advocates should bring to the attention of the court any deviations from the usual forms and offer an explanation for this. *Ex Parte Satbel (Edms) Bpk: In re Meyer v Satbel (Edms) Bpk 1984.*

- **Matters should be settled by the courts and not the media.** Legal practitioners may not therefore make statements to the media with regard to cases in which they are involved.

- Legal practitioners’ duty to the court is greater than their duty towards their clients, except as regards their duty not to disclose the confidences of the client to the courts. The lawyer must subordinate his or her own interests to those of the court and the client.

During a rape trial the defence advocate calls a witness a whore. The Judge does not seem perturbed by this and the prosecutor looks on with no objection registered on his face. Discuss?

- All practitioners of the law are **officials of justice**.

- The **public put their trust and confidence** in practitioners to carry on their profession with **integrity and honour** and the courts must therefore ensure this.

- **Witnesses** who are subpoenaed to appear in court are performing a **public duty** in coming to court and should be **treated with respect**. Offensive, unreasonable or intimidating cross-examination should be avoided.

- **Advocates and attorneys have a qualified privilege** in conducting a case in court. This privilege, which gives them great latitude to put their client’s case, is based on public policy to search for truth and justice. This privilege will lapse if they abuse the
legal process. *Only if an advocate or attorney is able to prove reasonable grounds for making defamatory statements, and to show that this promotes his client’s case, will he be able to rely on this privilege.*

- **Improper examination detracts** from the court procedure and its disciplined image. It creates an unfavourable image with the witnesses and general public.

- **It is the duty of the presiding judicial officer** (eg the judge) to protect witnesses from such abuse.

- **Given the power and influence judges have,** judges ought to be impartial and independent of government and outside financial interests.

The actions of all concerned are clearly a flagrant abuse of the reliance of a witness, as member of the public upon the moral authority and integrity of the judicial system.

---

**Explain what is meant by touting. Also give an example?**

*(5)*

*Section 17 (1) of the Attorneys Act 53 of 1979 describes “touting” as follows:*

**An attorney or candidate attorney shall be deemed to be guilty of touting if he -**

(a) accepts or agrees to accept or offers to accept remuneration for professional work at any tariff or scale of charges other than those fixed by law, regulation or rule, or does any work gratuitously for any person for the sole reason that such person is a shareholder, partner, director, owner or employee of any firm, business, company or institution; or

(b) by his conduct directly or indirectly represents or permits the impression to be created that he is prepared to do professional work at any other tariff or scale of charges than those fixed by any law, regulation or rule: provided that—
(i) an attorney or candidate attorney shall be entitled to act pro amico for any employee of the firm;

(ii) it shall not be considered as touting if any attorney negotiates with his client for another fee than the one prescribed by any tariff of fees; and

(iii) an attorney or candidate attorney may prove that he did not have the intention to attract work or business;

(c) procures or allows his name or that of any firm in which he is interested to appear in any client’s advertisement (other than a prospectus, offer for sale or statement issued in accordance with the laws or regulations relating to companies or the regulations of a recognised stock exchange) indicating that he or his firm holds the appointment of attorney, notary or conveyancer to such client or any other person or company.

These rules sometimes change as times change. For example, the rule that practitioners who write articles may not be identified in the press with reference to their firms (which could be considered a form of touting) no longer applies. For example, the system of uniform and fixed fees and the rules that forbid touting are seen as unfairly preventing practitioners from marketing their services sufficiently or surviving as “businesses”.

Write notes in which you explain the following:

The factors an advocate should consider in determining reasonable fees for services rendered? 2x

Advocates as litigation specialists:
may only charge only reasonable fees for services rendered and only receive payment from or through the attorney, as he may not receive fees directly as there is no fidelity trust fund for advocates.

In determining a fee, an advocate must consider:

- Time and labour, novelty and difficulty, skill required
- Customary charges by council of comparable standing for similar services
- In cases regarding money, the amount involved in the controversy and its importance to the client.

Write notes on factors that characterise the adversarial legal system? 2x

Wasserstrom argues as follows:

The adversarial system is characterised by...

- a cut-throat, “winner takes all” capitalistic ethic
- competitiveness (rather than cooperation),
- aggressiveness (rather than accommodation) and
- ruthlessness (rather than compassion).

