

LEGAL ETHICS: A GUIDE TO PROFESSIONAL CONDUCT FOR SOUTH AFRICAN ATTORNEYS. By E.A.L. LEWIS. [Cape Town: Juta & Co., Limited. 1982. xix+340 pp. R38.50]

LEGAL Ethics may be examined from many perspectives. The traditional treatise casts legal ethics in the mould of duty to the court, duty to the client, duty to the state, duty to society and other duties some of which coalesce and some of which conflict. A more modern approach to the topic involves looking at the economic, social and cultural setting of the profession to examine how it works as an integral part of society and how the “lawyers’ law” which regulates this influential profession benefits or burdens society. This book, however, has struck a middle course.

The learned author endeavours to look broadly at the tasks carried out by lawyers in private practice, and at each stage, he examines the relevant ethical precepts and rules of etiquette. For example, the earlier chapters look at the rules for obtaining clients and legal work and taking instructions from the client; the middle chapters examine the performance of different types of legal work both as a matter of contract (including what the learned author believes is implied into the contract of retainer) and the relevance of claims for negligence. Finally, the book discusses fees and costs, the determination of the attorney and client relationship and some miscellaneous but important topics such as the relationship with employees and extra-professional misconduct.

Around this general framework the author manages to weave an ethical fabric which fully clothes the profession. At the end of the book, one can truly say that the resulting work is comprehensive. Almost every aspect of the South African attorney’s practice is covered — including not only the bare negative precepts, but also positive exhortations which ultimately will lead to a better profession.

Certain parts of the book reflect the learned author’s personal bias in what may or may not be considered misconduct. He distinguishes statutory misconduct from other unprofessional conduct and unlike earlier authors who base ‘golden rules’ of conduct on fundamental Christian concepts (“Do unto others as you would they should do unto you”), the author poses another golden rule: “A practitioner must avoid all conduct which, if known, could damage his reputation as an honourable lawyer and honourable citizen.” He then lists fourteen sub-elements of this golden rule.

With respect, this golden rule and its sub-elements is not any more helpful than previous attempts in analysing what to do when faced with an ethical dilemma. Indeed, it relegates important parts of the substantive law, for example fiduciary duties, to the area of a mere matter of opinion—and your opinion of what is dishonourable may not be the same as mine. As an illustration of my point, discourtesy is listed as a sub-element with dishonesty. The fact that so many textbooks have been written and so many cases decided on intricate yet flexible questions of legal ethics means that it cannot be relegated to the areas of personal opinion. There is a firm body of law to be analysed and discussed.

Many precepts are expressed as absolutes when in fact they are not. In some cases the author's footnotes quote from Shakespeare and his own opinion to substantiate as absolutes what are essentially only personal values albeit that these values may be endorsed by a large conservative section of the legal community. He places a great deal of faith in the writings of Orkin, a Canadian writer in the field of legal ethics, but whose book was written twenty six years ago (1957). Since then, many writers within the western legal community worldwide have questioned the role of the legal profession in developing societies and, in particular, the performance of the private legal profession in providing legal services to the community. Consumerism has meant that professional advertising is not the ethical taboo that it was considered to be even ten years ago. Some writers would even argue that the limits on advertising are morally wrong. In these areas, the conservative dogmatism of the book is a little disappointing as it fails to come to grips with the topical ethical issues affecting the future of the profession.

The author's treatment of the concept of negligence as amounting to professional misconduct is carefully thought out and thoroughly researched. He draws on many authorities from England and other jurisdictions to show that 'absence of dishonesty does not preclude dishonour': inexcusable negligence may be sufficient for the profession to take a hand in reprimanding the delinquent lawyer. In all, this part of the book is a *tour de force*; it reflects the growing international awareness that to continue to enjoy self-regulation, the profession must shoulder responsibility for the competence of its members as well as other responsibilities. However, the inherent myopia inflicted by looking at the topic only from the point of view of the legal task in hand led the author to miss the significance of this development of the law in its social context: that large negligence suits will affect the economic viability of the profession. This means that there may be some scope for rearranging the structure of the profession to provide for adequate compensation for the victims of negligent lawyers but, at the same time, prevent the relevant insurance (no matter how this is underwritten) making an economic disincentive for the supply of legal services as a whole. The possibility of setting a ceiling on the lawyer's professional liability to his client was missed. No doubt, all these omitted points and other related issues have ethical ramifications for the profession.

Some criticism can also be levied at the book's failure to analyse the underlying cultural problems that South Africa undoubtedly has and how these problems interact with legal ethics. The supply of legal services to the deprived does not feature greatly in the book other than a few passing references to *pro deo* and *pro amico* work.

The profession is neither encouraged nor chastised for its role in providing legal services to socially deprived persons. Similarly, the learned author mentions the South African division between solicitors and barristers (called 'attorneys' and 'counsel' respectively) and, for example, the way that counsel refer to each other by their last name without the prefix 'Mr', 'Mrs' or 'Ms'. He introduces this sort of practice as belonging to the mores of the English preparatory school, but does not go further. Certainly, there is no gaining insight into the division of the profession and how 'legal ethics' in this area operates as an economic and class distinction such as has occurred in studies in the United States, Australia and England.

In summary, this book will provide a handy and comprehensive reference for the South African practitioner and his articled clerk engaged with the daily tasks of private practice. This alone is difficult and the learned author is to be commended on a job well done. Other readers may wish that the author had taken the opportunity for a wider perspective of the topic to gain better knowledge of how the South African profession operates and how it is governed in its behaviour by its own internal rules. More importantly, by limiting himself to the tasks performed by lawyers without reference to social, economic and cultural factors, the learned author has deprived the book of providing a guide to South African attorneys to meet the ethical challenges of the future.

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