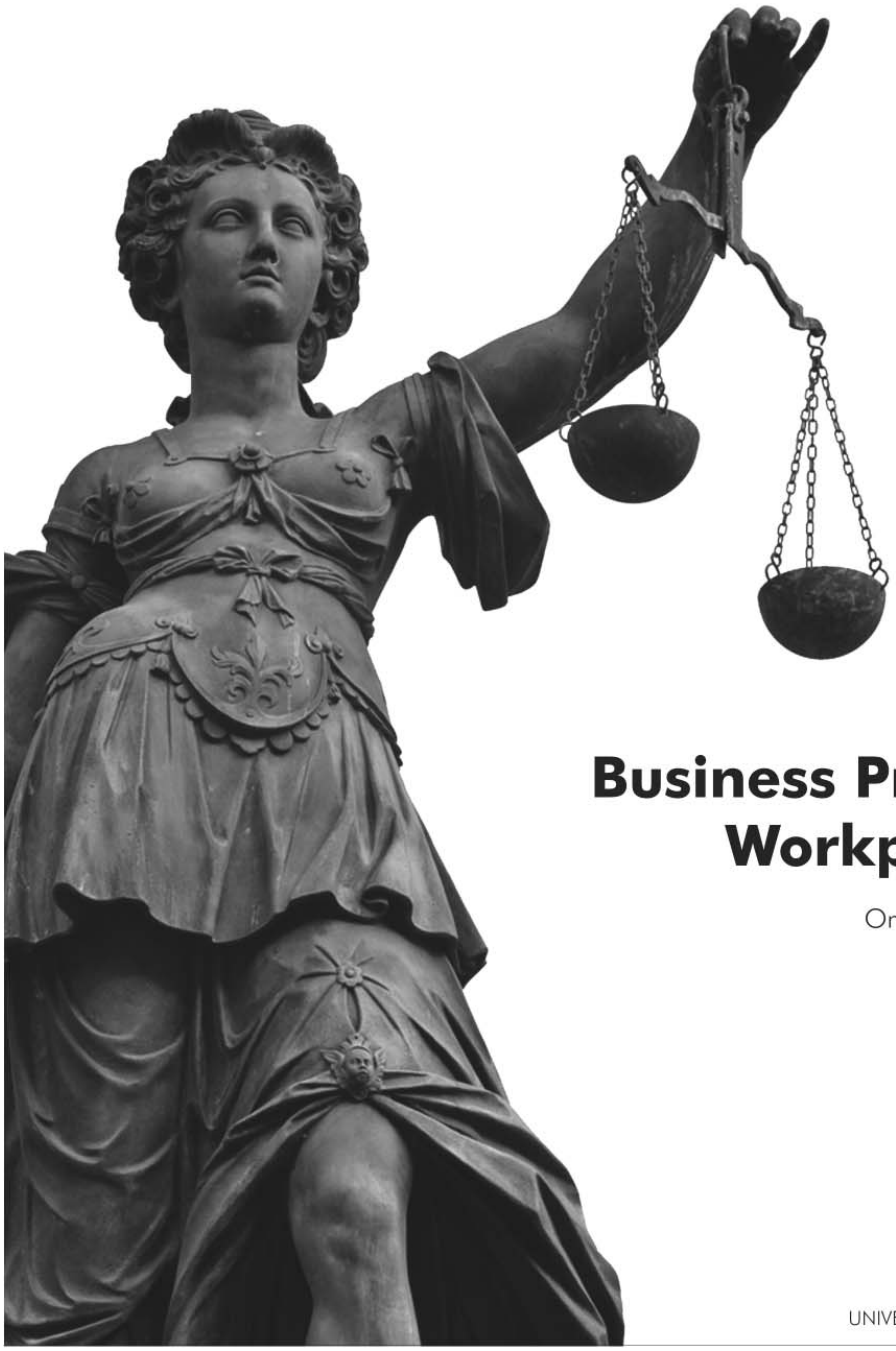


Business Practice and Workplace Ethics

Only study guide for BWE1501

DEPARTMENT OF JURISPRUDENCE
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INTRODUCTION



DEAR STUDENT

Welcome to the module, **Business Practice and Workplace Ethics BWE1501!**

In the module **Introduction to Paralegal Studies PAR1501**, you were introduced to paralegal practice. You know by now that there is a big difference between a paralegal and a lawyer (legal professional). For example, you know that lawyers are generally divided into two groups, namely attorneys and advocates, and you have a basic idea about what they do.

In this module we want to teach you more about the legal profession, the legal professionals themselves and what important ethical rules must be considered in legal practice.

BWE1501 consists of the following study units:

- **Study unit 1: The legal profession**
  In this study unit we will look at the attorneys' profession and the advocates' profession in detail. We will also show what other differences exist between paralegals and legal professionals.

- **Study unit 2: The law firm**
  In this study unit we will look at a law firm, the people who work in a law firm and the structure of a law firm. We will also look at the role that paralegals play in law firms.

- **Study unit 3: Ethical considerations**
  In this study unit we will look at what ethics is and what ethical considerations are applicable to paralegals. We will also look at how paralegals should apply these ethical rules to everyday practice.

How to use this Study Guide:

1. There is **no prescribed textbook** for this module. You must study this study guide together with the other tutorial letters for this module.
2. At the beginning of each study unit there is a block with the heading "**Learning outcomes"**. The contents of these blocks set out the most important aspects covered in each specific study unit. At the end of each study unit you should refer to the **learning outcomes** to ensure that you have attained the outcomes and can apply them to that study unit.
3. You will notice that various **activities** are set out in this module. You will need to work through all the activities on your own. We will provide feedback in a further Tutorial Letter 201 so that you can assess whether or not you answered the activities completely and correctly. It is very important that you complete all the activities before you look at Tutorial Letter 201 so that you can see what you understand and what you do not understand about the work covered in this module. Keep all your answers to the activities so that you can refer to them when working through the tutorial letters.
4. As this module is an introductory course, you will be provided with some **background information** about the legal profession. This background information is necessary for you to understand the legal profession, but we will not examine you on these aspects. All such discussions will contain an icon at the beginning which will indicate that you do not have to study the sections for assignment or examination purposes. Do not merely ignore these sections but read through them attentively as they will help you understand the legal profession better and will provide you with the background needed to understand the other work covered in this module.
5. You will encounter many new terms throughout this module. Where necessary we have explained certain terms throughout this study guide as they are introduced to you. However, this study guide may also contain other terms which might be unfamiliar to you. You will find a **glossary** at the end of this study guide which contains an alphabetical list of all these terms and their meanings. Such terms are indicated in *italics* throughout this study guide when used for the first time.
6. At the end of each study unit (including at the end of this section) there is a heading called "**Sources referred to in this study unit**". These paragraphs indicate the sources used to compile this module and you do not have to study them for assignment or examination purposes. Of course, you are welcome to look at these sources if you would like to know more about the specific subject.

7. We have used **icons** to indicate important information that will assist you in using this study guide. The following icons will be used:



This icon indicates an **activity**.



This icon indicates that the specific paragraph forms part of **background information** and will not be formally examined in your assignments or the examination. You should read through these sections attentively but do not have to study them.



This icon indicates **very important information** that will definitely form part of your assignments and your examination.

We trust that you will enjoy this module and wish you success in your studies.

STUDY UNIT

1



The legal profession

1. LEARNING OUTCOMES

When you have worked through this study unit you should be able to

- summarise the important characteristics of the attorney profession
- summarise the important characteristics of the advocate profession
- compare the attorney profession and the advocate profession
- differentiate between paralegals and other legal professionals
- evaluate the consequences of performing prohibited actions reserved for the legal profession

2. INTRODUCTION

Just like paralegals, legal professionals work in all sectors of society. Legal professionals include attorneys, advocates, legal advisors and *law graduates* employed by the *Family Advocate*, the *Master of the High Court*, the *Public Prosecutor*, the *State Attorney* and the *State Law Advisor*. These five institutions form part of government.

It is impossible to discuss all the careers that legal professionals can follow. For the purposes of this module we will focus on the two main careers in the legal profession, namely the attorney profession and the advocate profession. As a paralegal, you will be required to know the difference between these two professions and the relationship between the two, and where you as a paralegal fit into this relationship.

3. THE LEGAL PROFESSION

In study unit 1 of the module **Introduction to Paralegal Studies: PAR1501** you learnt the main characteristics of a paralegal namely:

- A paralegal is not a legal professional (lawyer)
- A paralegal has a basic knowledge of the law
- A paralegal obtained his/her legal skills or knowledge through education, training and work experience

- A paralegal works under the supervision of a legal professional
- A paralegal can be employed at different places

You also learnt the main differences between legal professionals (attorneys and advocates) and paralegals. We summarise the main differences in the table below:

Tabel 1: The main differences between legal professionals and paralegals

<table>
<tr><td colspan="2">Legal professional (lawyer)
Has a law degree</td><td colspan="2">Paralegal
Does not have a law degree but has one or more of the following:
A paralegal diploma
Received informal legal training
Practical legal experience</td></tr>
<tr><td>Attorney
Works at a law firm
Works directly with clients
Does all types of legal work</td><td>Advocate
Does not work at a law firm
Receives work from an attorney
Specialises in court work</td><td>Law firm paralegals
Works at a law firm
Works under the direct supervision of an attorney</td><td>Community-based paralegals
Works at a community centre
Works independently but refers work to an attorney where necessary</td></tr>
</table>

You learnt that attorneys and advocates are legal professionals who have a law degree, while paralegals do not. However, there are further requirements a law graduate must meet before he or she may be admitted as an attorney or an advocate.

You further learnt that attorneys usually work in law firms and work directly with the public, while advocates specialise in court work and may only accept work from an attorney. This distinction also needs further exploration.

In this module we will be expanding on both these issues so that you will have a better idea of where you, as a paralegal, fit into the legal profession.

3.1 Legislation that is relevant to legal professionals

As you familiarise yourself with the content of the study guide, you will find that different pieces of legislation are relevant to the attorneys and advocates' professions. These pieces of legislation include

- the Attorneys Act 53 of 1979
- the Admission of Advocates Act 74 of 1964
- the Right of Appearance in Courts Act 62 of 1995
- the Legal Practice Act 28 of 2014

The attorneys' profession is governed and regulated by the Attorneys Act 53 of 1979 and the regulations issued in terms of this Act.

The advocates' profession is governed and regulated by the Admission of Advocates Act 74 of 1964, the rules prescribed by the General Council of the Bar of South Africa and applicable court rules.

The Right of Appearance in Courts Act 62 of 1995 regulates in which courts attorneys or advocates may appear.

A new piece of legislation that is relevant for legal professionals is the Legal Practice Act 28 of 2014, which was enacted into law in September 2014. However, even though this Act is currently in force, it was not in effect by 2016. This means that the attorneys' profession is still governed and regulated by the Attorneys Act 53 of 1979 and that the advocates' profession is still governed and regulated by the Admission of Advocates Act 74 of 1964.

Activity 1.1



List the different pieces of legislation that are relevant to the attorneys and advocates' professions in South Africa.

Answer

Feedback on Activity 1.1: This question relates to paragraph 3.1 above and tests whether you are able to distinguish the different pieces of legislation relevant to legal professionals. A formal answer to this question will be given in a further Tutorial Letter 201.

There are different steps and phases that need to be completed before the provisions of the Legal Practice Act will become binding on legal professionals. Because the Legal Practice Act has not yet come into effect, we will now only look at the most important concepts that will have an impact on legal professionals when the Act comes into effect.

- *Single regulatory body for attorneys and advocates*

When the Legal Practice Act comes into effect, a single regulatory body, the South African Legal Practice Council, will regulate all legal practitioners and candidate legal practitioners (i.e. attorneys, advocates and candidate attorneys). Some of the duties of this Council will be to

- regulate the conduct and affairs of all legal practitioners
- advise the Minister regarding matters concerning the legal profession and legal practice
- develop norms and standards to guide the conduct of legal practitioners, candidate legal practitioners and the legal profession
- develop programmes to empower historically disadvantaged legal practitioners and candidate legal practitioners

- *Attorneys and advocates' professions*

Section 34(2)(a)(ii) of the Legal Practice Act states that an advocate may provide legal services for a fee if he/she is directly requested to do so by a member of

the public. An advocate may only act on a direct request from a member of the public if the advocate is in possession of a fidelity fund certificate and a trust account. As you will see further on in this study guide, currently, an advocate may not accept an instruction directly from a member of the public. Only attorneys accept instructions directly from members of the public. This separation between the professions exists because attorneys and advocates play specific roles in servicing a client's interests. When the Legal Practice Act comes into effect, this position will change. The specific roles of attorneys and advocates are discussed in paragraphs 4.1 and 5.1 of the study guide.

