

ATP 105

PROFESSIONAL ETHICS AND PRACTICE

COURSE INSTRUCTOR: Mr. Orii Onyango

Statement of Course Description, Objectives and Assessment

Description

A legal ecosystem (the Bar, Bench, Prosecution, State Law Office and the Academia) that is a stalwart of integrity is critical for the existence of a self-guarding democracy that is strongly rooted within the rule of law. Such a legal profession ensures that constitutionalism, justice, and the dignity of all citizens is respected and zealously upheld. This Course seeks to give students a practical perspective and understanding of the high ethical standards demanded and exercised in the legal profession. The course will expose students to the ethical and legal framework governing the conduct of legal professionals.

Objectives

At the end of the course, the students should be able to appreciate the theoretical and philosophical underpinnings of professional ethics. Additionally, the learners should exhibit a practical appreciation of professional ethics in the advancement of justice, the rule of law, and constitutionalism. It is expected that the students will also be well placed to trace the historical development and evolution of various laws, regulations, policies, and codes governing professional ethics. The course will also equip you with a concrete understanding of the modes of enforcement of the laws, regulations, and codes on professional ethics and practice. The students should also be able to assess the efficacy of professional ethics and practice laws in Kenya.

Teaching Method

The classes will adopt a learner-centric approach where the students will be expected to participate. For effective discussion, case law and relevant readings (statutes, journal articles etc) will be discussed under guidance from the course instructor. As such, prior reading is advised in preparation of a class.

Class attendance

Regular attendance is very important in understanding and completing the course successfully. Non-attendance should be communicated in advance, and a reasonable explanation for the same provided.

Course commitment

Regular attendance of classes and deep research outside the classroom is encouraged so as to widen scope of student's knowledge as well as enrich the discussion during lectures. Students are also advised to fully participate in Firm (group) discussions and assignments.

Evaluation

The Council of Legal Education (CLE) will direct on the dates of Examination through appropriate forum.

Recommended Learning Resources

The following materials contained herein are not exhaustive.

Textbooks

1. Bailey, S.H., (1991) *Smith and Bailey on the Modern English Legal System* (2nd Edn). Sweet and Maxwell, London
2. *Compendium of Codes of Legal Practice, Conduct, Ethics and Etiquette in East Africa*, EALS! LawAfrica (K) Ltd .2005
3. Gichure W. Christine, *Basic Concepts in Ethics*. 0997). Focus Publications Ltd, Nairobi
4. Harvey;W. *Introduction to the Legal System in East Africa* (EALB,1975)
5. Home, ET., (1988) *Corder's Levi Relating to Solicitors* (8th Edn) Butterworths. London and Edinburgh.
6. Morgan. T.D. *Problems and materials on professional responsibility*, (2nd Edn.) (1981) The foundation press
7. Parker. S., and Charles, S, (Eds) (1995) *Legal Ethics and Legal Practice*. Contemporary issues. Clarendon Press
8. Rhode. D.L. (Ed.) *Ethics in Practice. Lawyers Roles, Responsibilities, and Regulation*. (2000) Oxford University Press, Inc. New York
9. Y. Ghai and J.P.W.B.McAuslan, *Public Law and Political Change in Kenya*. O.U.P, Nairobi. 1970

STATUTES

1. Advocates Act. Chapter 16 Laws of Kenya
2. Council of Legal Education Act. Chapter 16A Laws of Kenya
3. Law Society of Kenya Act. Chapter 18 Laws of Kenya
4. Leadership and Integrity Act
5. Public Officer Ethics Act, 2003
6. The Draft Law Society Bill, 2012
7. The Ethics and Anti-Corruption Commission Act
8. The Judicial Service Act, 2011
9. The Supreme Court Act, 2011
10. The Vetting of Judges and Magistrates Act. 2011
11. Advocates Disciplinary Committee Rules
12. The Advocates (Continuing Professional Development) Rules, 2014
13. Aavocates (Practice) Rules

Codes, Model Laws and Guidelines, and other Instruments

1. Bangalore Principles of Judicial Conduct
2. Code of Conduct- Office of the Attorney General Act
3. Commonwealth Latimer House Principles