This according to him legitimizes role-differentiated behaviour which can be sustained only if the adversarial criminal law system (where prosecutor and accused act as opponents) is itself legitimate.

The presiding officer is an objective onlooker seldom getting involved in the legal process. The defence and the prosecution are the active role-players whom attempt to validate or vitiate conviction or absolution according to set standards of proof, being beyond reasonable doubt in criminal matters and on a balance of probabilities in civil matters - and at times beyond reasonable cost to their own morality and ethics.
Andreas Eshete in “The Good Lawyer: Lawyers’ roles and Lawyers’ ethics” postulates that lawyers - by the very nature of their adversarial practice are vulnerable to wrongdoing and that their training is not geared to instil morality.

Write notes on Deontic ethics or the ethics of duty? (5)

Immanuel Kant (1724–1804) is one of the most famous exponents of deontological ethics or the ethics of duty. According to Kant, the first principle is that in any ethical situation you should act in the same way you would have others act in a similar situation. You always have to treat others with respect, and may never regard a person as a mere means to an end.

According to Kant Universalising a morally good action imposes the duty on all to do the same for no other reason than it is your duty. Hence - since moral goodness is the reason for the duty, it is necessary for everyone to accept and obey it. Obedience is necessary because moral goodness is desired by everyone. Kant calls this first principle of deontic ethics the categorical imperative.

Legal Practitioners are members of a profession and are governed by professional rules. They are obliged to comply with these rules and to fulfill minimum ethical obligations, whether they like it or not. They have a “morality of duty” and failure to abide by the rules brings about sanction.

Write notes of the duty owed by an advocate towards the court when he appears in an ex parte application? 2x (5)
In ex parte applications, practitioners are obliged to act in the utmost good faith and to put all relevant facts to the court so that the court may have full knowledge of the circumstances of the case (Estate Logie v Priest 1926 AD 312).

- In ex parte applications, practitioners are obliged to act in the utmost good faith and to put all relevant facts to the court so that the court may have full knowledge of the circumstances of the case.

- In motion court proceedings, advocates should bring to the attention of the court any deviations from the usual forms and offer an explanation.

- They should inform the court of all the relevant case law of which they are aware, even if this may be to the detriment of their client’s case.

- They may not abuse court procedures or use delay tactics.

- They may not act in contempt of court.

- Matters should be settled by the courts and not the media. Legal practitioners may not therefore make statements to the media with regard to cases in which they are involved.

Clients form a constant feature in the professional lives of legal practitioners. The legal profession has put in place various systems and processes that are aimed at protecting clients. Bearing in mind the division of the legal profession into both attorneys and advocates, discuss the lawyers relationship with clients. In your discussion you should consider – amongst others:

(i) Acceptance of a mandate from clients? (5)
(ii) The referral rule and its rationale? (5)
(iii) The need for a trust banking account? (5)
(iv) The duty of confidentiality owed to the client? (5)
(v) Recourse for clients who are not satisfied with a legal practitioner’s work? (5)

4 x Repeat! [25]
(i) The acceptance of a mandate from clients:

Attorneys should be committed to the aggressive single-minded pursuit of their client’s legal objectives, regardless of their personal opinion of the character or the moral merits of the client’s objectives.

Whilst attorneys are not obliged to accept client’s brief, an attorney should - if he does accept a client’s mandate - carry out the work with the necessary due diligence - encompassing the care, skill and commitment that may reasonably be expected from any legal practitioner including to:

- seek to balance the interests of clients with the interests of the community.
- endeavour to reach a solution by settling out of court, rather than initiating legal proceedings, if it is in the client’s interests.
- be honest in advising the client on the merits of his or her case and should tell a client when he is wrong, even if this might mean that the client goes elsewhere for advice.
- act fairly towards unrepresented party to a contract.
- not acquire a financial interest in the subject matter of a case which you are conducting.
- consider any possible conflict of interests and whether the mandate involves any illegality or other impropriety and refuse to co-operate or withdraw if dishonesty is required of the practitioner himself by the client or any party.
- keep a separate banking account in which all money held or received by them on account of other persons must be deposited.
- honour his duty of confidentiality i.r.o confidential communications made with a view to litigation, as well as all confidential communications made for the purpose of giving or receiving legal advice or assistance, which are considered to be privileged information.

