

Ethics Professional Responsibility and the Lawyer
by Duncan Webb

Published by: Butterworths (New Zealand) 2000

ISBN 0408715227

423 pages plus the New Zealand Law Society Rules of Professional Conduct for Barristers and Solicitors 1998.

Reviewed by Peter MacFarlane^[*]

In the last ten years there has been an increasing recognition by judges, Law Reform agencies and legal academics of the importance of legal ethics (or perhaps more correctly, professional responsibility) in the teaching and practice of law. This has arisen not only because of a change in professional emphasis from public service to commercial gain and the development of large national and multi-national firms. Concerns by a better-informed public in relation to the conduct of lawyers have also contributed to the growing importance of professional responsibility in both legal practice and education. The move to establish legal ethics courses in undergraduate law degrees is of relatively recent origin. In the past, such courses were often seen by students (and by some members of the academy) as 'easy' or 'soft' options'. However the trend now is to recognise the academic and practice significance of such courses. This has led to an increase in Australia and New Zealand of academic writings concerning legal ethics and the teaching of legal ethics. This text by Duncan Webb is a significant contribution to the body of literature in this area. In the United States the subject of legal ethics has been an area of strong academic research and teaching for a number of years. The focus of this text is on New Zealand law and practice. The main limitation in this regard is that, for the most part, the case references and references to Rules of Conduct relate to New Zealand. However, having said this, much of what is included in terms of commentary can readily be applied to the Australian and South Pacific jurisdictions.

In the Preface the author notes that the book is aimed at lawyers and law students in that it 'seeks to inform them about the content of the obligations owed by lawyers to clients, to the courts, to the profession and the general public'. He also states that the book intends to discuss 'the foundations, critique and justifications of those obligations'. In the coverage of materials in a book on legal ethics it is not easy to achieve a right balance as regards issues mainly involved in the practice of law and those dealing with the teaching and learning of legal ethics. The author is to be commended for being able to maintain just such a balance. This is one of the strengths of the book. Apart from this, the text is well set-out and is easy to read. It is also properly indexed and is comprehensive in its coverage of the issues. It is divided into five Parts, with Chapters within each Part.

Chapter 1 'The Profession and Society', considers the sociological foundations of the opposing approaches as regards the place and role of the legal profession in society. It contains a good mixture and balance of legal and sociological theory and applies these various approaches to the area of legal practice. It is often overlooked that the law is regarded as a profession. This oversight could have some (negative) consequences in terms of legal practice in that the teaching of legal ethics would tend to focus merely on

the application of rules of conduct. In this text the author first of all gives consideration to what it means to be a professional. This puts the rest of the work in context and provides the student-at-law with the theoretical basis necessary to assess the rationale and relevance of Rules of Practice.

Chapter 2 looks at 'Perceptions of the Role of Lawyers'. It is often said that the public hold lawyers in low esteem. Academic texts and articles will often explore why this is so. However it is arguable that for everyone who has a bad story about a lawyer (usually because he or she did not get the desired outcome) there are those who believe their lawyer did a good job (usually those who have a positive outcome) and if evidence of applications for tertiary entrance are relevant, it seems that an increasing number of people see law as a desirable profession. The debate about the perception of lawyers, if couched in terms of individual experiences could become a subjective exercise of little value. In discussing perceptions about and the role of lawyers the author is to be credited for properly analysing the work done by the lawyer, and the extent to which this work can be supported by principles of ethics. Such an analysis raises the question as to whether the lawyer is merely to be regarded as a 'hired gun'. This, in turn, brings us back to a discussion of the various sociological approaches to the nature of law as a profession and the extent to which the adversary system can be held responsible for what are perceived to be the unethical and immoral aspects of legal practice: 'A hired gun approach seems a particularly defensible approach in an adversarial system of litigation which demands that each litigant should put his or her case and try to undermine that of the opposition'. (p33) It must be remembered however that the description or analogy of the lawyer as a 'hired gun' is incompatible with the fact that the lawyer also owes a paramount duty to the court and the administration of justice. This 'paramount' or competing duty may directly clash with the lawyer's 'other' duty to represent the client's best interest. This Chapter is a provocative and thoughtful one. It raises many issues as to how we perceive the role of the lawyer, the law, and their relationship with social values, individual freedoms and client autonomy.