4. The Law Society of Kenya Digest of Professional Conduct and Etiquette (As at 1st January 2000)
5. The Judicial Service Code of Conduct and Ethics, 2003

Other Sources (Preliminary readings)

1. *Final Report of the Task Force on Judicial Reforms* (July, 2010)
2. Mark Stobbs (2002). *Review of the Effectiveness of the Disciplinary Committee of the Law Society of Kenya and The Complaints Commission*
3. Ojienda, Tom. *Professional Ethics and the Legal Profession*. Paper prepared for presentation at the Induction Program for newly admitted lawyers on the 14th February, 2004.
4. *Report of the Advisory Panel of Eminent Commonwealth Judicial Experts* Nairobi, Kenya May 17, 2002
5. *Report of the Task Force on The Development Of A Policy And Legal Framework For Legal Education In Kenya* August 2006
6. *Task Force on The Development Of A Policy And Legal Framework For Legal Education In Kenya* (situation paper) April 2005
7. Wood, David, *Judicial Ethics: A Discussion Paper*, Australian Institute of Judicial Administration Incorporated, 1996

Case laws can be obtained from the Kenya Law website (www.kenyalaw.org). For England and American cases, students are advised to look up the databases hosted at <http://www.baiiii.org> and <https://www.law.cornell.edu/> respectively.

Students are further advised that further readings will be provided during classes.

Guest speakers may be invited to speak on select topics. Students will be expected to be particularly keen in these lectures and to engage the speakers in their selected topics. The Guest Lecturers shall include:

- a) Justice Odunga — Integrity on the Bench.
- b) Mrs Dorcas Oduor of the DPP's office — Integrity of prosecutors.
- c) Hon Emily Omily Ominde- JSC Member, speaking on how JSC enforces the judicial professional code.
- d) A representative of the Advocates Complaints Commission — professional conduct of advocates.

The dates of the guest lectures shall be communicated soon.

TERM ONE

Week One to Three

Week 1

1. Introduction and Overview of Professional Ethics and Practice

- Definition of Ethics
- Nature of Ethics

- Philosophical foundations of Ethics

Week 2

- Nature of the Legal Profession

Week 3

- History of the Legal Profession
- Historical Evolution of the Legal Profession in Kenya (during, and after colonialism)
- Role/ functions of the Lawyer in society

What are the ethics behind the LSK Advocates Dress Code?

Should a lawyer's ethical decisions be determined by the morals (values, norms, and virtues) or should a particular situation be used to assess the ethical conduct of an advocate?

Week Four to Six

The Advocates Act, Chapter 16 Laws of Kenya

Rule 9 of the Advocates (Practice) Rules

The Council of Legal Education Act, Chapter 16A laws of Kenya

The Law Society of Kenya Act

Aaron Ringera and 2 Others vs. Paul Muite and Others (Unreported)

Cannisius Kiruqara vs. Evans Monari and Others. (Unreported)

Mohammed Ashraf Sadique & Another v Mathew Oseko tie Oseko & Company Advocates

[2009] eKLR

Obura v Koome HCCA 146 of 2000

1. The rights, privilege, and obligations of an advocate

Week 4- The rights of an advocate

Week 5- The privilege of an advocate

Week 6- The obligations of an advocate

- Correspondence between advocate and client or third party
 - Article 31 of the Constitution of Kenya (does it protect confidential information?)
 - Section 134-137 of the Evidence Act, Cap 80 Laws of Kenya.
 - Minter v Priest (1930) AC 558 (HL) as per Lord Atkin
 - United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950)
 - Lincoln v Daniels (1962) 1 OS 237
 - Norwich Union Life Insurance Society v Tony Waller Ltd (1984) 1 All ER 597 CA
 - Sirnaam General Contracting Co v Pilkington Glass Ltd (1987) 1 All ER 345
 - Togstad v. Vesely, Otto, Mille.- & Keefe, 291 N.W. 2d 686 (Minn. 1980)
- The advocate and correspondence
 - Minter v Priest (1930) AC 558 (HL)
- The advocate and professional undertakings
- Advocate-client privilege and the waiver of the privilege.