- **Once an attorney has accepted a mandate**, he has to see the matter through; he may withdraw only with the client’s consent, or with good reason, such as the client’s improper or fraudulent behaviour.
(ii) The referral rule and its rationale?

Advocates generally may not accept briefs directly from clients but must be briefed by an attorney. Hence - attorneys must facilitate access by the client to an advocate, should the client’s brief or circumstances so require.

This is also known as the referral rule - which includes to:

- initiate contract between advocate and client;
- negotiate and receive fees from the client;
- instruct the advocate specifically in relation to each matter affecting client’s interest;
- oversees each step advised or taken by the advocate;
- keeps the client informed, and is present as far as possible during interactions between the client and the advocate.

The rationale for the referral rule:

- The client is afforded the legal expertise required at the appropriate time of the litigation process.
- The advocate is not burdened by unnecessary detail, but only with what is essential to the matter at hand.
- It is in the public interest that advocates do not handle any money on behalf of clients as this is the task of the briefing attorney.

(iii) The need for a trust banking account

All attorneys must keep a separate trust banking account
- in which all money held or received by them on account of other persons must be deposited.
- No amount standing to the credit of such an account is to be regarded as forming part of the assets of the attorney.

- Any shortfall in the account may be recovered from the Fidelity Fund in proper circumstances.

The law society’s most fundamental rule is that the total amount in an attorney’s trust account must at all times be sufficient to cover the amounts owing to trust creditors (although it is no requirement for admission as an attorney that the applicant should satisfy the court of this ability).

An attorney receiving money from his client without having any trust account, would become involved in the financial affairs of his client and would therefore lose his professional independence and ability to act in the interest of his client and may – if abuse is proven be summerly struck off the roll.

(iv) The duty of confidentiality owed to the client?

The contract between attorney and client also brings about the duty of confidentiality.

- The attorney may not divulge confidences or communications made to him or her by the client in the course of their professional relationship.

- This applies whether the communication is oral or in writing, and even where the client admits that he or she has committed a crime.

Hence a relationship develops between an attorney and client wherein the attorney’s duty of confidentiality and the client’s corresponding right to confidentiality,
continue even after the attorney-client relationship has come to an end, and only the client may waive this right.

Apart from this contractual obligation, it is also an established principle of South African law that confidential communications made with a view to litigation, as well as all confidential communications made for the purpose of giving or receiving legal advice or assistance, are considered to be “privileged information”.

- This means that privileged information may not be disclosed to a court or in quasi-judicial proceedings, or offered in evidence.
- It is an accepted legal principle that to divulge this kind of information would not promote the proper functioning of the litigation process or of the legal system in its entirety.

*S v Safatsa* 1988 (1) SA 868 (A)

The privilege is the client’s, and not the practitioner’s

*Algemene Balieraad van Suid-Afrika v Johan van den Berg* 2005 (case no 2419/2005 C).

Privilege must be claimed in court, and does not arise automatically

(v) Recourse for clients who are not satisfied with a legal practitioner’s work?

Attorneys are bound by a strict professional code and clients inter alia have the right to professional, honest, equitable and unbiased conduct and advice at all times.

- Should an attorney act unprofessionally in any way a client will have the following options of recourse - being:
  - To communicate the cause of dissatisfaction with the attorney himself.
  - To insist upon a remedy - either personally or in writing by registered mail.
» Should the attorney fail to take appropriate action the client will be entitled to lodging a complaint in writing with the **Provincial Law Society** in the client’s region.

The Provincial Law Society will **thoroughly assess all matters** once the required correspondence has been exchanged who will investigate the matter and **take appropriate action** against the attorney in question.

---

**What is the rationale for the crime of contempt of court?**  

(5)

**The rationale for the crime of contempt of court is the following:**

- Courts must be able to attend to the proper administration of justice and must be seen and accepted by the public to be doing so.

- Without public confidence in the administration of justice and in the integrity of judges, the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed.

