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Modern Legal Ethics, by Charles W. Wolfram

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BOOK REVIEW

Modern Legal Ethics, By Charles W. Wolfram.[1] St. Paul, Minn. West Publishing Co. 1986, pp. 1363. $45.95.[2]

Reviewed by Maynard E. Pirsig[3]

The literature on professional ethics of the bar has been noted for its paucity of competent texts. Aside from Hoffman's Resolutions and Sharswood's lectures published in the last century and Drinker's book on Legal Ethics published in 1953, few texts have been produced on the subject other than some of limited and often superficial character.[4] Wolfram's text is a welcome exception and stands above anything of recent origin. Its coverage is comprehensive. It is not confined to the ethics of the profession but extends to collateral subjects such as the philosophical basis of professional ethics,[5] the adversary system, unauthorized practice of law, the constitutional right to counsel, legal education and admission to the bar, the selection and tenure of judges, and others. Usually, in the author's discussion of legal and ethical principles, these collateral topics are not further considered. Nevertheless, their inclusion gives the book a perspective and depth unique to the literature on the subject.

Notwithstanding this extensive coverage of subject matter, most topics are thoroughly discussed, analyzed, documented and commented upon. Over 5000 cases are cited in accompanying footnotes, often with brief summaries of their content. Some 2000 law review articles, books, and other sources also

1. Charles Frank Reavis, Sr., Professor of Law, Cornell Law School.

2. Two versions have been published - a practitioner's edition and a student edition. The latter omits some appendices and the chapter on judges. Citations in this review are to pages in the practitioner's edition.

3. Professor, William Mitchell College of Law, St. Paul, Minnesota. Professor Pirsig is a former Associate Justice of the Minnesota Supreme Court and former Dean of the University of Minnesota Law School. He is co-author with Professor Kenneth Kirwin of CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (4th Ed. 1984).

4. On the other hand, in the last few years, there has been a surge of casebooks published for law school instructional use.

5. A subject to which, as the author recognizes, only a limited amount of space could be allotted and only an outline of some of its aspects offered.

are cited, again with frequent accompanying comment. Of course, the ethics Codes of 1969 and 1983 of the American Bar Association are included and are analyzed and compared in detail.[6]

No text on legal ethics or professional responsibility currently in existence approaches this thoroughness in citation of authorities and other documentation.[7] One might expect this to lead to a considerable degree of superficial treatment. For the most part this has not been the case. Throughout the book, the discussion is of a superior quality characterized by thorough analysis of the issues considered, fair statement of arguments pro and con on questions of policy, careful interpretation of cases, and usually, a statement of the author's own point of view. Examples of superior discussions include conflict of interests, the role and responsibilities of corporate and government lawyers, confidential communications, the selection, tenure and retirement of judges, and the first chapter of the book, entitled "The World of Lawyers" which deals with a variety of subjects about lawyers generally.

The limitations of space in a hornbook's single volume probably accounts for the more limited discussion or even omission of some topics that some readers might regard as important. This reviewer, for example, would like to have seen more consideration given to such topics as the merits and limitations of integrated bar assoications which exist in a majority of states; the roles and responsibilities of attorneys representing juveniles charged with delinquency or a client threatened with commitment as mentally ill;[8] the reasons for and the impact on the bar of the recent extensive increases in liability insurance premiums; the use and merits of computers which are rapidly invading law offices and the resulting ethical implications;[9] and

6. States such as Minnesota which have replaced their version of the 1969 Code with a version of the 1983 Code will welcome the author's comparison of the two Codes.

7. Even non-legal sources, such as the New York Times and the Wall Street Journal are found in the footnotes to the text.

8. Subjects sadly confused even in the 1969 and 1983 Codes. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-11, EC 7-12 [hereinafter CODE]; MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14 and accompanying comment [hereinafter MODEL RULES].

9. The publisher has included "preformulated Westlaw references" after most of the sections in the book.

the ethical and practical problems faced by attorneys in class action suits.