Minter v Priest (1930) AC 558 (HL)- Whose privilege is it? Who decides when to lift it?

Read Michrnerhuizen S. (2007): *Confidentiality, Privilege: A Basic Value in Two Different Applications*. Accessible at

http://www.americalibar.org/content/damiaba/administrative.professional_responsibility/confidentiality_or_attorney.clutchchecialarn.pdf

- Communications between advocate and the court
Munster v Lamb (1883) 11 QBD 588
- Communications between advocate and the public
- What are the rights, duties, and obligations of in-house counsels? (Should state counsels and other government lawyers be subject to regulations and ethical codes that govern those in private practice? What is the rationale of your argument?)
- Professional Etiquette and decorum (Why regulate dressings?)
- Conflict of interest. (How does it happen? How do you mitigate the circumstances occasioning conflict of interest? How does one avoid such circumstances?)
Kamlesh D Pattni & Others v George Oraro & Others HCCA 286 of 2001 (unreported)
National Bank Ltd v Peter Korat & Anor HCCC 77 of 1997 (unreported)
Hedrich v Standard Bank of Scotland [2008] EWCA Civ 905, [2008] All ER
Francis Mugo & 22 others v James Bress Muthee & 3 others [2005] eKLR
- The role of an advocate as an officer of the Court (see roles of the Prosecution office). According to Richard Du Cann in The Art of the Advocate: as an officer of the Court, the advocate's absolute loyalty and devotion to truth and justice should always subsume duty towards clients. (Whose truth?)
- The advocate as a citizen
An of Snntland r2nnR! Ft/tina 3r:87 A1: r. 7Z.
Myers v Elman (1940) AC 282
Ronde' v Worsley (1969) 1 AC 191

Week Seven to Ten

1. The limits(disabilities) of an advocate's duties, rights, privileges, and obligations

Week 7- Limits of Duties

Week 8- Disabilities of an advocate's rights

Week 9- Disabilities of an advocate's privileges

Week 10- Disabilities of an advocate's obligations

To what extent and under what circumstances should an advocate transact commercially with their client? What vitiates legal advice rendered by an advocate to their client in commercial arrangements? (negligence in fiduciary relationships) (duty of care of an attorney to a client) (Place of rules of equity (fiduciary duty) in professional ethics and practice)

Rule 11, 15, and 25 LSK Digest

Rule 2 and 7 Advocates practice Rules

Nocton v Lord Ashburton (1914) AC 932

- Should an advocate act for more than one client where the clients are also involved in another case pitching them against each other?
Sobeth Developers Ltd v South Nyanza Sugar Co. Ltd. [2010] eKLR
- Under what conditions can the advocate-client relationship continue in the face of future commercial transactions between the advocate and client? Sobeth Developers Ltd v South Nyanza Sugar Co. Ltd [2010] eKLR. (For a government's advocate, should they sever the legal relationship where the client's position (government policies or manifesto) contravenes legitimate expectations or harms public interests?)
- Other disabilities of an advocate
Purchases, loans, gifts, bequests, trusteeships
Re A Solicitor (1974) 3 All ER 853 (How much should an advocate communicate to their client in the execution of wills?)
- Advocates and subject matter of suit (In what circumstances can an advocate disqualify themselves from an ongoing suit?)
- Privity of information. (Is it ethical for an advocate to disqualify or abandon a case upon coming into new evidence or information that is dangerous or of concern to national security? Does the attorney-client privilege cushion the attorney from revealing such information?)
- What are the remedies of breach of fiduciary duties?

TERM TWO

Week Eleven to Thirteen

1. Retainer

A retainer refers to legal fees paid in advance by a client for unrendered services.