- *Cost estimate notice*

Section 35(7) of the Legal Practice Act indicates that whenever any attorney or advocate first receives an instruction from a client, the client must be provided with a cost estimate notice, *in writing*, specifying: likely financial implications (including information on fees, disbursements and other costs), the practitioner's hourly fee, the client's right to negotiate fees, an outline of the work to be done, the likelihood of engaging an advocate, the financial implications of withdrawing from a trial and how costs will be recovered. If an attorney or an advocate does not provide a cost estimate notice to a client, it will be considered misconduct and the client will not be required to pay until the South African Legal Practice Council reviews the matter.

- *Recognition of paralegals*

As you have already learnt, only attorneys and advocates are considered to be legal professionals/practitioners. The Legal Practice Act does not change this position. It does, however, according to Section 34(9), call for the South African Legal Practice Council to investigate and to make recommendations on the statutory recognition of paralegals to the Minister within two years after the commencement of Chapter 2 of the Act, taking into account best international practices, the public interest and the interests of the legal profession, with a view to legislative and other interventions in order to improve access to the legal profession and access to justice generally.

Activity 1.2



List and briefly describe (in your own words) the most important concepts that will have an impact on legal professionals when the Legal Practice Act 28 of 2014 comes into effect.

Answer

Feedback on Activity 1.2: This question relates to paragraph 3.1 above and tests whether you understand the most important concepts that will have an impact on legal professionals when the Legal Practice Act comes into effect. A formal answer to this question will be given in a further Tutorial Letter 201.

You now have an overview of certain important factors of the Legal Practice Act that will impact attorneys and advocates once it does come into effect. **Please bear in mind that since the Act has not yet come into effect, the practical consequences of the Legal Practice Act will only be felt in a few years time**.

Let us now explore the attorneys' profession in some detail.

4. THE ATTORNEYS' PROFESSION

As previously mentioned attorneys work with the public and are usually the first points of contact when someone wants to obtain professional legal advice. This means that attorneys have a broad knowledge of the law in order to provide legal advice across different legal fields.

The fact that attorneys work with the general public has led to the attorneys' profession being highly regulated. The profession is governed and regulated by the Attorneys Act 53 of 1979 and the regulations issued in terms of this Act. The reason for such vigorous regulation is because there is a trust relationship between an attorney and his or her client. This means that the client does not understand the legal rules and procedures and trusts that his attorney will protect his or her rights and give him or her sound advice. It also happens regularly that an attorney holds his client's money in trust for a certain purpose and there are specific rules governing when and how an attorney may hold money in trust on behalf of his client. You will learn more about this specific issue below.

4.1 What do attorneys do?

Attorneys are engaged in a large variety of legal work. This can include civil matters, criminal matters, commercial work, labour law, property law, family law, estate planning and tax planning. Attorneys also accept instructions from various types of clients, for example individuals, companies, banks and associations.

Seeing that some of the areas of law can be complex, some attorneys specialise in a specific field. However, many attorneys still engage in general legal work across various fields and these attorneys are known as general law practitioners.

Attorneys may appear in the lower courts (e.g. magistrates' courts) and some attorneys may even appear in the higher courts (e.g. the High Court). However, attorneys generally make use of advocates to appear in court, especially in complex legal matters.

Generally, attorneys do the following:

- consult with clients to take instructions and provide legal advice
- research legal principles applicable to a specific case
- draft legal documents (e.g. legal opinions, court documents and contracts)
- *vet* legal documents (e.g. legal opinions, court documents and contracts)
- correspond with clients, advocates, opposing parties and government institutions
- appear in courts or other tribunals on behalf of clients
- attend to legal negotiations and settlement talks



4.2 Admission requirements

4.2.1 Attorneys

Before someone may practice as an attorney, that person must be admitted as an attorney by the High Court. The Attorneys Act prescribes the minimum requirements that must be met before the High Court may admit someone as an attorney. The main requirements can be summarised as follows:

- **Prescribed age**
  The candidate must be 21 years of age or older.

- **South African citizen or permanent resident**
  A candidate must be a South African citizen or have the right of permanent residence in South Africa and be an ordinary resident of South Africa.

- **Law degree**
  Currently, a candidate must have an LLB degree before he/she can be admitted as an attorney. An LLB degree is a bachelor's degree in law that takes a minimum of four years to complete. There are exceptions to the above rule (e.g. if someone studied law overseas), but all of these exceptions require a formal law degree.

- **Fit and proper person**
  A candidate must be regarded as a fit and proper person. This means that a candidate must have the necessary personal attributes to practise as an attorney. This refers to the moral integrity (especially honesty) of a candidate. A candidate must state that he/she has not committed any criminal offence. This does not mean that a candidate is automatically disqualified from entering the attorneys' profession if he/she has been convicted of a criminal offence, since it is up to the court to assess whether he/she is a fit and proper person. However, the candidate will have to explain the circumstances surrounding the criminal conviction and provide the court with proof that he/she has been rehabilitated.

- **Articles of clerkship**
  Before a candidate may be admitted as an attorney, he/she must have the necessary practical experience, which is usually served under articles of clerkship. This means that a candidate must work under the supervision of an experienced attorney on a full-time basis. The service period ranges from between one and five years, depending on different factors. To qualify for a shorter period of service, a candidate may attend a full-time school for legal practice for a period of six months. A person serving under articles of clerkship is called a candidate attorney or an articled clerk. The supervising

attorney is called a principal. Before the Law Society will register articles of clerkship, the candidate must be interviewed by a senior member of the Law Society (i.e. a senior practising attorney) in order to establish whether or not the candidate is a fit and proper person. The main focus of the interview is to establish whether or not the candidate has any previous criminal convictions.

- **Attorneys' admission examinations**
  A candidate must have successfully completed the four prescribed attorneys' admission examinations. These examinations are practically orientated and a candidate must have completed either a period of six months' service under his/her articles of clerkship or he/she must have attended a full-time school for legal practice for a period of six months before he/she may write these examinations.

- **Compulsory practical legal training**
  A candidate must attend a compulsory practical legal training course. The course can be either a full-time school for legal practice for a period of six months or the short course offered by the Law Society for five weeks during or after the service period under the articles of clerkship.

As you can see from the above discussion, there are many requirements that must be met before someone may be admitted and practise as an attorney. The requirements involve formal legal training, practical training and practical experience. These requirements are all aimed at ensuring skilled attorneys are produced who can assist the public with legal problems. Once a candidate is admitted by the High Court to practise as an attorney, the attorney's name is entered onto the roll for attorneys, which is a register that the Registrar of the High Court keeps of all the names of the attorneys admitted by that court.

4.2.2 Conveyancers and notaries

We have already mentioned that many attorneys specialise in specific legal fields. Two of the fields in which attorneys may specialise are *conveyancing* and *notary practice*.

Conveyancing deals with rights in respect of immovable or fixed property, for example the ownership of a farm or a house. Conveyancers attend to the registration of ownership and other rights in immovable property at the *Deeds Office* and the drafting of the documents necessary for such registration.

Notary practice refers to the practice of drafting, executing and registering notarial deeds. Notarial deeds are also registered at the Deeds Office. Notarial deeds are specialised legal documents that must be executed (signed) by a notary. Examples of notarial deeds include antenuptial contracts, trust instruments and deeds of donation. Notaries are obliged to keep a record of all the notarial deeds executed by them. This record is called a protocol.

Only attorneys may be admitted as conveyancers and notaries after they have passed the required examinations. After an attorney has passed the conveyancing or notary examination, he or she may apply to the High Court to be admitted as a conveyancer or a notary. His or her name will then be entered onto the rolls for conveyancers or notaries that are kept by the Registrar of that specific High Court.



4.3 Professional associations

4.3.1 Law Society of South Africa

The Law Society of South Africa is a statutory body created by the Attorneys Act and aims to represent, to promote and to educate the attorneys' profession in the public interest. It also regulates the profession. The Law Society of South Africa can be divided into the following law societies:

- **The Law Society of the Northern Provinces**
  This law society covers Gauteng, Limpopo, Mpumalanga and the North West Province areas.

- **The Law Society of the Free State**
  This law society covers the Free State Province area.

- **The Cape Law Society**
  This law society covers the Northern, Eastern and Western Cape areas and the former Transkei and Ciskei areas.

- **The KwaZulu-Natal Law Society**
  This law society covers the KwaZulu-Natal Province area.

Once an attorney is admitted to practise as such, he/she becomes a member of the law society of the province in which he/she practises. Details of all practising attorneys (including conveyancers and notaries) in an area are kept by the specific law society for that area. These records contain the basic information of attorneys, conveyancers or notaries, including their names, date of admission, date and reasons for removal from the roll (if applicable) and contact details. Attorneys are obliged to update this information as and when it changes. This means that a member of the public can check with the court and the law societies whether someone who presents him/herself as an attorney has, in fact, been admitted and is permitted to act as such and obtain the contact details of that attorney.

Section 58 of the Attorneys Act lists the main aims of the Law Society. The most important aims are the following:

- to maintain and enhance the prestige, status and dignity of the profession
- to regulate the exercise of the profession
- to encourage and promote efficiency and responsibility within the profession
- to promote the integrity of practitioners
- to uphold and improve the standard of professional conduct and qualifications of practitioners
- to provide for the effective control of professional conduct by practitioners
- to represent the general views of the profession

The Law Society enforces ethical rules of conduct issued by the Law Society. If an attorney is suspected of contravening the provisions of the law or ethical rules, the Law Society will investigate the matter. In appropriate circumstances the Law Society may apply to the High Court to have the attorney struck off or removed from the roll of attorneys, which means that the person may no longer practise as an attorney.

4.3.2 Attorneys Fidelity Fund

The Attorneys Fidelity Fund is a statutory body established in terms of the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act 19 of 1941 and governed by the provisions of the Attorneys Act. The purpose of this fund is to compensate or reimburse clients should their trust money be misappropriated by an attorney. (You will learn more about trust money below.) The protection granted by the Attorneys Fidelity Fund encourages the public to make use of attorneys, conveyancers and notaries. The fund also promotes the interests of the profession by providing funding for university law clinics and bursaries for law students.



4.4 Regulated profession

As mentioned above, the attorneys' profession is regulated by the Attorneys Act and the regulations issued in terms of this Act. The main issues relating to the regulation of the attorneys' profession are listed as follows and each will be elaborated on below:

- **Trust and business money**
- **Trust and business accounts**
- **Accurate and detailed bookkeeping records**
- **Auditing of trust accounts**
- **Reporting to and inspection by the Law Society**
- **Fidelity fund certificates**
- **Interest earned on trust monies**
- **Sharing of fees**
- **Ethical rules prescribed by the law societies**

4.4.1 Trust and business money

Generally, **trust money** refers to the situation where someone holds money on behalf of someone else. The money does not belong to the person holding the money and he/she has to look after the money on behalf of the owner. When we talk about holding money in trust in the context of the attorneys' profession, we are referring to a situation where the client pays money to the law firm, but the money is not owed to the attorney at the time when it is paid (e.g. for legal work that must still be carried out). Sometimes the attorney is never entitled to this money, but must pay the money to a third person (e.g. the purchase price for a house that is paid into the attorney's trust account and only paid to the *seller* after the house has been registered in the name of the *purchaser*).

Trust money includes the following:

- advance deposits to cover legal fees and expenses (e.g. divorce matters)
- monies collected on behalf of a client (e.g. debt collection, Road Accident Fund matters and Workmen's Compensation Fund matters)
- monies received from other attorneys or opponents where matters have been successfully concluded (e.g. where the court case was successful and the court ordered the opposing party to pay an amount to the client for damages)
- monies received in conveyancing matters (e.g. the purchase price for a house)

Business money refers to all money that is owned by the law firm and that can be used by the law firm as it deems fit. For example, the firm may use business money to pay overheads or to divide as profit between the partners.

This is money that is owed to the law firm and has been received for legal work already done or for expenses already paid in respect of a specific matter (e.g. postage costs).

The difference between trust money and business money can be summarised as follows:

- **Trust** money is the **client's** money.
- **Business** money is the **firm's** money.