- Such lack of confidence in, and even contempt for, courts will have the effect that people will be generally dissatisfied with all judicial decisions and will become unwilling to obey them. Whenever the allegiance to the laws is so fundamentally shaken, justice will be obstructed.

- The rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.

- The authority and influence of the court exist in the interest of the public at large.
The crime of scandalising the court is, therefore, concerned primarily with the publication of comments which reflect adversely on the integrity of the judicial process or its officers.

The crime of contempt of court does not aim to protect the feelings or even reputation of judges or to grant them any additional protection against defamation other than that available to other persons.

Critically discuss the argument that legal ethics is no more than compliance with a legal or professional code? (5)

In spite of the lofty ideals and the strong disciplinary prescriptions, there is criticism from both the side of the profession and the public against the legal code of ethics.

Practitioners raise certain practical concerns – being:

- Professional codes are not always enforced by law societies and those who transgress them are not always dealt with effectively. Hence practitioners argue that the profession might as well abandon them, or replace them with codes of business ethics.

- Others are afraid of upholding ethical values and sticking to the rules, when their colleagues are not. They fear that by trying to encourage their clients to do the right thing, these clients may go to somebody else who is willing to carry out their wishes.

They also raise certain theoretical concerns:

- The very idea that the practice of law is a profession (and not merely a job in which bureaucratic tasks associated with a business are executed) counters the idea that legal ethics can be reduced to the “rules of ‘professional conduct’”.
One justification for the self-regulation of the profession is that the practice of law requires complex professional judgments, the reasonableness of which can be judged only by fellow professionals.

Self-regulation presumes that the conduct of a practitioner will not be judged against a code, but by colleagues who exhibit those virtues inherent in morally good practitioners.

The formalistic idea that legal ethics is no more than the compliance with a legal code makes, according to our view, a mockery of this justification, reduces law to another business enterprise, and exposes the continued existence of the law and bar societies as no more than agencies created to protect vested interests.

Stan Ross comments that: When law and ethics are approached from this wider philosophical perspective, it becomes clear that legalistic or rule-based approach to ethical responsibility frequently results in strangely unethical approach to legal ethics amongst lawyers.

Ethical philosophy suggests that ethical responsibility involves much more than, or even something completely different, to strict compliance with rules.

An attorney approaches you as an advocate to represent his client who is suspected of raping / molesting a 6 year old girl / having performed an illegal abortion. Will you accept the brief or not? 4x

Advocates as litigation specialists: are obliged to accept the brief if they are available and able to do the work.
The fact that the advocate’s political or religious beliefs conflict with those of the client does not justify refusal of a brief.

Advocates generally may not accept briefs directly from clients but must be briefed by an attorney. This is called the “referral rule”.

Direct instruction is sometimes allowed, for example, from the Legal Aid Board.

Direct instruction for legal opinions is also allowed in some provinces. These are, however, exceptions on a strict rule.

Attorneys on the other hand are not obliged to accept client’s brief, an attorney should - if he does accept a client’s mandate - carry out the work with the necessary due diligence and encompassing the care, skill and commitment that may reasonably be expected from any legal practitioner.

If so attorneys should be committed to the aggressive single-minded pursuit of their client’s legal objectives, regardless of their personal opinion of the character or the moral merits of the client’s objectives.

Discuss the lawyer’s relationship with the public? (5)

As officials of justice lawyers...

should be available to render legal services to the public.

bear the trust and confidence of the public and are expected to...

carry on their profession with integrity and honour

Thus lawyers should maintain high standards of professional behaviour:

accordingly the courts must ensure that practitioners are persons of dignity, honour and integrity (Nathan v Natal Law Society 1999 (1) SA 706 (C))
Misconduct of such a serious nature that it shows defects in character and a lack of integrity renders the person unfit to practise must elicit sanction from the profession including disbarment.

- **Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop** 1994 (1) SA 359 (A). disbarred for contravening the insolvency act & statutory perjury which detracted from his fitness to practise as an attorney.

- In **Ex Parte Moshesh** 1992 (4) SA 875 (E) it was held that the fact that Moshesh was a fugitive from justice was incompatible with the high moral and ethical standards expected of an attorney, and that he could not be re-admitted as an attorney.