Chapter 3 is titled 'The Law Society and its Roles'. While this Chapter does put considerable emphasis on the role and functions of the New Zealand Law Society and District Law Societies, it nevertheless raises general questions that have application across jurisdictions. The author puts a strong case for intervention by an authority -apart from the body that already exists to represent the interests of lawyers and monitor their conduct concluding that 'the harshest criticism that can be made of self-governance of the profession is that it is ineffective'. (p 97) Still, the reviewer believes that in this Chapter there is perhaps an over-emphasis on 'self regulation and governance' at the expense of 'enforcement and discipline'. This later issue is partly discussed in Chapter 4 but stronger links could have been made between these two Chapters and the options, in terms of discipline and enforcement, could have been given more detailed attention.

Chapter 4 is about 'Professional Standards'. This Chapter examines the Rules of Conduct, their scope and purpose. The focus is clearly on New Zealand. Nevertheless it still offers guidance for those in other jurisdictions. There is also a useful, albeit limited discussion of the meaning of 'misconduct' and 'unprofessional conduct', 'misconduct in a professional capacity', 'conduct unbecoming' etc. The points made by the author in these sections further strengthen the view that legislation governing the practice of law should set-out clearly what types of conduct would attract disciplinary penalties. Such legislation exists in certain Australian jurisdictions. It is helpful for the lawyer and the public in that they are not forced to a reading of conflicting case law in order to determine whether (and if so what) disciplinary offence might have been committed. This Chapter also considers Complaints Procedures and the merits of a legal Ombudsman or Independent Legal Services Commissioner.

Chapters Five to Twelve deal with the relationship between lawyer and client. This relationship is a complex one and is based upon a duty to do the best for the client. In acting in the best possible way for the client, the lawyer must, while being fearless in the cause of the client, do so within the law and is also subject to a duty the lawyer owes to the court. Chapter 5 is a general Chapter that sets the scene in terms of the theoretical foundation of the relationship, and the sources of law upon which it is based. Subsequent Chapters focus on particular aspects of the relationship. For example Chapter 6 is headed 'Lawyer-Client

relationship – formation, termination and abuse’ and contains a good discussion of the ‘cab-rank rule’, including the perceived disadvantages and objections to the rule, which is subject to a number of exceptions. The footnotes detail useful references to earlier articles and scholarly writings in this area. In a ‘fused’ profession the continuation of the cab-rank rule can all the more be justifiably criticised. This Chapter discusses the relevant issues pertaining to these matters. It also considers the termination of the relationship between lawyer and client (including termination by the lawyer) and potential areas of abuse so far as the relationship is concerned.

Chapter 7 is headed ‘Loyalty’ and for the most part deals with the ethical problem of acting for a client with interests inconsistent with those of the lawyer or another client of the lawyer, or acting for both parties. The question of loyalty also raises the duty that the lawyer has to the court. The (paramount) duty of the lawyer may result in apparent ‘disloyalty’ to the client. It would have been helpful, as a clarification, to refer to this ‘higher’ duty as part of the introduction to this Chapter, where the author notes at p 175: ‘Once a client retains a lawyer, the lawyer’s loyalty must be undivided. Lawyers are committed to acting in the interests of the client to the exclusion of their own interests, or the interests of any third party’. In terms of the duration of what the author calls the duty of loyalty, there also should be some clarification to the uncompromising statement that ‘once the retainer has been terminated the lawyer is no longer under a duty to act in the best interests of the clients, to disclose information to them, or to advise them’. (p. 214). This fact, as recognised in the following paragraph of the text, does not apply to the duty of confidence which continues after the retainer has come to an end.

Chapter 8 deals with the duty to maintain clients' confidences. There are competing issues here such as the duty to the client and the duty to the administration of justice. However these should rarely give rise to any ethical dilemma as far as the lawyer is concerned. In the same way that the courts’ duty is not necessarily about the finding of truth, so it is that the lawyer is under no legal or ethical obligation to disclose a state of affairs that is legal even if prejudicial to the other side. It perhaps would therefore have been useful to put this discussion in the context of the adversary system and the right to silence.

Chapter 9 is also a Chapter about conflicts-of-interest – in this case protecting the confidences of former clients. The whole area of conflicts-of-interest is linked or intermingled with the protection of client confidentiality: the two cannot sensibly be separated. Arguably, it would have facilitated greater understanding if Chapters 7, 8 and 9 were merged under the headings of ‘the general duty of confidentiality’, ‘confidentiality and acting for both parties’, ‘confidentiality and acting against former clients’, ‘the duty not to mix private interests with the affairs of the client’ etc.

Chapter 10 concerns the ‘Duties to Disclose and Keep Informed’. The duty of keeping the client informed is an important duty and one that the surveys show is a major reason for criticism of the profession – communication problems of not being told what is happening. The duty to disclose the likely success or otherwise of the actions that would be taken by the lawyer and alternatives that might be available could have been given greater emphasis. This is so especially in the context that litigation should be a remedy of last resort. Most of the Chapter deals with the question of disclosing to the client of information that has come to the knowledge of the lawyer accidentally or through a confidential communication.