4.4.2 Trust and business accounts

Generally, attorneys receive and hold large sums of trust funds on behalf of their clients. It has been said that a client entrusts his/her money to an attorney because the legal profession is seen as a dignified profession. Unfortunately, there are attorneys who have acted dishonestly and stolen trust funds belonging to their clients. Therefore, the Attorneys Act prescribes and regulates the way in which trust money must be managed by attorneys.

Firstly, it is important to remember that only practising attorneys are allowed to receive and to hold trust funds on behalf of their clients.

Secondly, a law firm is required to open and to keep separate trust and business accounts. These bank accounts are always in the attorney's name or in the name of the law firm for which the attorney works. For example, Mdlovu Attorneys will have a trust account called Mdlovu Attorneys Trust Account and a business account called Mdlovu Attorneys Business Account. Sometimes, people will talk about a Section 78(1) account when they are referring to a trust account. This is because opening and keeping a trust account is prescribed by Section 78(1) of the Attorneys Act.

Thirdly, trust money must always be paid into the trust account as soon as possible after it has been received.

Lastly, trust money must be held in the trust account for as long as it remains the property of the client. No expenses incurred by the firm may be paid from the trust account; they must be paid from the business account. Money can only be paid into the business account or transferred from the trust account when it becomes due to the firm.

Example: A client pays a deposit into a trust account for legal work to be carried out on a matter. When the client pays this money to the firm it is still the client's money, because the work has not yet been performed. Therefore, the deposit is paid into the trust account and is held in trust on behalf of the client.

Once the legal work has been performed and invoiced to the client, the amount of money invoiced may be set off against the deposit paid by the client into the trust account and that amount may be transferred to the business account. This money has now been earned by the firm and is now owned by the firm to be used as it deems fit.

When money is received by a law firm, the person receiving the money on behalf of the firm may not always know whether the money is trust money or business money. Therefore, many law firms deposit all money into their trust account,

because it is safer to deposit all money in the trust account and then to transfer money to the business account once it has been established that such money is owed to the firm. In this way, there is little chance that any trust money may end up in the business account by mistake. If trust money is mistakenly paid into the business account by the client, the law firm must transfer such money to the trust account immediately.

In light of the above discussion you should now see that all monies received by a law firm will be classified as either trust money or business money and must be dealt with in the prescribed way.

Activity 1.3



List and describe the four ways the Attorneys Act prescribes and regulates the way in which trust money must be managed by an attorney.

Answer

Feedback on Activity 1.3: This question relates to paragraph 4.4.2 above. A formal answer to this question will be given in a further Tutorial Letter 201.

Activity 1.4



Read the following scenario and then answer the questions.

Mrs Ngcobo wants to institute divorce proceedings against her husband. She consults with her attorney, who advises her that he is willing to act on her behalf but that he will require a deposit of R5 000. Mrs Ngcobo decides to pay the deposit since she wants the attorney to proceed with the divorce proceedings.

Answer each of the following questions separately with reference to the above facts.

1.4.1 Is the R5 000 trust money or business money? Give reasons for your answer.

Answer

1.4.2 After Mrs Ngcobo pays the deposit but before the attorney proceeds with the matter, Mrs Ngcobo and her husband reconcile. She tells her attorney that she no longer wants to proceed with the divorce proceedings against her husband. Is Mrs Ngcobo entitled to the return of her deposit? Give reasons for your answer.

Answer

1.4.3 Suppose the attorney prepares a divorce summons, issues the summons at court and sends the summons to the sheriff to have it served on Mr Ngcobo. However, after Mr Ngcobo receives the summons, he and Mrs Ngcobo talk and decide to give their marriage another chance. Mrs Ngcobo then talks to her attorney and instructs him not to proceed with the divorce proceedings. The attorney provides a final settlement account in respect of the work done for R2 000 in legal fees and R140 for expenses (sheriff's fee for serving the summons). Explain what amount Mrs Ngcobo will be entitled to receive from her attorney and give reasons in your answer with reference to the difference between trust and business monies.

Answer

Feedback on Activity 1.4: These questions test whether you understand the difference between trust money and business money. If you have any difficulty in answering the questions, refer to the work dealt with in paragraphs 4.4.1 and 4.4.2 above. Formal answers to these questions will be given in a further Tutorial Letter 201.

4.4.3 Accurate and detailed bookkeeping records

A practising attorney is obliged to keep faithful and detailed records of all trust monies received. If not, the attorney will be guilty of unprofessional conduct and may be struck off the roll or suspended, thus being prevented from practising as an attorney for a specified period of time.

4.4.4 Auditing of trust accounts

Every law firm must submit its accounting records for inspection by accountants approved by the Law Society. A list of trust balances must be drawn up every three months, showing the exact amounts of funds held on behalf of each client. In addition, trust accounts must be submitted for an annual audit. An audit is when a qualified accountant or auditor goes through a firm's bookkeeping records to determine whether or not it has followed the correct bookkeeping procedures.

4.4.5 Reporting to and inspection by the Law Society

After the auditors have completed the audit and have found no irregularities, they provide a certificate to this effect, which must then be submitted to the Law Society. This certificate states that the trust funds are intact and that all legal requirements have been met. If the auditors have found any irregularities, they will report this to the Law Society and the Law Society will investigate the matter to determine whether the attorney has acted unlawfully or unethically. If the Law Society determines that the attorney has acted unlawfully or unethically, it may apply to the High Court to suspend or strike that attorney off the roll of attorneys.

In addition to the above reporting requirement, the Law Society may also inspect an attorney's bookkeeping records to ensure that the provisions of the Attorneys Act have been met. If an attorney refuses to provide the Law Society with access to his/her accounting records, the attorney will be guilty of unprofessional conduct and may be struck off the roll or suspended from practising as an attorney for a specified period of time.

It is very important for an attorney to ensure that trust money is dealt with in the correct way and that it is not misappropriated. Special legal bookkeeping software programs exist that assist in managing trust money in the correct way. A good bookkeeper who understands the difference between these two concepts and knows how to manage trust and business money is priceless to any law firm, although it remains the attorney's responsibility to ensure that trust money is managed correctly.

4.4.6 Fidelity fund certificates

In terms of Section 41 of the Attorneys Act, attorneys practising for their own account or in partnership must be in possession of a fidelity fund certificate. (You will learn when an attorney is practising for his/her own account or in partnership in study unit 2.) A fidelity fund certificate is issued by the Attorneys Fidelity Fund.

Because every law firm will have at least one attorney who is practising for his/her own account, every law firm should be in possession of at least one fidelity fund certificate. Fidelity fund certificates are issued for one year only, which means that law firms must apply for a new certificate every year. The certificate must be displayed in a prominent place in the law firm's office.

Failure to comply with this rule may have two consequences. Firstly, the attorney practising without a fidelity fund certificate will not be entitled to any fee or reward for any professional services rendered. Secondly, such a person will be guilty of a criminal offence. The penalty applicable is a fine of not more that R2 000 and/or imprisonment for a period not exceeding six months.

When you refer a client to an attorney, you should ensure that the law firm you are referring the client to has a current, valid fidelity fund certificate. If you have been at the law firm's office you should see a recent fidelity fund certificate on the wall. If not, ask the attorney to provide you with a copy of the law firm's fidelity fund certificate or phone the relevant Law Society and confirm that the firm has been issued with the required fidelity fund certificate.

4.4.7 Interest earned on trust monies

You may wonder what happens to the interest that is earned on any trust money. The interest earned is not the firm's money and must be paid over to the Attorneys Fidelity Fund. This is the main source of income for the Fund and is used to reimburse clients who are victims of trust fund theft and to provide funding and bursaries to promote the interests of the attorneys' profession.

The nett interest earned on trust monies must be paid to the Attorneys Fidelity Fund twice a year. The nett interest refers to the interest earned on the trust money less the banking charges, which can be summarised as follows:

Nett interest = interest earned less banking charges

There is an exception to the above rule. If the client specifically gives instructions to the effect that his/her trust money must be invested on his/her behalf, the attorney will do so and the interest will then accrue to the client. Such accounts are referred to as Section 78(2A) accounts, since this section in the Attorneys Act governs these accounts.

> **Please note** that the above rule applies to **trust money only** and is not applicable to business money. Interest earned on business money belongs to the firm, since business money belongs to the firm!

4.4.8 Sharing of fees

Attorneys may not share any of their fees by way of a partnership, commission, allowance or in any other manner with someone who is not an admitted attorney in South Africa. This means that attorneys may not share any fees with advocates, paralegals, foreign attorneys or members of the public. Therefore, attorneys may only share their fees with other attorneys. This rule is intended to prevent solicitation of clients by paralegals for profit and to avoid the unauthorised practice of law by paralegals. Contravention of this rule is a criminal offence.

4.4.9 Ethical rules prescribed by the law societies

We have already mentioned that once a person is admitted as an attorney, he/she automatically becomes a member of the specific law society for that area. This also means that he/she is automatically subject to the rules of that law society. The law society may take action to enforce its rules with regard to members. This enforcement may include instituting and holding disciplinary proceedings and applying to the High Court for the suspension or removal of an attorney from the roll of attorneys.



4.5 Reserved work and exclusivity of profession

It is clear that the attorneys' profession is heavily regulated and for good reason (to protect the public and to ensure good quality legal services). As such, there must be rules to ensure that only attorneys provide certain legal services and may hold trust monies on behalf of clients in legal matters. We will discuss these rules below.

4.5.1 Drafting and preparation of certain legal documents

Section 83(8) of the Attorneys Act states that only an attorney may draw up or prepare the following documents, or cause them to be drawn up or prepared, for financial gain:

- an agreement, deed or document relating to immovable property or any right in or to immovable property (other than lease contracts for periods of less than five years, conditions of sale or brokers' notes)
- a will or other testamentary document
- a memorandum or articles of association or prospectus of any company
- an agreement, deed or document relating to the creation or dissolution or amendment of a partnership
- any document relating to or required or intended for use in any action, suit or other court proceeding in a court of civil jurisdiction in South Africa

Contravention of this section is a criminal offence and can lead to a fine of not more than R2 000. Failure to pay any fine may lead to a term of imprisonment not exceeding six months.

There is also other work that is specifically reserved for attorneys, conveyancers or notaries in terms of other laws and rules. The laws and rules governing the specific legal field will prescribe when any work may only be performed by an attorney, conveyancer or notary. When you are practising in a specific legal field, you should always check whether or not the specific rules preclude you from performing certain work. For example, the Deeds Registries Act 47 of 1937 deals with various issues in respect of the registration of various deeds. In terms of Section 87 of this Act, for example, only a notary may draw up and sign an antenuptial contract that will be registered in the Deeds Office.

Please note that a person who draws up or prepares any of the above documents in the course of their employment on behalf of their employer (if such an employer is an attorney) will not be guilty of a criminal offence. This is because the attorney is overseeing the work of the employee and takes responsibility for the work carried out by the employee. This means that a paralegal working at a law firm under the supervision of an attorney who receives instruction to prepare one of these documents will not be committing a crime in doing so.

4.5.2 Pretending to be an attorney, conveyancer or notary

It is a criminal offence to misrepresent yourself as, or pretend to be, an attorney, conveyancer or notary if you are not admitted or permitted to act as such. Section 83(1) of the Attorneys Act states that you may not make use of any name, title or addition or description implying or creating the impression that you are an attorney, conveyancer or notary or perform any act that may only be performed by an attorney, conveyancer or notary. Contravention of this section can lead to a criminal conviction with a fine of not more than R2 000 for each offence (i.e. for each time you pretend to be an attorney).

Section 83(10) of the Attorneys Act states that if you directly or indirectly purport to act as an attorney, conveyancer or notary without a fidelity fund certificate, you are also guilty of a criminal offence. The penalty applicable to this offence is a fine of not more than R2 000 and/or imprisonment for a period not exceeding six months.

4.5.3 Practising as an attorney, conveyancer or notary

Even if you do not misrepresent yourself as an attorney, conveyancer or notary, Section 83(10) also prohibits you from practising as an attorney, conveyancer or notary for your own account or in partnership without a fidelity fund certificate. This means that you may not carry out work that is exclusively reserved for attorneys or that is traditionally carried out by attorneys, conveyancers or notaries for your own account or in partnership. The penalty applicable to this offence is a fine of not more than R2 000 and/or imprisonment for a period not exceeding six months.

For example, if you receive trust money from clients and hold such money in trust for legal work without a fidelity fund certificate, you will also be guilty of contravening the above law since only attorneys may hold money in trust, provided they are in possession of the prescribed fidelity fund certificate.