- Nature of a retainer
Cf ruling in Njouaoro & Cc Adv vs. Dubai Bank Kenya Limited Misc App 286 of 2007
Bank Trust Co Ltd -v- Hett Stubbs & Kemp 1978.
Is it ethical to be on a retainer?
What is the effect of a retainer on an advocate's morale? Should clients pay fees through retainers so as to mob/ate and/or compel their advocates to handle suits?
- What are the various modes of retainer
- What is the reasonable duration under which a retainer should proceed?
Danish Mercantile Co Ltd v Beaumont (1951) 1 All ER 925 at 930 per Jenkins LJ
- Capacity: Who can retain an advocate

- o Daimler Co Ltd v Continental Tyre and Rubber co (Great Britain) (1916) 2 AC 307
- : King Woolen Mills Ltd and Anor v. Kaplan & Stratton Advocates Civil. App. No. 55/93
- Retainer on particular occasions
 - : Njougoro and Company Advocates v Dubai Bank Kenya Limited [20081 eKLR
- Sale of land, Grant of Lease, Mortgages, Appointment of trustees
- Termination of retainer (through notice, loss of capacity, court order, or lapse of timeframe in which legal services engaged, death of client, fraud. bankruptcy, client's intentions)
 - o Njougoro and Company Advocates v Dubai Bank Kenya Limited [20081 eKLR
 - o Watts v Official Solicitor (1936) 1 All ER 249 CA
 - o Krakauer v Katz (1954) 1 All ER 244
- Effects of termination
 - o Njougoro and Company Advocates v Dubai Bank Kenya Limited 12008] eKLP

Week Fourteen to Sixteen

1. Advocate on a Retainer
 - Authority of an advocate on retainer
 - o Can be express, implied, usual or apparent
 - : King Woolen Mills Ltd and Anor v. Kaplan & Stratton Advocates Civil. App. No. 55/93
 - Nocton v Lord Ashburton [1914] AC 932
 - o Re Storer (1884) 26 Ch D 189
 - What are the limits of the retainer?
 - Waugh v HB Clifford & Sons Ltd (1982) 1 All ER 1095 CA
 - Groom v Croker (1939) 1 KB 194 (1938) 2 All ER 394
 - Acts generally authorized
 - Effects on want of authority
 - Imena vs. Ethuro (2005) 1 KLR 417
 - Richmond v Branson & Son (1914) 1 Ch 968
 - Selangor United Rubber Estates Ltd v Cradock (No 4j (1969) 3 All ER 965 at 975
 - Indemnity from Client
 - Sheffield Corp v Barclay (1905) AC 392 at 397
 - Authority on documents after termination of retainer
 - The advocate and liability insurance
 - Sections 81 of the Advocates Act

Week Seventeen to Twenty

1. Lien
 - Nature of a lien.
 - What is an advocate's lien?
 - Types of liens (Common law lien: Retaining lien; Specific lein and Statutory lien)

Barat v Gough-Thomas (1951) 2 All ER 1048 at 1048 per Evershed MR
Re Qirmingham. Savage v Standard (1959) Ch 523, (1958) 2 All ER 397

- When is an advocate entitled to a lien, and what type of lien?
- What costs can an advocate secure with a lien?
- Nature of right conferred by Lien, limitation of Lien

Section 47, 48, 52, and 80 of the Advocates Act

Rule 7 of the Advocates Practice Rules

2. What is the role of an advocate in the society?

- The ethical rationale of holding Pro bono publico briefs
- The ethics behind free legal aid clinics (What form of punishment should the governing bodies reserve for advocates who use legal aid trusts and foundations to enrich themselves?)
- Defence in capital offences (Can holding defence briefs in capital offences be justified given that most firms or advocates do it out of tradition rather than pursuit of justice for the inmates? What is the efficacy of public defence briefs in capital trials?)

TERM THREE

Week One to Two

Advocate's (Marketing & Advertising) Rules 2012.

Rule 2 of the Advocates (Practice) Rules

In the matter of Ababu P.T. Namwamba Misc No DCC 207/2004

Okenyo Omwansa George & another v Attorney General & 2 others [2012] Eklr per Justice Majanja

- Advertising

Can the business ethics of the commercial wcit.⁴ work within the legal field?