Chapter 11 concerns competence and advocates’ immunity. The text highlights the issues and the emerging principles in these areas. The question of the immunity of the advocate is always a lively area for debate in legal ethics courses. The text makes reference to the English Court of Appeal decision in *Arthur J S Hall and Co V Simons* [1999] 1 *Lloyd’s LR* PN 47. Since publication of Webb’s book, the House of Lords has considered this matter by way of appeal in a case reported at [2000] 2 *FLR* 545. The majority of the Law Lords held that it is no longer in the public interest for advocates to be accorded blanket immunity from suits for negligence in relation to their conducting of civil or criminal litigation. For those jurisdictions where it still applies the author makes a convincing argument that the principle of advocate immunity should be abandoned.

Chapter 12 deals with fees. It should be read by all those in practice. Despite continued references to over-servicing, the high cost of legal services, and the extra charges that are often unknown to the client, lawyers still seem reluctant to move to an open and transparent approach on the issuing of legal fees including allowing the client the opportunity to have them fully assessed. The merits of contingency fees - in all their different forms - have been debated for some time now and the author is to be commended for his comprehensive treatment and referencing of this issue. It was also appropriate to include in this Chapter the question of pro bono work. Fees are not just about the process of reward for services rendered. In the context of the legal profession they are also about access to the law in that if fees are exorbitant it would 'lock out' or diminish the poorer clients' access to the courts. At a time when there is an increasing divergences of views as to the obligations of lawyers to engage in pro bono work, it is good to see a discussion of the underlying issues that support the conclusion of the author 'that people ought not to be denied the benefits of the legal system and law because of low incomes' (page339).

Chapters 13 and 14 is discussed under Part Four of the text which is headed 'Duties to the Administration of Justice'. Chapter 13 deals with 'The administration of Justice' and Chapter 14 'Duties in the Conduct of Litigation'. Although the contents of these Chapters are more relevant to those who practice in the courts, they also include helpful advice concerning the duty to expedite proceedings, the duty to encourage the settling of cases and lawyers' duty in pre-trial matters. It is especially important for lawyers to be aware of their responsibilities concerning witnesses and the taking of evidence. The text offers essential advice for junior lawyers in this regard. These Chapters could also have included consideration of the particular role of prosecutors in a criminal trial vis-à-vis the Rules and the principle that their task is not to fight for the conviction of the accused at all costs.

The final Part of the text – Part 5 is headed 'Duties in Legal Practice'. It contains only one Chapter. Here the author outlines a large number of disparate obligations concerning advertising, soliciting work and 'whistle blowing'. There is a section on undertakings which all lawyers should be reminded about. It is sometimes forgotten that the lawyer who does not honour an undertaking he or she has given to a court will be held personally liable. It would also amount to misconduct. The final part of the Chapter deals with barrister's sole and professional cooperation with non-lawyers. The work done by a lawyer who is employed in the public sector can also pose special problems. It would have been helpful to include in this Chapter something about the particular nature of their work. Perhaps this could have been done by expanding the discussion of 'loyalty' (page 195) to include those issues pertaining to government lawyers also.

The author notes in his Preface that the significantly changing and changed environment concerning the practice of law and pressures on the profession have intensified the various calls and proposals for reform. The advent of the legal ombudsman or legal services commissioners and the recent removal of certain powers of the Queensland Law Society in respect of discipline have made a work of this kind even more timely.

In my own jurisdiction (Vanuatu) we currently have no requirements for the keeping of trust account records, no requirement for professional indemnity insurance and no Code of Ethics or Rules of Practice. The Attorney-General has established a committee to re-draft the *Legal Practitioners Act* with a view to incorporating a Code of Ethics and this work is expected to be complete by the end of 2003. Small jurisdictions raise special problems in terms of conflicts of interest and confidentiality. In these circumstances it is even more important to have effective Rules of Professional Conduct and a client-focused mechanism for dealing with complaints. The University of the South Pacific Law School has only recently moved to approve the introduction of Legal Ethics as a course within the undergraduate LLB degree. It is hoped that moves in both these areas of teaching and practice will increase public confidence in the profession, make for better lawyers and contribute to the legal education of those studying the law. This book provides a valuable resource in meeting those needs.

[*] Legal Practitioner (Vanuatu) and Associate Professor in the School of Law, University of the South Pacific
Port Vila, Vanuatu

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