4.5.4 Court appearances

In terms of Section 3 of the Right of Appearance in Courts Act 62 of 1995, any attorney may appear on behalf of another person in any court in South Africa except the High Court and the Constitutional Court. However, an attorney may apply to the Registrar of the High Court to appear on behalf of another person in the High Court and the Constitutional Court. Candidate attorneys have limited rights to appear on behalf of other persons in the magistrates' courts.

A paralegal may not appear on behalf of another person in any court. However, each tribunal or board will have its own rules in respect of who may appear and in some tribunals a person may not be represented by an attorney. You will need to check with each tribunal whether or not you may represent the client.

Activity 1.5



1.5.1 Read the following scenario and then answer the questions.

You are a paralegal at a community centre. You consult with a client and realise that the matter should be referred to an attorney. You ask around and Mr Ntsimang is recommended.

You go and see Mr Ntsimang to discuss the possible referral. Nowhere in Mr Ntsimang's office do you see a fidelity fund certificate and Mr Ntsimang avoids any questions you ask in this regard, but he assures you that he is an attorney. What do you think would be the best action you could take in these circumstances? Discuss all the possible options, taking into account what you have learnt about the attorneys' profession so far.

Answer

1.5.2 You are a paralegal at Ndlovu and Mhlangu Attorneys. Your supervising attorney provides you with the necessary documents and instructs you to prepare the first draft of a will for one of his clients. You do as you are told and then give him the first draft to check and to make amendments. Are you guilty of a criminal offence? Give reasons for your answer.

Answer

1.5.3 As a paralegal working on your own in a community, you open and maintain a trust account. You are the only person who has signing powers on this account and the only person administering this trust account. Is this acceptable and what are the possible consequences?

Answer

1.5.4 You are a paralegal at a community centre. When you have to refer a matter to an attorney you always refer the client to a law firm that pays you a set amount for each referral. Is this permissible? What are the consequences of such action?

Answer

1.5.5 You are a paralegal at a law firm. You are paid on an incentive basis based on a percentage of the fees paid by any new clients you bring to the firm. Is this permissible and what are the consequences of such actions?

Answer

Feedback on Activity 1.5: These questions deal with different aspects of the work covered in paragraphs 4.4 and 4.5 above. If you have any difficulty in answering the questions, please refer to these sections. Formal feedback to these questions will be provided in a further Tutorial Letter 201.

You now have an understanding of the attorneys' profession. Let us now examine the advocates' profession.

5. THE ADVOCATES' PROFESSION

When we discussed the attorneys' profession, we mentioned that attorneys work with the public and are usually the first point of contact when someone wants to obtain professional legal advice. This means that attorneys have a broad knowledge of the law in order to provide legal advice across different legal fields.

While attorneys generally provide a large variety of legal services directly to the public, advocates specialise in preparing and presenting cases in court. They also tend to specialise in a specific field of law. For these reasons, advocates do not accept instructions directly from the public, but receive instructions from attorneys who need specialised services in a specific matter. Generally, these services are to present a case in court or to provide a legal opinion on a specific issue.

Advocates work independently and for their own account. In other words, they are sole practitioners and do not form law firms with one another or with attorneys.

Sometimes, advocates are also referred to as "counsels". Advocates are divided into junior counsels and senior counsels. Advocates with extensive experience and expertise and with more than 10 years of practice may be appointed as "senior counsels" and are also referred to as "silks". Silks usually wear a silk robe, which is different to the robe worn by junior counsels. Silks usually appear together with a junior counsel in large and complex cases.

5.1 What do advocates do?

Advocates accept instructions from the attorney representing the client and may not accept instructions directly from the public. Therefore, the advocates' profession is referred to as a referral profession.

When an attorney instructs an advocate to handle a specific matter, we usually say that the attorney briefs the advocate on the case. The advocate is provided with copies of all the relevant documents and information the attorney has on file with the attorney's instructions (e.g. to draft a certain court document or attend to the hearing of the matter in court). This bundle of documents with instructions is called a brief.

All advocates have the right to appear in all courts in South Africa, including the magistrates' courts, the High Court, the Supreme Court of Appeal and the Constitutional Court.

Generally, advocates do the following:

- research legal principles applicable to a specific case
- draft legal documents (especially court documents and those that entail complex legal opinions)
- vet legal documents (e.g. legal opinions and court documents drafted by attorneys before such documents are finalised)
- prepare legal arguments (called heads of argument) for use in court
- appear in courts or other tribunals on behalf of clients
- attend to legal negotiations and settlement talks prior to and during court proceedings

You will have noticed that there is an overlap between the things that attorneys and advocates do. It sometimes happens that a case is not so legally complex

and an attorney may feel confident enough to handle the drafting of the court documents and the court appearance him/herself. As advocates are specialists in presenting court cases, their fees for such work is higher than those charged by attorneys and it is not economical to use advocates for every court case. However, the more legally complex a matter, the more likely it is that an advocate will be briefed to present the client's case in court.



5.2 Admission requirements

Before someone may practise as an advocate, that person must be admitted as an advocate by the High Court. The Admission of Advocates Act 74 of 1964 prescribes the minimum requirements that must be met before the High Court may admit someone as an advocate. The main requirements for admission as an advocate are listed and then summarised below:

- **Prescribed age**
- **South African citizen or permanent resident**
- **Law degree**
- **Fit and proper**
- **May not be on the roll of attorneys**

• Prescribed age

The candidate must be 21 years of age or older.

• South African citizen or permanent resident

A candidate must be a South African citizen or have the right of permanent residence in South Africa and be an ordinary resident of South Africa.

• Law degree

A candidate must have a law degree to be admitted as an advocate.

• Fit and proper

A candidate must be regarded as a fit and proper person. This means that a candidate must have the necessary personal attributes to practise as an advocate. This refers to the moral integrity (especially honesty) of a candidate. A candidate must state that he/she has not committed any criminal offence. This does not mean that a candidate is automatically disqualified from entering the advocates' profession if he/she has been convicted of a criminal offence, since it is up to the court to assess whether he/she is a fit and proper person. However, he/she will have to explain the circumstances surrounding the criminal conviction and provide the court with proof that he/she has been rehabilitated.

• May not be on the roll of attorneys

If a candidate has previously been admitted as an attorney, he/she must have his/her name removed from the roll of attorneys before he/she may be admitted as an advocate. Therefore, it is impossible to be an attorney and an advocate at the same time.

Once a candidate has been admitted by the High Court to practise as an advocate, the advocate's name is entered onto the roll for advocates. This is a register of all the names of advocates admitted by that court and is kept by the Registrar of that High Court.

Although it is not required, it is **customary for an advocate to join one of the advocate societies, called Bars**. The General Council of the Bar of South Africa is the body that represents the advocate profession in South Africa and its main purpose is to ensure that members maintain professional standards. The Bars offer professional training to advocates who want to join the Bar. The professional training consists of a one-year apprenticeship (called a pupilage) and the passing of an examination and the successful completion of this training is a requirement for joining the Bar. This training tests the candidate's practical ability to perform the duties of an advocate. During the pupilage, the candidate (called a pupil advocate) will work under an experienced advocate in order to observe the workings of the profession.



5.3 Professional associations

5.3.1 General Council of the Bar of South Africa

As mentioned above, the advocates' profession is represented and regulated by the General Council of the Bar of South Africa (GCB). The term "Bar" is used to refer to societies of advocates. As such, the GCB is made up of the different advocate societies, or Bars, in South Africa, which are as follows:

- the Cape Bar
- the Free State Society of Advocates
- the Eastern Cape Society of Advocates (Port Elizabeth)
- the Eastern Cape Society of Advocates (Grahamstown)
- the Society of Advocates KwaZulu-Natal (Durban)
- the KwaZulu-Natal Pietermaritzburg Bar Council
- the Pretoria Society of Advocates
- the Johannesburg Society of Advocates (Witwatersrand)
- the Northern Cape Society of Advocates
- the Bisho Society of Advocates
- the North West Bar Association
- the Society of Advocates Transkei

The most important objectives of the GCB are the following:

- to deal with all matters affecting the profession and to take action if necessary
- to uphold the interests of advocates in South Africa

Generally, the GCB aims to maintain professional standards and conduct among its members and to enforce discipline when necessary. The Bars enforce ethical rules of conduct issued by the GCB, called the Rules of Professional Ethics. If an advocate is suspected of contravening the law or ethical rules, the specific Bar investigates the matter and may, in the appropriate circumstances, apply to the High Court to have the advocate expelled from the profession. If the court grants the expulsion order, the person concerned may no longer practise as an advocate.

5.3.2 Independent Association of Advocates

The Independent Association of Advocates was established in 1994 for advocates who are not members of the Bars. Such advocates are still bound by the rules of the Bar, which can be enforced by the courts on application from the specific

Bar. However, the Bars may not institute disciplinary proceedings against non-member advocates who do not adhere to the rules.

5.4 Regulated profession



Since advocates are professionals and specialists, the advocates' profession is also regulated by laws and rules. Specifically, this profession is regulated by the Admission of Advocates Act and the rules issued by the Bar. **We will now look at the main aspects concerning the regulation of the advocates' profession**.

5.4.1 Referral profession

As mentioned before, advocates may not accept instructions directly from the public. If an advocate does accept instructions directly from the public, the advocate will be guilty of unprofessional conduct and may be suspended or struck off the roll of advocates.

The reason for this rule is that it promotes specialisation and the independence of the advocates' profession and is, therefore, in the public interest. Furthermore, if advocates were allowed to receive instructions directly from clients, there would be no laws or rules governing trust funds and the protection of trust funds from misappropriation or theft.

5.4.2 Sharing of fees

In terms of Section 9(2) of the Admission of Advocates Act, an advocate may not share any portion of his/her professional fees (whether by way of partnership, commission, allowance or any other manner) with any other person who is not practising as an advocate. This means that advocates may not share any fees with attorneys, paralegals or members of the public. Therefore, advocates may only share their fees with other advocates. Contravention of this rule is a criminal offence.

5.4.3 Ethical rules prescribed by the Bar

Advocates who are members of the Bar must comply with the ethical rules that are prescribed by the Bar. If members do not comply with the prescribed rules, the Bar may enforce these rules. This enforcement may include instituting and holding disciplinary proceedings and applying to the High Court for the suspension or removal of an advocate from the roll of advocates.

We have dealt with some of the rules that are relevant to paralegals, but there are many rules that we have not discussed. Some of the ethical rules that should be observed by paralegals are also applicable to advocates. These rules will be discussed in study unit 3.

5.5 Exclusivity of profession and reserved work



5.5.1 Pretending to be an advocate

It is a criminal offence to misrepresent yourself as, or pretend to be, an advocate if you have not been admitted or permitted to act as such. Section 9(1) of the Admission of Advocates Act states that you may not make use of any name, title or addition or description implying or tending to induce the belief that you

are an advocate or may perform any act that may only be performed by an advocate. Contravention of this section can lead to a criminal conviction with a fine of not more than R200 and/or 12 months' imprisonment.

5.5.2 Practising as an advocate

Even if you do not misrepresent yourself as an advocate, Section 9(1) also prohibits you from practising as an advocate. This means that you may not carry out work that is exclusively reserved for advocates or that is traditionally done by advocates. Again, contravention of this section can lead to a criminal conviction with a fine of not more than R200 and/or 12 months' imprisonment.

5.5.3 Court appearances

In terms of Section 2 of the Right of Appearance in Courts Act, any advocate shall have the right to appear on behalf of another person in any South African court. From our discussion above in respect of attorneys, you already know that paralegals may not appear in court on behalf of another person.

We have examined the attorneys' profession and the advocates' profession. Now let us compare the two professions.

6. A COMPARISON OF THE ATTORNEYS' PROFESSION AND THE ADVOCATES' PROFESSION

Now that you have learnt all about the attorneys' profession and the advocates' profession, you should be able to compare them with each other and be able to identify and to discuss the similarities and the differences between them.

Activity 1.6



Below is a table that summarises some of the most important differences between the attorneys' profession and the advocates' profession. Please insert the missing information and add a few differences between the professions that you have identified yourself.

Attorneys' profession	Advocates' profession
Attorneys work directly with the public.	
	Advocates specialise in preparing and presenting cases in court.
This profession is represented and controlled by the Law Society of South Africa.	
Admission to this profession requires articles of services for a period of one to five years.	In order to join the Bar an advocate must _____ _____

Attorneys' profession	Advocates' profession
	This profession is governed and regulated by the Admission of Advocates Act.
Trainee attorneys are called _____	Trainee advocates who want to join the Bar are called _____
	Advocates may appear in all South African courts when representing a client.