**Lawyers’ conduct in court and towards witnesses in court:**

- Witnesses who are subpoenaed to appear in court are performing a public duty in coming to court and should be treated with respect. Offensive, unreasonable or intimidating cross-examination should be avoided.

- Improper examination detracts from the court procedure and its disciplined image. It creates an unfavourable image with the witnesses and general public. It is the duty of the presiding judicial officer (eg the judge) to protect witnesses from such abuse.

- In terms of our Roman-Dutch common law, advocates and attorneys have a ‘qualified’ privilege in conducting a case in court. This privilege, which gives them great latitude to put their client’s case, is based on public policy according to which they should not be hampered in their search for the truth and justice. They may not, however, abuse the legal process to slander the opposition or third parties maliciously.
If this privilege is abused, for example by making false and slanderous statements wholly unconnected to the case, the privilege lapses and legal liability for the injury caused may ensue. Only if an advocate or attorney is able to prove reasonable grounds for making defamatory statements, and to show that this promotes his or her client’s case, will he or she be able to rely on this privilege.

Write notes on the following:

(i) Characteristics of post-modern ethics

(ii) What is the meaning of legal ethics

(iii) When and how may judges be removed from their office?

(iv) The duty of confidentiality owed by the attorney to his client?

(v) The circumstances when an advocate can refuse to accept a mandate?

In summary, postmodernism is characterised by

(1) the demise of the belief in the universal validity of a particular life-style or morality,

(2) the celebration of difference,

(3) the rejection of absolutes as well as universals, and

(4) the recognition of necessity to accept uncertainty and indeterminacy as a way of life.

Legal ethics in the wide sense refers to the relationship between law and ethics.
In the narrow sense it refers to the ethical standards of professional conduct applicable to the field of law.

In the narrow sense it thus deals with the ought’s of providing legal services for example, the question: “how ought a legal practitioner to behave in order to be a good, decent and proper legal practitioner”.

Bryant et al postulates that: “While ethics is about what we ought and ought not to do, it is also about setting priorities in human behaviour. Ethics is not always about what is absolutely right or wrong, acceptable or unacceptable, ideal or less than ideal. It is also about what is the best decision in particular circumstances, what is the lesser of two evils, what is the balance between doing good and causing harm. Ethics is therefore about working out the principles on which we make these sorts of decisions.”

“Legal ethics” can be understood in a wide and a narrow sense.

In the wide sense, it refers in general to the relationship between law and ethics (or morality). For example may the law be used to enforce moral views on abortion, homosexuality, prostitution or human cloning?

In the narrow sense, the term refers to the ethical standards of professional conduct applicable to the field of law (as opposed to the field of medicine, for example, in which case we would speak of “medical ethics” to refer to the professional conduct required of medical practitioners).

Legal ethics in the narrow sense thus deals with the “ought’s” of providing legal services: “How ought a legal practitioner to behave in order to be a ‘good’, ‘decent’ and ‘proper’ legal practitioner?”
(iii) When and how may judges be removed from their office? 5x

The impeachment and removal from office of a judge in terms of section 177 of the Constitution is available in extreme cases only, namely incapacity, gross incompetence, or gross misconduct on the part of the judge – or – if 2 thirds of the national assembly calls for the removal of a judge.

It is clear from the above that judges may be removed from office by a special impeachment procedure.

Section 174 (1) provides that judges must be SA citizens who are “appropriately qualified” and “fit and proper persons”. Judges ought to be impartial and independent of government and outside financial interests.

Whilst no code of ethics for judges is currently in force, and all complaints are referred to the Judicial Service Commission - it is of paramount importance that judges can still be “credible flag bearers“ of the need to observe the law and good morals and that their word, decisions and judgment should be beyond doubt.

Resignation - What is expected of judges themselves in this regard?

We prefer to regard moral integrity as including the whole person in all aspects of his or her life. We prefer people in public office who have private moral integrity, as well as public integrity.

The Constitutional Court held in this respect that no one expects judges to be infallible.

What is expected from them is honesty, integrity and self-discipline, and that the process of resolution followed by them should be analytical, rational, and reasoned.

Nothing prevents a judge to resign of own accord.
The duty of confidentiality owed by the attorney to his client?