- Touting
- Champerty

Ahmednasir Abdikadir & Co Adocares v. National Bank of Kenya Limited 2006
eKLR

Wild v Simpson (1918-19) All E.R 682 (illegality of champerty)

Re Trepcá Mines Ltd. (1962) 3 All ER 351 per Lord Denning M.R

Section 36(1) of the Advocates Act

Week Three to Six

1. Torts of an Advocate

- Negligence.

Rankine v Gatton Sons & Co Ltd (1979) 2 All ER 471

Apollo Insurance Co Ltd v Flavia Rodrigues HCCC 431 of 2002 (unreported)

Hedley Byrne & co Ltd v Heller & Partners Ltd (1964) AC 465

Midland Bank Trust Co Ltd v Nett. Stubbs & Kemp (1979) 3 All ER 571

- As an officer of the court (default, misconduct or failure to act with reasonable competence and expedition)
 - Godfrey v Dalton 1830- a case on breach of trust through failure to exercise reasonable probity. See the judgment by Tindal CJ
 - Fletcher & Son v Jubb. Booth and Helliwell (1920) 1 KB 275 at 280 as per Lord Scrutton
- Liability of an advocate (in proceedings, out of Court)
 - Edwards v Porter (1923) 2 KB 538
- Trusteeship
- Liability to third parties (in contract)
 - Tai Hing Cotton Mill Ltd v Liyu Chong Hing Bank Ltd (1986) 2 All ER 947 PC
- For contempt of court
- Undertakings as legally enforceable solemn legal declarations. Undertakings must mirror the intentions of the parties.
 - Re a Solicitor (1966) 3 All ER 52
 - Silver and Drake v Baines (1971) 1 All ER 473
 - Muthaura Mugambi Ayugi & Njonjo, Advocates V Jane Nyamboke Njage (locus classicus of local cases on undertakings)
 - United Mining and Finance Corpn. Ltd v Becher (1910) 2 KB 296
 - Kenya Reinsurance corporation v V.E.Muguku T/A V.E. Muguku & Co NAI CA NO.48 of 1994
 - Peter/tg'Ang'a credit Bank & rhArlac AyAkn AlyArhAe 774
 - Co.Advocates NAI CA No. 263 of 1998

Assuming that as an advocate you have been sued for a tort by your client, what would be your defenses?

Week Seven to Ten

1. Ethics and Practice within a Firm
 - Multi-disciplinary practice
 - Article:** Brustin, S. L. "Legal Services Provisions through Multidisciplinary Practice-Encouraging Holistic Advocacy While Protecting Ethical Interests." *U. Colo. L. Rev.* 73 (2002): 787.
 - Certification of law practice- what is the role of certification in enhancing professional ethics and professionalism in the legal field?
 - The management of a firm- how can the management of a legal firm contribute towards ethical and professional conduct?
 - The administrators of Maxwell Ombogo vs. Standard Chartered Bank Ltd and the Law Society of Kenya. CA NO. 162 OF 1999 NBI
 - Myers Elman (1940) AC 282

2. Enforcing professional ethics and practice
 - The Advocates Complaints Commission
What is the process of filing a complaint against a lawyer?
 - The Advocates Disciplinary Committee
What is the nature of a disciplinary proceeding against an advocate of the High Court of Kenya? Are the principles of natural justice observed during the disciplinary hearings?

Maharaj Krishan Bhandari v The Advocates Committee Privy Council Appeal No 39 of 1955

In the matter of Ababu P.T. Namwamba fvlisc Nc DCC 207/2004

Week Eleven to Thirteen

Course wrap-up and Revision.

1. THE ADVOCATES (CONTINUING LEGAL EDUCATION) REGULATIONS. 2004
 - What reforms should be introduced to the CLE to bolster legal professionalism?
What is the role of the CLE in enhancing professional ethics and practice?

2. A radical appraisal of Professional Legal Ethics and Practice (What is the image of the legal profession to the society? Can it be salvaged? If yes, how? If no, why? What is the role of professional ethics and practice in redeeming the image of the legal profession?)
 - *in the matter of an Application by Rita Biwott* HCCA 238 of 1994 (unreported)
 - Mark Stobbs (2002) Review of the Effectiveness of the Disciplinary Committee of the Law Society of Kenya and The Complaints Commission