Feedback on Activity 1.6: Formal feedback will be provided in a further Tutorial Letter 201.

Activity 1.7



List five similarities between the attorneys' profession and the advocates' profession.

Answer

_____

_____

_____

_____

_____

_____

_____

_____

Feedback on Activity 1.7: Formal feedback will be provided in a further Tutorial Letter 201.

We have compared the attorneys' and advocates' professions (i.e. legal professionals). Now let us look at the differences between legal professionals and paralegals.



7. THE DIFFERENCES BETWEEN PARALEGALS AND LEGAL PROFESSIONALS

You have learnt a lot about the legal profession and the differences between attorneys and advocates. You should now be in a better position to understand the differences between paralegals and legal professionals and be able to identify whether someone is a legal professional or not. The main differences between paralegals and legal professionals are explained below.

7.1 Qualifications

Legal professionals are law graduates, that is to say, most of them have law degrees. In contrast, paralegals do not have law degrees, but have a diploma in law (formal tuition), will have attended workshops or short courses on law (informal tuition), or will have extensive work experience as paralegals.

7.2 Admission requirements

You should know by now that the legal profession prescribes further requirements before law graduates may be admitted as attorneys or advocates in South Africa. In study unit 3 of **Introduction to Paralegal Studies PAR1501** you learnt that the paralegal practice is not formally recognised as a profession or a career and, therefore, there are no formal admission requirements for becoming a paralegal. You also learnt that there are movements that are working towards the formal recognition and regulation of paralegals in South Africa in order to enhance the paralegal profession and to protect the public interest. In all probability, there will be formal admission requirements for paralegals sometime in the future.

Activity 1.8



Look at the following words and circle all the words you think refer to a paralegal:

legal advisor	notary	lawyer's assistant
legal services assistant	paralegal specialist	attorney
attorney assistant	candidate attorney	magistrate
legal clerk	judge	filing clerk
document clerk	conveyancer	lawyer's aide
lawyer	legal secretary	legal assistant
legal typist	public prosecutor	

Which of these words are <u>not</u> associated with paralegals and why do you think so?

Answer

Feedback on Activity 1.8: Formal feedback will be provided in a further Tutorial Letter 201. If you have any difficulty in answering this question, refer to paragraphs 2 and 3 above.

7.3 Professional associations

The attorneys' profession is represented by the Law Society of South Africa. The Attorneys Fidelity Fund also promotes the interests of the attorneys' profession while protecting the public against theft and dishonesty by attorneys. The advocates' profession is represented by the General Council of the Bar of South Africa. Advocates who are not members of the Bar form part of the Independent Association of Advocates.

In contrast, the paralegal profession is represented and promoted by the National Community-based Paralegal Association and the National Paralegal Institute. (Refer to study unit 3 of **Introduction to Paralegal Studies: PAR1501**.)

7.4 Regulated profession

Both the attorneys' profession and the advocates' profession are regulated by laws and rules that are enforced by their different professional associations and the courts. The attorneys' profession is regulated mainly by the Attorneys Act and the ethical rules issued by the law societies. These laws and rules are enforced by the law societies and the High Court. The advocates' profession is regulated mainly by the Admission of Advocates Act and the rules issued by the General Council of the Bar of South Africa. These laws and rules are enforced by the Bars and the High Court.

In contrast, you learnt in study unit 3 of **Introduction to Paralegal Studies: PAR1501** that there are no laws or rules governing and regulating paralegal practice. However, the National Paralegal Institute is addressing the training issues of and ethical codes for paralegals in order to obtain formal recognition for paralegals and to regulate paralegal practice.

7.5 Exclusivity of work

You have learnt that there is certain work that may only be performed by attorneys and advocates. You also learnt that only admitted attorneys or advocates may represent themselves as such and may practice as attorneys or advocates. Therefore, paralegals may not carry out any of the actions that are reserved for the attorneys' and advocates' professions.

As a paralegal, you must ensure that you understand what you are not permitted to do and that you never engage in any of the prohibited actions, since contravention of these laws and rules will have serious consequences!

Activity 1.9



Look at the following actions and consider whether or not a paralegal may do any of them:

1. Draft and sign court documents (e.g. a summons) for use in court.
2. Draft and execute an antenuptial contract.
3. Draft and execute all the documents necessary to transfer a property into another party's name.
4. Appear in the High Court before a judge on behalf of another.

5. Appear in the High Court before a judge on his/her own behalf.
6. Appear in the magistrates' court before a magistrate on behalf of another.
7. Appear in the magistrates' court before a magistrate on his/her own behalf.
8. Make a presentation to a group of people in respect of how the law works.

Answer

Feedback on Activity 1.9: If you have any difficulty in answering this question, refer to the work covered in paragraphs 4.5 and 5.5 above. Formal feedback will be given in a further Tutorial Letter 201.

8. CONCLUSION

In this study unit you were taught the difference between the attorneys' profession and the advocates' profession. You learnt how they are controlled and where you, as a paralegal, fit in.

Now that you understand that you are not a legal professional we will take a closer look at the workings of a law firm. In the next study unit, we will look at what a law firm is, the different people who work at a law firm, the structure of a law firm and the role of paralegals in a law firm.



9. SELF-ASSESSMENT

Before you start with the next study unit, answer the following questions **on your own** to ensure that you know and understand the work covered in this study unit:

9.1 Summarise the important characteristics of the attorneys' profession.

9.2 Summarise the important characteristics of the advocates' profession.

9.3 Compare the attorneys' profession and the advocates' profession with each other.

9.4 Differentiate between paralegals and other legal professionals.

9.5 Evaluate the consequences of performing actions reserved for the legal profession.

10. SOURCES REFERRED TO IN THIS STUDY UNIT

Admission of Advocates Act 74 of 1964 (and the regulations issued in terms thereof).

Attorneys Act 53 of 1979 (and the regulations and rules issued in terms thereof).

Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act 19 of 1947.

Borman, R, Raubenheimer, E & Van der Walt, R. 1998. *Paralegals: introduction to legal practice*. 3rd edition. Queenswood: Seytrade Publishers.

Cooks, A. 2010. *Legal bookkeeping for support staff*. L.E.A.D–Law Society of South Africa.

Deeds Registries Act 47 of 1937.

De Klerk, W (ed). 2006. *Clinical law in South Africa*. 2nd edition. Durban: LexisNexis Butterworths.

Legal Practice Act 28 of 2014.

Right of Appearance in Courts Act 62 of 1995.

Statsky, WP. 1992. *Introduction to paralegalism: perspectives, problems and skills*. 4th edition. Saint Paul, MN: West Publishing Company.

Thebe, M. 2015. Legal Practice Act: what's happening now? *De Rebus*, August. Available at: http://www.derebus.org.za/legal-practice-act-whats-happening-now/ (accessed on 24/01/2017).

Wainwright, P. 2014. The Legal Practice Act 28 of 2014: in force but not effect. Available at: http://www.polity.org.za/article/the-legal-practice-act-28-of-2014-in-force-but-not-effect-2014-10-21 (accessed on 24/01/2017).

Whittle, B. 2015. National Forum starts shaping the new dispensation. *De Rebus*, August. Available at: http://www.derebus.org.za/national-forum-starts-shaping-new-dispensation/ (accessed on 24/01/2017).

www.lssa.org.za.

www.sabar.co.za.



STUDY UNIT

2

The law firm

1. LEARNING OUTCOMES

When you have worked through this study unit you should be able to

- explain what a law firm is and compare the different business forms a law firm may take
- identify the different positions within a law firm according to their functions
- construct and separate the different departments in a law firm
- formulate the role of a paralegal in a law firm

2. INTRODUCTION

In the previous study unit the differences between the attorneys' profession and the advocates' profession were compared. You learnt how these different professions are controlled and where you, as a paralegal, fit in.

Now that you understand that you are not a legal professional, we will take a closer look at the workings of a law firm. In this study unit, we will look at what a law firm is, the different people who work at a law firm, the structure of a law firm and the role of paralegals in a law firm.

We start off by clarifying what a law firm is.

3. WHAT IS A LAW FIRM?

As mentioned in study unit 1, attorneys and candidate attorneys work at law firms. A law firm consists of one of more attorneys who are supported by candidate attorneys and/or administrative staff.

Once a person has been admitted as an attorney, they may practise

- for their own account
- in a partnership with other attorneys
- as a member of a professional company
- as a professional assistant in a partnership or a professional company

When an attorney works for his/her own account, he/she is the sole owner of the law firm and is entitled to all the profits of the law firm. "Partners" or

"members" refer to two or more attorneys who manage and own a law firm together and who share the profits of the law firm between them. All attorneys who are working for their own account in partnership with other attorneys, or who are members of a professional company of attorneys, must be in possession of a fidelity fund certificate.

A professional assistant is an admitted attorney who works at a law firm as an assistant to other, more experienced attorneys. Professional assistants do not work for their own account and do not share in the profits of the law firm, but usually work for a fixed salary. Therefore, they do not need to be in possession of a fidelity fund certificate. Professional assistants are usually junior or newly admitted attorneys who work for a few years before they have gained enough experience to practise as partners or members of the law firm.

Candidate attorneys are precluded from sharing in the profits of the law firm and as such also work for a fixed salary. Because candidate attorneys have not yet been admitted as attorneys, they cannot apply for a fidelity fund certificate.

A law firm may take the following business forms:

- **sole practitioner**
- **partnership**
- **professional company**

- **Sole practitioner**
  This is a law firm where one attorney works for his/her own account. The sole practitioner may be assisted by professional assistants, candidate attorneys and/or administrative staff.

- **Partnership**
  This is a law firm where two or more attorneys own and manage the firm together as partners. They are all liable for the liabilities of the law firm and may all share in its profits. They may be assisted by professional assistants, candidate attorneys and/or administrative staff.

- **Professional company**
  A professional company is a law firm that is incorporated as a company of attorneys in terms of Section 23 of the Attorneys Act. You can identify law firms that are incorporated companies by the letters "Inc" (abbreviation of the term "incorporated") after the firm name, for example, Ndlovu Bester and Nkosi Attorneys Inc. Only attorneys who are in possession of a fidelity fund certificate may be members of such a company and share in its profits, and they will all be liable for the liabilities of the company. The members may also be assisted by professional assistants, candidate attorneys and/or administrative staff.

Activity 2.1



List and describe the different **business forms** that a law firm may take.

Answer

Feedback on Activity 2.1: This question relates to paragraph 3 above and tests whether you understand the differing types of business forms that a law firm may take. A formal answer to this question will be given in a further Tutorial Letter 201.

You now have an understanding of a law firm and the different business forms it may take. Let us now consider the people who work at a law firm.

4. PEOPLE WORKING AT A LAW FIRM

A law firm requires the services of a number of people, who are classified as follows:

- attorneys and candidate attorneys
- administrative staff
- human resources
- IT support
- bookkeeping staff

We will examine each of the abovementioned groups of staff, starting with attorneys and candidate attorneys.

4.1 Attorneys and candidate attorneys

As mentioned earlier, a law firm is owned and managed by one or more attorneys, who may be assisted by professional assistants and/or candidate attorneys.

4.2 Administrative staff

The partners, professional assistants and candidate attorneys in a law firm are supported by administrative staff. Administrative staff include receptionists, switchboard operators, secretaries and typists.

4.3 Human resources

Most law firms employ at least one human resource specialist to manage all human resource matters in the firm. This person or team is responsible for the appointment of new staff and all the administrative duties related to employee matters, for example, unemployment indemnity fund registrations, employee tax deductions and reporting requirements, retirement fund matters, employee disciplinary matters and employee complaints.

4.4 IT support

Every law firm requires IT support to some extent. IT refers to information technology and all the computer, software, internet and email requirements of a firm. The team that provides IT support will be responsible for ensuring that all electronic information is stored safely and is available to the employees when necessary. It will also be responsible for controlling internet and email usage by employees of the firm. It may also need to manage and understand the different software programs used by the firm and ensure that they are used correctly. The IT support team will work according to the instructions of the partners as communicated to it by the responsible partner.