The contract between attorney and client also brings about the duty of confidentiality.

- The attorney may not divulge confidences or communications made to him or her by the client in the course of their professional relationship.
- This applies whether the communication is oral or in writing, and even where the client admits that he or she has committed a crime.

Hence a relationship develops between an attorney and client wherein the attorney’s duty of confidentiality and the client’s corresponding right to confidentiality, continue even after the attorney-client relationship has come to an end, and only the client may waive this right.

Apart from this contractual obligation, it is also an established principle of South African law that confidential communications made with a view to litigation, as well as all confidential communications made for the purpose of giving or receiving legal advice or assistance, are considered to be “privileged information”.

- This means that privileged information may not be disclosed to a court or in quasi-judicial proceedings, or offered in evidence.
- It is an accepted legal principle that to divulge this kind of information would not promote the proper functioning of the litigation process or of the legal system in its entirety.

*S v Safatsa* 1988 (1) SA 868 (A)

The privilege is the client’s, and not the practitioner’s

*Algemene Balieraad van Suid-Afrika v Johan van den Berg* 2005 (case no 2419/2005 C).
Privilege must be claimed in court, and does not arise automatically

(vi) **Recourse for clients who are not satisfied with a legal practitioner’s work?**

Attorneys are bound by a strict professional code and clients inter alia have the right to professional, honest, equitable and unbiased conduct and advice at all times.

- Should an attorney act unprofessionally in any way **a client will have the following options of recourse** - being:
  - To **communicate the cause of dissatisfaction with the attorney** himself.
  - To **insist upon a remedy** - either personally or in writing by registered mail.
  - Should the attorney fail to **take appropriate action** the client will be entitled to lodging a complaint in writing with the **Provincial Law Society** in the client’s region.

The Provincial Law Society will **thoroughly assess all matters** once the required correspondence has been exchanged who will investigate the matter and **take appropriate action** against the attorney in question.

---

(v) **The circumstances when an advocate can refuse to accept a mandate?**

**Advocates** generally may not accept briefs directly from clients but must be briefed by an attorney. This is called the **“referral rule”**.

**They are however obliged to accept the brief if they are available and able to do the work.** The fact that the advocate’s political or religious beliefs conflict with those of the client does not justify refusal of a brief.

**Refusal may only be justified if:**
The advocate is already committed to defend another party in the same matter.

The advocates schedule would not permit or cause undue delay.

The matter falls beyond the advocates field of expertise

The advocate may have a financial or pecuniary interest in the outcome or any possible conflict of interests and whether the brief involves any illegality or other impropriety.

You are an attorney. On Saturdays you play golf with the local doctor and the state prosecutor. While playing you tell them of one of your existing cases, mentioning the persons’ name and the facts of the case. You have a good laugh because the case is very interesting. But is your conduct acceptable? (5)

- The contract between attorney and client also brings about the duty of confidentiality.

- The attorney may not divulge confidences or communications made to him or her by the client in the course of their professional relationship. This applies whether the communication is oral or in writing, and even where the client admits that he or she has committed a crime.

- The attorney’s duty of confidentiality and the client’s corresponding right to confidentiality, continue even after the attorney-client relationship has come to an end, and only the client may waive this right.

- Apart from this contractual obligation, it is also an established principle of South African law that confidential communications made with a view to litigation, as well
as all confidential communications made for the purpose of giving or receiving legal advice or assistance, are considered to be “privileged information”.

- This means that the information may not be disclosed to a court or in quasi-judicial proceedings, or offered in evidence. It is an accepted legal principle that to divulge this kind of information would not promote the proper functioning of the litigation process or of the legal system in its entirety (S v Safatsa 1988 (1) SA 868 (A)). The privilege is the client’s, and not the practitioner’s (Algemene Balieraad van Suid-Afrika v Johan van den Berg (case no 2419/2005 C). Privilege must be claimed in court, and does not arise automatically.

- The conduct in the scenario is clearly a gross transgression of the attorney’s duty to protect the right to confidentiality of his client and can lead to sanction from a professional body or even disbarment.

=====================================================================
Compiled by Pierre Louw : LLB UNISA : 2014