4.5 Bookkeeping staff

You have already learnt about the specific bookkeeping procedures and requirements applicable to law firms. It is of vital importance that a law firm adheres to and follows the specific bookkeeping requirements and procedures, as failure to do so may have serious consequences. Specifically, special care must be taken to ensure that the trust account of the law firm is managed correctly. Therefore, every law firm requires the expertise and services of qualified accountants and auditors. There are many accountants available who specialise in legal bookkeeping and who are employed by law firms to ensure that their books are in order and that the reporting requirements of the law societies are met.

Activity 2.2



Identify the different positions within a law firm (which requires the services of staff) according to their functions and briefly elaborate on each of these positions.

Answer

Feedback on Activity 2.2: This question relates to paragraph 4 above and tests whether you understand the differing roles that people play at a law firm. A formal answer to this question will be given in a further Tutorial Letter 201.

Now that we have looked at the various types of staffing at a law firm, let us move on to examining the structure of a law firm.

5. STRUCTURE OF A LAW FIRM

Every law firm will have its own structure, depending on the number of attorneys working at the law firm and the type of work it performs. A small law firm will have fewer departments while a larger law firm will have more departments.

Typically, the average law firm consists of the following departments, as depicted in Figure 2.1:

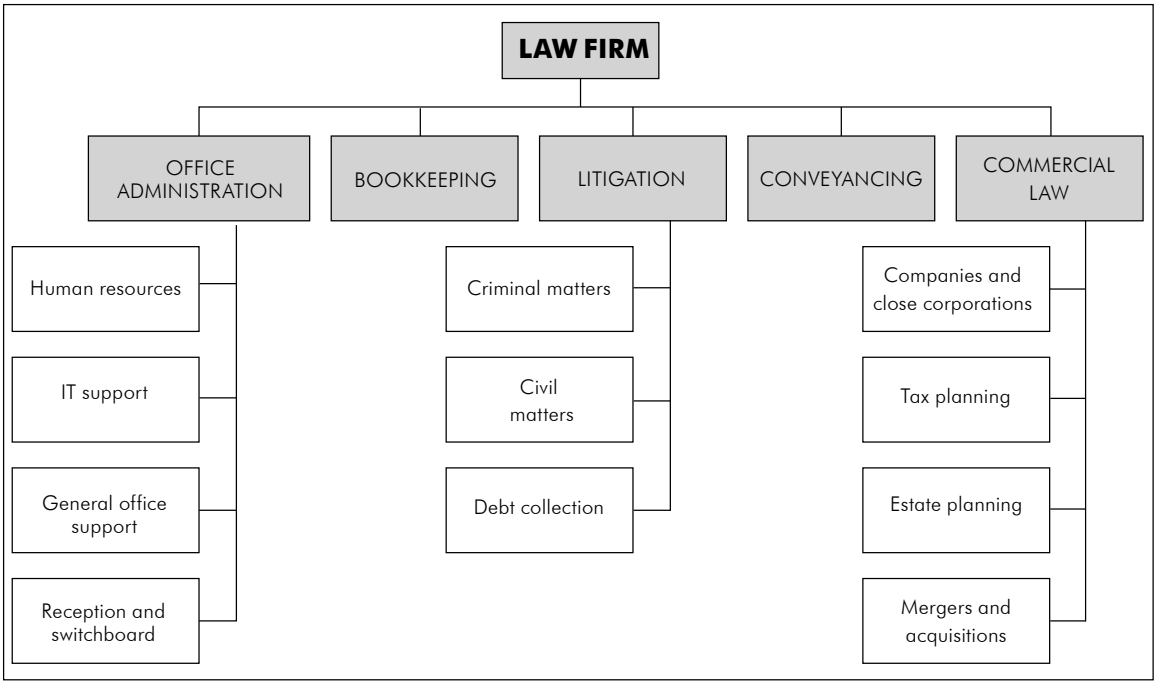


Figure 2.1: Typical departments in a law firm

5.1 Office administration and bookkeeping

Most law firms have an office administration department and a bookkeeping department. These two departments will be filled with administrative staff with qualifications and/or experience in that specific field. For example, human resources will be filled with staff with the required qualifications and/or experience in human resource issues. The bookkeeping department will be filled with accountants and/or accounting clerks.

Usually, each of these departments is headed and managed by a specific partner. In addition, the bookkeeping and office administration departments have to report to the partners of the law firm on a regular basis. Partners of the law firm may also require that certain duties only be carried out on the specific instruction of the partners, or for a partner to sign off on a specific action before that action is taken. For example, it may be a requirement of the law firm that two partners must sign any cheque prepared by the bookkeeping department and/or authorise any electronic fund transfers (EFTs). This ensures that the partners remain aware and in control of all actions carried out within the law firm.

5.2 Legal departments

The legal departments will differ from law firm to law firm, depending on their specific needs. For example, a law firm that does a lot of tax law work may have a separate department that deals with tax matters. If a law firm does not specialise in conveyancing work, it will probably not have a separate conveyancing department and any occasional conveyancing work might be dealt with by the commercial law department or by any of the attorneys who have the expertise and experience to do the work.

Generally, each legal department is headed by a partner of the firm. This partner manages and controls the specific department and is assisted by one

or more professional assistants, candidate attorneys, secretaries, typists and/or filing clerks. Larger law firms rotate candidate attorneys on a regular basis to ensure that they are all exposed to and obtain experience in different legal fields.



6. ROLE OF PARALEGALS IN A LAW FIRM

Paralegals in law firms play more of a supportive role, although they work independently to some extent. They have more responsibility than secretaries, typists and filing clerks, but still remain under the management and control of the attorneys working in the specific department.

For example, a paralegal who works in the companies and close corporations department of a law firm may be responsible for the registration of new companies. The paralegal will receive instructions from one of the attorneys to register a specific company and must do all the related work to ensure the registration of that specific company. He/she must have the necessary knowledge and experience to know what forms must be completed and what documents must be lodged at the Companies and Intellectual Property Commission. He/she must further ensure that the necessary documents are lodged and must follow up on the registration process at the Commission. The paralegal may do all of this independently while keeping the instructing attorney up to date on any developments. Therefore, the paralegal does not consult with the client or take direct instructions from the client, but receives instructions from the attorney and has to report back to that attorney.

This does not mean that all paralegals who work at law firms have no contact with clients. Depending on the type of work and the duties of a specific paralegal, he/she may be required to contact clients directly. However, almost all paralegals who work at law firms must report directly to one of the attorneys in respect of all work done, or an attorney must oversee or sign off on all the work that a paralegal does. A paralegal usually has to report to the head of the specific legal department. This is because the partners of a law firm are accountable and responsible for all work done by the employees.

Activity 2.3



In view of the above discussion, what do you think a paralegal's role is in a law firm? Write your ideas in the space below. Provide reasons for your ideas.

Answer

Feedback on Activity 2.3: There is no right or wrong answer to this question, provided you have provided good reasons for your opinion.

In your answer you should have indicated that a paralegal's role in a law firm will differ from law firm to law firm.

As a general rule, you should have mentioned that a law firm paralegal works under the supervision of an attorney and assists the attorney with drafting and preparing documents. However, a paralegal may work quite independently and be allowed to contact clients directly, provided that an attorney oversees the work of the paralegal. This is especially true in situations where the work is more of an administrative nature (e.g. completing standard forms for submission to government institutions) than a legal nature (e.g. providing legal advice).

In addition, you could have differentiated between the roles of community-based paralegals and law firm paralegals by pointing out that while a community-based paralegal will be the first point of contact with the client, a law firm paralegal will receive instructions from an attorney and will not meet with clients the first time they make contact with the law firm.

7. CONCLUSION

In this study unit you were taught what your role as a paralegal is in a law firm. You learnt what a law firm is, the different people who work in a law firm, the structure of a law firm and the role of paralegals in a law firm.

Now that you understand your position in a law firm we will take a closer look at ethical issues in the workplace. In the next study unit, we will look at what ethics is, the different ethical approaches that exist and specific ethical guidelines applicable to paralegals.



8. SELF-ASSESSMENT

Before you start with the next study unit, answer the following questions on your own to ensure that you know and understand the work covered in this study unit:

8.1 Explain what a law firm is and compare the different business forms a law firm may take.

8.2 Identify the different positions within a law firm according to their functions.

8.3 Construct and separate the different departments in a law firm by means of a flow chart.

8.4 Formulate the role of a paralegal in a law firm.

9. SOURCES REFERRED TO IN THIS STUDY UNIT

Borman, R, Raubenheimer, E & Van der Walt, R. 1998. *Paralegals: introduction to legal practice*. 3rd edition. Queenswood: Seytrade Publishers.

De Klerk, W (ed). 2006. *Clinical law in South Africa*. 2nd edition. Durban: LexisNexis Butterworths.



STUDY UNIT

3

Ethical considerations

1. LEARNING OUTCOMES

When you have worked through this study unit you should be able to

- define ethics, to differentiate ethics from morality and to explain when an act is unethical
- identify and differentiate between the four different approaches to ethical problems
- apply ethical guidelines to specific case scenarios in order to reach a well-thought-out and substantiated recommendation for action

2. INTRODUCTION

In study unit 2 your role as a paralegal in a law firm was examined. You learnt what a law firm is, the different people who work in a law firm, the structure of a law firm and, finally, the role of paralegals in a law firm.

Now that you understand your position in a law firm we will take a closer look at ethical issues in the workplace. In this study unit, we will look at what ethics involves, the different ethical approaches that exist and specific ethical guidelines applicable to paralegals. Let us now analyse the concept "ethics".

3. WHAT IS ETHICS?

"Ethics" can be explained by considering the following example:

Telling lies is wrong. Our relationships with each other only function well if there is a presumption that what we say to each other is true. Trust is essential in human relationships and in public life. One of the most painful experiences for parents is if they discover that one of their children has lied to them. Similarly, children's confidence in adults and, indeed, themselves can be seriously harmed if their parents lie to them. Politicians tend to lose elections when they lose the trust of the electorate.

Now the question is asked: "Is telling lies always wrong?" Consider the following scenario:

Suppose you are a South African living at the height of the apartheid struggle and that you are hiding an anti-apartheid freedom fighter in your basement. One day, the security police arrive at your house and ask you whether there are any anti-apartheid activists around. Almost certainly your answer will be "No". You lie in order to protect the person you are hiding. You recognise that telling lies is usually wrong, but under these circumstances, surrendering the anti-apartheid freedom fighter to the apartheid police is worse.

While ethics is about what we ought to do 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.

In short, **ethics is the study of right action** (i.e. our values and their justification) and **good conduct** (i.e. the actual values and standards of conduct by which we live).

Let us now have regard to the differences between ethics and morality.

3.1 The difference between ethics and morality

Ethics and morals are intricately connected, but they also have different denotations and connotations.

Morality refers to all the current and traditional norms, values and virtues held by a society and moral conduct. Norms are moral rules or obligations. A norm such as "do not kill" is a socially accepted standard of behaviour – something that is "morally acceptable". Values are expressed in attitudes, beliefs and judgements about what is good and bad, right and wrong. Examples of values include justice, responsibility and integrity. Virtues are dispositions of character such as honesty, caring and fairness. Moral conduct concerns our interaction with other people and how our actions affect other people. Norms, values, virtues and moral conduct guide people in deciding what ought to be done or ought not to be done.

Ethics is the intellectual reflection on these norms, values, virtues and moral conduct, both by individuals and by communities or groups. Ethics reflects on the norms and values of individuals and of society as a whole. It is the ordering, the questioning, the awareness and the investigation of what we believe to be right. This reflection aims at balancing the interests of the various parties or stakeholders affected by decisions and actions in a way that gives expression to the norms and values that we believe should be adhered to within a society.

The difference then between morality and ethics is that morality refers to the goodness or badness, rightness or wrongness, of behaviour, while ethics is a theoretical examination of morals and morality. A moralist is someone who tells us what he/she thinks is good or right, while an ethicist questions the underlying principles of what is good or bad, right or wrong.

Let us now examine when an act becomes unethical.

3.2 When is an act unethical?

Before we can answer the question: "When is an act unethical?", we need to determine what an ethical problem is. An ethical question arises in any situation in which the wellbeing and the interests of people are in conflict.

Consider the following scenario: Suppose you are an employee of a firm that bottles drinking water. You have realised that in order to meet the demand, management has decided not to filter the water. What should you do? There is a conflict of interests here: the interests of the people who drink the water, the interests of the company and your own interests as an employee. What action should you take, if any? The issue here is an ethical one because there is a conflict of interests and the wellbeing of those involved is at stake.

Let us now examine what makes an action unethical. There is no short answer to this problem, but the following general observations can be made:

An action is unethical if it

- disregards important interests and jeopardises the wellbeing of other people
- breaks an agreement
- conflicts with the moral norms and values of a person or society
- will result in harm to other people, groups, society as a whole or the environment

Note, with reference to the second point, that an agreement might be tacit or explicit. For example, in a business environment it is tacitly agreed that people will turn up on time for meetings. It is, therefore, unnecessary to make a written agreement every time a meeting is called, because being punctual is what is expected and has been tacitly agreed upon.

Let us now explore the four different approaches to solving ethical problems.

4. APPROACHES TO ETHICAL PROBLEMS

In this study unit we will discuss four important approaches for contemplating and answering moral questions. These approaches are the following:

- deontological ethics (rule-governed ethics or duty ethics)
- utilitarianism (consequentialism)
- virtue ethics (personal moral virtue)
- an African ethical approach (people are interrelated)

Each of the abovementioned approaches for contemplating and answering moral questions will now be considered.

4.1 Deontological ethics (rule-governed ethics)

Deontology is an ethical approach that holds that there are certain universal rules or principles that should determine our moral decisions. The deontologist asks "is it right?" or "does it conform to moral norms or values?" You should try to determine whether any rational person in your position would make exactly the same moral decision that you are making.

The philosopher Immanuel Kant (1724–1804) is regarded as the father of deontological ethics. He laid down two basic maxims/criteria that should guide moral decision making:

1. All moral decisions should be put to the universalisation test, that is, whether the decision you are contemplating would be upheld by all ra-

tional individuals in a similar situation across the boundaries of space, time and circumstance.

2. The second criterion can be described as the "golden rule", which is to do to others what you would want them to do to you.

When we view moral principles as universal rules, they become important guides to our conduct. They tell us what we should or should not do. Examples of moral principles are "one ought not to steal" and "human life is sacred". Moral principles are the rules that regulate interactions between people so that, as far as possible, no one's vital interests and wellbeing are sacrificed. A principle guides our conduct in a way that discourages us from pursuing our own self-interest. A person who acts "on principle" is not swayed in his/her opinion by considerations of personal interest or by the private interests of other people. For example, in cases of "whistle-blowing" it is usually not in a person's interests to expose corruption. It is, however, in the interests of the firm in question and the country at large. It is the right thing to do, but it is often not personally expedient. We will clarify this concept by means of the following scenario.

Activity 3.1



Think about the following scenario and answer the questions that follow from a deontological perspective:

Suppose you are offered a bribe to do work for someone. You would have done the work anyway, but now you will receive more money.

3.1.1 What should you do?

Answer

3.1.2 What would a principled person do?

Answer

3.1.3 Why would a principled person act in that way?

Answer

3.1.4 Do you think a principled person can be successful in business? Provide reasons and a logical argument to substantiate your answer.

Answer

Feedback on Activity 3.1: This activity tests whether you can apply the principles of deontology that we examined in paragraph 4.1 above. Remember that deontology holds that there are certain universal rules or principles that should determine our moral decisions. The deontologist asks the following questions:

- **"Is it right?"**
- **"Does it conform to moral norms or values?"**

You should determine whether any rational person in your position would make exactly the same moral decision that you are making as you answer the above scenario. Also remember to apply the "golden rule", namely, do to others what you would want them to do to you. Formal answers to these questions will be given in a further Tutorial Letter 201.

A principled person is someone who seeks to apply moral values to daily living. The principles they subscribe to guarantee that their actions do not compromise the authority of the people with whom they interact and the respect they owe others. Never treat people as a means to an end. In other words, see people as valuable rather than useful. A person of integrity will be motivated by goodwill in their interactions with others, regardless of personal gain.

The second important ethical approach for contemplating and answering moral questions, is utilitarianism which will now be considered.

4.2 Utilitarianism (consequences)

Utilitarianism is concerned with the consequences of actions. In other words, a utilitarian will ask whether the goals or consequences of certain actions are good or bad. Therefore, we can say that utilitarianism is the ethical approach of whatever works best for most people. In order to determine what the best outcome will be, one has to take into account the effect of the proposed action on all those who will enjoy or suffer the consequences. No action or state of affairs is right or wrong in itself. To judge whether an action will bring the best

outcome, one looks at the effect the action will have on the wellbeing of the people involved.

Activity 3.2



Think about the following scenario and answer the questions that follow:

You work as a paralegal for a firm of attorneys. The firm is approached by a state hospital that provides sophisticated care and that is one of the best organ transplant facilities in the country. The hospital has asked for extra funding in order to do another hundred very urgent transplants. The government has refused because the money could be better spent on immunising children in rural communities.

3.2.1 From a utilitarian perspective, what should be done?

Answer

3.2.2 What is your view on the matter? Defend your standpoint.

Answer

Feedback on Activity 3.2: This question tests whether you are able to apply the principles of utilitarianism as outlined in paragraph 4.2 to the scenario. Formal feedback will be provided in a further Tutorial Letter 201.

The third important ethical approach for contemplating and answering moral questions is virtue ethics, which will now be considered.

4.3 Virtue ethics (personal moral virtue)

A third approach to addressing moral problems is personal virtue. This approach argues that what is important in moral decision making is to focus on the kind of person you are, rather than focusing too narrowly on your actions. According to this view, a moral person is a virtuous person. A virtuous person is someone whose conduct exhibits virtues such as courage, fairness, kindness, honesty, accountability and self-control. Virtues are aspects of a person's character that make it likely that he/she will judge wisely and well in situations of moral perplexity. The virtuous person is not a blind follower of rules, nor a calculator of outcomes. Virtues are qualities of character and conduct that are morally excellent. As earlier scholars put it, *actio sequitur esse*, that is, actions follow from who we are; good conduct is a consequence of good character.

It is important to remember that virtues are not inborn: they are learnt or acquired through education and practice. This means that virtues need to be nurtured. Moral education and formation are essential to the construction of moral character. Moral formation occurs when moral norms and values become "internalised" as part of a person's character and conduct. Moral formation is the result of both external and internal factors. External factors include the influence of parents, schools, religious groups, mentors and colleagues, while internal factors refer to the choices that people make in response to their experiences. Therefore, we become what we choose to become. Moral formation is also a process. Therefore, the repetition of good actions leads to the formation of good habits, which in turn leads to the formation of a good character. This also means that developing virtues will require the remaking of the social environment in which we live. We should not view personal ethics in an individualistic manner. Although it is true that virtue ethics is practised by individuals, it is not true that individuals exist in a vacuum. All of us exist within a group or a social context and we are intrinsically part of a community.

Activity 3.3



You work as a paralegal for a state department. The state sends you on an expensive 18-month training course paid for by taxpayers' money. You meet a lot of people from the private sector during the course. You impress them and a few firms make you an offer. You are extremely interested in the opportunities, but you have signed a post-training obligation with the state. You decide to do part-time work for the firms in question, but it soon takes up all your time.

3.3.1 How can understanding and practising personal virtue assist a person in this kind of situation?

Answer

3.3.2 What kinds of virtue should be cultivated in the public sector to avoid this type of situation? Can you make suggestions on how this should be done?

Answer:

Feedback on Activity 3.3: In your answer, consider virtues like integrity and loyalty. Formal feedback will be given in a further Tutorial Letter 201.

Let us now consider an African ethical approach (the fourth approach) to contemplating and answering moral questions.

4.4 An African ethical approach (people are interrelated)

A fourth approach to addressing moral problems is an African ethical approach. At the core of the legal profession are legal professional ethics. In the previous parts of this study unit you have been taught the rule-based approach, utilitarianism and virtue ethics. These theories are taken from a Western perspective, which is based on individual autonomy. In African philosophy, reality is related to the whole, meaning the whole community. Some scholars argue that the legal profession is a *sui generis* (unique) community with its own culture and that other worldviews, as such, should not have an impact on lawyers. This cannot be accepted and Mnyongani argues that there should be a symbiotic relationship between the law and the cultural milieu (environment) within which it operates. Culture plays the role of informing one's sense of morality and ethics. "Culture is a fundamental determinant of ethical decision making. It directly affects how an individual perceives ethical problems, alternatives, and consequences." Morality can be considered universal, but there is an element of specificity that needs consideration and this is where an African perspective comes in.

Following the dawn of the new democracy in South Africa, African customary law coexists side by side with the Western-inspired dominant common law, but the two legal systems have more dissimilarities than similarities. One such dissimilarity is the use of lawyers in dispute resolution processes. "The use of lawyers is historically alien to customary law." The recognition of customary law by the Constitution means that more lawyers will deal with matters related to customary law in court, but customary law is silent on what the duties of lawyers are or should be and, therefore, is also silent on how they should conduct themselves ethically. "This is so because customary law knows of no class of

people called lawyers and has no role for them in its processes and procedures." As Mnyongani explains, African traditional processes are not complicated and are conducted not only in a familiar environment, but also in a language familiar to the parties concerned. Disputes in traditional settings are dealt with at different levels of the societal hierarchy, depending on the nature of the disputes and the parties involved. Most traditional societies in South Africa would generally follow the same organisational structure. In a family household, the head of the family is responsible for settling disputes and dispensing justice. Where such disputes involve more than one family, elders and clan leaders take responsibility for ensuring that justice is served. The first two levels are characterised by a degree of informality. The process is formalised when the dispute involves people from different clans or neighbourhoods, in which case the sub-headman would convene his court or council. Proceedings usually take place in the open, under a tree. The same procedures are followed for both criminal and civil cases. Examination and cross-examination of the accused are open to everyone attending. Before sentence is passed, the accused is asked to suggest the sentence he/she deems fit for the crime committed. Should the dispute need further referral, it would then proceed to the headman and a senior traditional leader until it reaches the king for final determination. It was hoped that the Traditional Courts Bill, once enacted, would have affirmed and recognised traditional justice systems as indicated above.

When disputes among Africans arise, they are settled in accordance with living customary law that requires no lawyers, yet, there are still debates as to what customary law really is and when it is applicable and to whom, since there is a contrast between the codified law of the state and the living customary law that governs traditional communities. Living customary law's underlying principle is ubuntu – I am because you are. Central to the idea of ubuntu is the notion that people are interrelated, that a person is a person through other persons. The practice of law, whether customary or Western orientated, should strive to maintain harmony in a community. "The African worldview knows no distinction between law and morality. In view of the fact that ancestors play a vital role in African life, a morally good life has future implications. The maintenance of harmony may require that one should live a morally good life in order to be a good ancestor as opposed to being a bad one. Ancestors too play a very active role in the daily activities of the community. The atonement of an offence is incomplete without recourse to the world of the ancestors."

The problem is that even though the new constitutional dispensation acknowledges customary law, it is currently not applied in nearly all the courts and disputing parties still rely on the courts of law to give direction in disputes. In colonial times and later in the apartheid era, courts of law did not have legitimacy in the eyes of the black majority. "They were viewed as institutions of oppression." In the constitutional era there has been an effort to ensure the legitimacy of the courts and the law. But there remain challenges. The challenges of poverty and illiteracy impede on the enjoyment of constitutionally guaranteed rights. If people are not aware of their constitutionally enshrined rights and how they can access and protect those rights, the human rights discourse will be of no meaning to them. This is where paralegals can be of assistance in a community – they could clarify the legal process vis-à-vis (as regards) the customary way of settling disputes to those who do not understand. Even the most sophisticated members of society struggle to understand the language used and the processes followed in court.

Most of what is called ethics within the legal profession in South Africa is nothing but rules made by the legislature or administrative agencies like the Law Society or the Bar Council. These agencies' sole purpose is to regulate the conduct of professionals within the legal profession. Rules are indispensable, especially for

a profession as complex as the legal profession, but rules cannot be the be all and end all of ethics. Cognisance should be taken of people's views on morality and how these views could enhance the rules of the profession.

Activity 3.4



You are a paralegal who works in a community centre. A group of paralegal students from that community come into the centre and ask you the following questions, to which you provide an answer:

3.4.1 What is ubuntu and how is it linked to living customary law?

Answer

3.4.2 Does customary law recognise the role of lawyers? If not, how are disputes usually dealt with in the traditional setting?

Answer

Feedback on Activity 3.4: These questions test whether you are able to identify and apply the principles of an African ethical approach as outlined in paragraph 4.4 above. Formal feedback will be provided in a further Tutorial Letter 201.

Remember:

The four approaches to moral problems discussed above are not mutually exclusive. Now that we have an understanding of the four ethical approaches, let us identify the most salient aspects of each approach by performing a quick ethics test.

4.5 A quick ethics test

We can formulate a quick ethics test for each approach as follows:

Four ethical approaches	Quick ethics test
A. Deontological (rules)	Is it legal? Does it comply with a code of conduct? Can it be universalised? Does it comply with the "golden rule" (i.e. do unto others as you would have them do unto you)?
B. Utilitarianism (consequences)	How would it look in tomorrow's newspaper? What would the consequences be?
C. Virtue ethics (personal good conduct)	Will I consider myself a good person if I do this? How does it make me feel?
D. African ethical approach (people are interrelated)	No difference between law and morality. I am because you are. A person is a person through other persons. A morally good life will maintain harmony.

4.6 Consequences of unethical behaviour by paralegals

When a paralegal acts unethically, he/she is not in any danger of being struck from any roll. However, this does not mean that unethical behaviour by a paralegal cannot have serious consequences. A paralegal's unethical behaviour can result in a loss of respect for him/her, the loss of the employer's client and disciplinary action. In addition, the paralegal may lose his/her employment and may even be subject to criminal prosecution or a civil law suit.



5. SPECIFIC ETHICAL GUIDELINES FOR PARALEGALS

We will now look at specific ethical guidelines that you must consider and apply in your workplace.

5.1 Accepting instructions

Before accepting instructions, lawyers and paralegals should consider a few important factors, such as whether there is a potential conflict of interests, whether the clients' instructions involve illegality and whether they possess the necessary skill to execute the mandate. They should also consider whether they have sufficient time at their disposal to attend to the clients' instructions efficiently and within a reasonable space of time. This applies equally to those in private practice and those employed to render legal services to the poor, for example, clinicians and practitioners at the Legal Aid Board.

5.2 The mandate

Lawyers and paralegals may not act in any matter unless they have clear instructions to that effect. The mandate need not be in writing. Paralegals must act according to the clients' instructions at all times. They may, however, exercise their own professional judgement. Acting contrary to the scope of the mandate may result in civil liability for damages.

5.3 Confidentiality and privilege

With some exceptions, information given to a lawyer and a paralegal in the course of representing a client must be kept confidential and may not be discussed with others outside the office. The rule of confidentiality applies not only to information given to a lawyer by a client, but also to information relating to a client's case that is obtained from other sources.

What does "confidential" mean?

Confidentiality means that you are entrusted with the confidence of another person or with his/her private affairs or purposes. This information is intended to be held in confidence or kept private.

All information that a lawyer or a paralegal obtains from or about a client in the course of representation is presumed to be confidential. The duty of confidentiality usually begins with the first meeting between a lawyer or a paralegal and a client and it continues after the client–lawyer relationship has terminated.

This rule is of special concern for paralegals who leave one law firm to work for another. Paralegals may never divulge confidential information learnt through previous employment – especially if it would be to the detriment of former clients.

As with most ethical rules, there are exceptions to the rule of confidentiality. The most common exceptions are the following:

- Confidential information may be divulged with the permission of the client.
- Confidential information may be disclosed when implicitly authorised in order to carry out the representation of the client.
- Confidential information may be disclosed to prevent the client from committing a criminal act.
- Confidential information must be divulged if so ordered by a court of law.

Activity 3.5



3.5.1 Discuss what it means when one says that paralegals are subject to the principles of attorney–client privilege.

Answer

3.5.2 Discuss whether it is permissible for a paralegal to release confidential information to a photocopying service to be copied and bound?

Answer

Feedback on Activity 3.5: Refer to paragraph 5 when answering the above questions. Formal feedback will be provided in a further Tutorial Letter 201.

5.4 Conflict of interest

What does "conflict of interest" mean?

A conflict of interest is a real or seeming incompatibility between the interests of two clients, such that the lawyer or paralegal is disqualified from representing both clients if the dual representation adversely affects either client or if the client does not consent.

A conflict of interest can arise when

- the interests of two clients are directly adverse
- the interests of a client and a former client are materially adverse in a substantially related matter
- the personal interests of a lawyer or a paralegal are adverse to the interest of a client
- the business interests of a lawyer or a paralegal are adverse to the interest of a client

As a paralegal, you must be aware of and abide by the ethical rules that govern attorneys with regard to conflicts of interest. A paralegal who does not work in a law firm and who assists clients without the supervision of an attorney will be responsible for ensuring that there are no conflicts of interest involving current clients and between current and former clients, much in the same way that attorneys are responsible for ensuring that there are no such conflicts of interest.

If you change employers and you are not sure whether there might be a potential conflict of interest, here are some guidelines you may follow:

- Keep a current list of client names and the matters on all the files on which you work. This list should be kept confidential!

- When you leave your position, take a list of the clients on whose files you have worked and the matters to compare them with the files you may be assigned to in future.
- If your employer takes on a client in whom you have a personal interest, be it a financial interest or a personal relationship, the information should be reported to the supervising attorney as soon as possible.
- If you ever suspect that you may be involved in a conflict-of-interest situation, report it immediately to your supervising attorney or another appropriate individual in your law firm or law department.

Activity 3.6



You have just started working as a paralegal with a law firm. You are given a file and, while going through it, you realise that this firm is representing a company you know. In your previous position you worked at the company against whom the litigation is now being directed. You get the feeling this might be a conflict of interest, but you are still on probation and, therefore, unsure about whether you should tell your new employer of your past involvement with the case. What should you do? Discuss why.

Answer

Feedback on Activity 3.6: Have regard to paragraph 5.4 when answering this question. Formal feedback will be provided in a further Tutorial Letter 201.

Activity 3.7



Suppose you are a paralegal at a law firm. You are reviewing a list of new clients and you notice that your law firm has initiated a lawsuit against a firm in which your wife or husband is a shareholder. Do you have a conflict of interest? What should you do?

Answer

Feedback on Activity 3.7: Formal feedback will be provided in a further Tutorial Letter 201.

5.5 Competence and diligence

Competence and diligence means to have the legal knowledge, skills, thoroughness and preparation reasonably necessary for representation. You must pursue matters on behalf of clients with commitment and dedication. As a paralegal you must be certain you have the requisite knowledge and skills to perform the tasks that have been assigned to you. If you do not possess such skills, you must work to educate yourself and ask for help. It is important that you do not misrepresent the level of your knowledge and skills, because doing so can have serious consequences for you, the attorney you work for and the clients. Paralegals must be diligent in the completion of their assignments, since attorneys rely on their ability, skills and diligence to get the work done thoroughly and on time.

Activity 3.8



What skills should a paralegal possess in order to be considered competent?

Answer

Feedback on Activity 3.8: This question relates to paragraph 5.5 above. Formal feedback will be provided in a further Tutorial Letter 201.

5.6 Financial matters

Attorneys have the ultimate ethical responsibility in respect of most financial matters. However, because clients generally pay for the time paralegals spend working on their files, paralegals must be familiar with the rules of ethics concerning billing and fee splitting. In addition, because paralegals are often responsible for the bookkeeping and record keeping associated with accounting for client funds, it is imperative that they are familiar with the ethical rules

applicable to attorneys concerning client funds and the rules for bookkeeping and record keeping in respect of client funds.

5.7 Trust accounting

Paralegals are often responsible for trust accounting functions. As a paralegal you might find that your work on real estate, personal injury or other types of files requires you to set up and to maintain trust accounts for holding and distributing funds on behalf of clients.

Any attorney who delegates work involving trust accounting to you will have the ultimate responsibility for the funds. However, as a paralegal you must be aware of the ethical rules for handling clients' funds. Some of the tasks you may be assigned with regard to clients' trust accounts could include

- notifying clients of any disbursements or withdrawals from the trust accounts
- preparing statements of the accounts for clients, to be approved by the supervising attorney
- reconciling monthly bank statements to trust account registers and calculating interest

5.8 Paralegals and billing

Attorneys and paralegals have set billing rates. Billing rates are usually based on the market and paralegals' experience and level of expertise. It is very important that you track your billable hours closely. It is your ethical responsibility to keep accurate time records, reflecting the amount of time spent on each client's file and the work done for each client.

What is meant by "billable hours"?

Billable hours are hours and fractions of hours that are spent working on a client's file that will later be billed to that client.

Non-billable time includes time spent on training, interviewing, continuing education, marketing, file maintenance, administrative matters, pro bono work and personal matters.

Activity 3.9



Suppose you are a paralegal in the corporate department of a law firm. The work for a big contract is complete and you and another paralegal have made a significant contribution to the success of the case. Both of you have put in more or less the same amount of hours to complete the work; however, the other paralegal has considerably more billable time on the file than you. When you confront her she says "with a bill this size, no one will notice if I add a few extra hours." Your principal has signed off the file already and you will be paid the following day. What, if anything, should you do?

Answer

Feedback on Activity 3.9: Have regard to paragraph 5.8 above. Remember to consider the principles of ethics when answering this question. Formal feedback will be provided in a further Tutorial Letter 201.

6. CONCLUSION

In this study unit you were taught general ethical guidelines and a few specific ethical rules concerning paralegals. You will use these guidelines extensively in paralegal practice. Therefore, it is of utmost importance that you ensure that you are familiar with all the work covered in this study unit.



7. SELF-ASSESSMENT

Answer the following questions on your own to ensure that you know and understand the work covered in this study unit:

7.1 Define ethics, differentiate ethics from morality and explain when an act is unethical.

7.2 Identify and differentiate between the four different approaches to ethical problems.

7.3 Read through your answers in the activities and ensure that you have reached well-thought-out and substantiated recommendations for actions.

You have reached the end of the module Business Practice and Workplace Ethics. We hope you enjoyed working through this module and wish you success with your further studies.

8. SOURCES REFERRED TO IN THIS STUDY UNIT

Borman, R, Raubenheimer, E & Van der Walt, R. 1998. *Paralegals: introduction to legal practice*. 3rd edition. Queenswood: Seytrade Publishers.

Mnyongani, FD. "Whose morality? Towards a legal profession with an ethical content that is African" 2009 (24). *SA Public Law* 121–134.

Mnyongani, FD. "Duties of a lawyer in a multicultural society: a customary law perspective?" 2012 (23) *Stellenbosch Law Review* 352–369.

Schneeman, A. 2000. *Paralegal ethics*. Canada: West Legal Studies.

University of South Africa. Department of Philosophy and Systematic Theology and Theological Ethics. 2008. *Tutorial letter 501: theoretical* and *applied ethics PLS2116*. Pretoria: University of South Africa.

GLOSSARY

Antenuptial contract	A contract between two people who are planning to get married and which deals with how the property of both will be controlled by them during their marriage and how it will be divided after the marriage
Companies and Intellectual Properties Commission	Government office where a record is kept of all the registered companies and close corporations in South Africa.
Conveyancing	Legal work related to the transfer of property from one person's name to another person's name.
Deeds Office	Government office where a record is kept of all the land in South Africa and the owners thereof.
Family Advocate	Government office that deals with divorce matters in which children are involved. It assists parties to resolve guardianship, custody and access issues.
Law graduate	A person who has successfully completed a law degree.
Master of the High Court	Government office that deals with the regulation and protection of the financial interests of persons whose financial matters are managed by others, for example minors and the mentally challenged.
Notarial practice	Legal work related to the drafting and preparation of certain legal documents known as notarial deeds.
Public prosecutor	Attorney employed by government to institute and conduct criminal proceedings on behalf of the State.
Purchaser	A person who buys something from another person.
Registrar of the High Court	The administrative manager of a specific High Court who is responsible for ensuring that all administrative procedures in that court run as prescribed.
Serve	A legal term to describe the delivery of certain legal documents in accordance with prescribed legal procedures.
Seller	A person who sells something to another person.
Sheriff	An officer of the court who has the responsibility for delivering certain legal documents and taking possession of property on behalf another person in terms of a court order.

State Attorney	Government office that acts on behalf of the State in legal matters.
State Law Advisor	Government office that provides legal services to the State.
Statutory body	An institution or company that has been established in terms of legislation.
Tacit	When something is understood without being explicitly said or stated.
Vet	Careful and critical examination of a legal document or opinion.

SOURCES REFERRED TO IN THIS SECTION

Bryant, J & Searle, J. 2005. *Introduction to bioethics*. Chichester: Wiley.
Oxford South African Concise Dictionary. 2006. Cape Town: Oxford University Press.
www.lssa.org.za.
www.paralegaladvice.org.za.