It may be helpful and illustrative to summarize the author's discussion of the issues and problems raised when a lawyer trying a case also attempts to testify for his client.(p. 375 et seq.). He summarizes and compares the relevant provisions of the 1908, the 1969, and the 1983 Codes. For example, he notes that the 1969 Code first introduced the prohibition against any member of a law firm trying a case if another member is testifying. He refers to the ambiguity in the 1969 Code provisions that if an attorney "ought to testify" and "knows or it is obvious" that this is so, rejection of or withdrawal from the case is required.[10] Though poorly drafted, he prefers the provisions of the 1983 Code which state that an attorney "shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness."[11] This, he believes, does not permit the attorney to elect not to testify and remain in the case. He interprets the term "necessary" as including testimony essential to the success of the client's case and probably also testimony in which a disinterested lawyer would consider the testimony important to the client's case. Merely cumulative evidence would not be included.

When the adverse party calls the attorney to the stand and the testimony would be adverse to the attorney's client, the author states a conflict exists between attorney and client and the testifying attorney becomes disqualified and must withdraw. If favorable to the client, the opposing party who called the attorney to the stand is in no position to complain.[12]

He approves of the more flexible provisions of the 1983 Model Rules permitting an attorney to act as both advocate and witness if "substantial hardship" would otherwise ensue to the client, but, he notes, this does not permit self-inflicted hardship, e.g., by incurring large expenditures knowing of the likelihood of having to testify.[13]

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10. *See* CODE, *supra* note 8, at DR 5-105(B); DR 5-102(A).

11. *See* MODEL RULES, *supra* note 8, at Rule 3.7(a).

12. P. 383. The author recognizes that the court needs to guard against the prospect that the adverse party may use this as a tactic to remove the attorney rather than having a true need for the attorney's testimony. *Id.* He notes that a lawyer who himself is the litigant may both try the case and testify on his own behalf. *Id.*

13. MODEL RULES, *supra* note 8, at 3.7(a)(3). Under DR 5-101 (B)(4) of the Code, the substantial hardship must exist "because of the distinctive value of the lawyer or

The author examines the rationale commonly given by courts for not permitting attorneys to be both advocate and witness, namely, (1) the harm to the client, for the trier of fact will discount the attorney's favorable testimony as being biased when he or she is also trying the case; (2) the likely reluctance of opposing counsel to effectively cross-examine a testifying attorney; (3) the greater credibility likely to be ascribed by the trier of fact to testifying attorneys;[14] and (4) the appearance of impropriety when attorneys act as both advocate and witness.

He is critical of these reasons. The first can be avoided by the client's consent or by another member of the attorney's firm trying the case, if either were allowed. The second is unrealistic since the supposedly reluctant attorney showed no such reluctance in seeking disqualification.[15] As to the third reason, he doubts that "undue juror gullibility about the credibility of a lawyer's testimony is lessened by removing the lawyer-witness from the second role of advocate."(p. 378). With respect to the appearance of impropriety, "a matter as serious as disqualification or discipline cannot confidently rest on anything as amorphous as suspected public misperception of lawyers."(p. 378).

The author presents his own views on the subject. He believes that the testifying attorney should not be compelled to withdraw if the testimony to be given would be favorable to the lawyer's own client. In that case, the author would only compel the attorney to elect between acting as advocate or as witness. "If the lawyer chooses to forsake advocacy to testify, the opposing party can have no complaint."(p. 389). If the choice is to continue as advocate and forego testifying, "there is no confusing mixture of roles and every legitimate interest of the adversary is protected."(p. 389).

Finally, he notes that whether a lawyer should be permitted to act as both advocate and witness is left largely to the judges in charge of the litigation and is seldom raised in disciplinary proceedings against an attorney.[16]

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his firm as counsel in the particular case." CODE, *supra* note 8, at DR 5-101(B)(4). The hardship requirement is met, he believes, when court approval is required for withdrawal and approval is refused. *See* p. 389.

14. The author notes the inconsistency with the first stated reason.(p. 378).

15. "The quaking advocate must still cross-examine a lawyer, even if the witness is not also an advocate."(p. 378).

16. P. 390. The author's discussion of the lawyer advocate-witness covers 16

This summary of the author's discussion of the lawyer advocate-witness, incomplete as it necessarily must be, should in some degree indicate the thorough and complete treatment that characterizes most of the topics covered in the book, extending even to minute, but significant, details. His discussion provides helpful background information, clear statement of ethical and legal principles, analysis in depth of the policy considerations involved, and a presentation of the author's own views, both critical and favorable.[17]

Some readers may find some aspects of the book not to their liking. The author expresses no exciting approbation of the 1983 Code and his reservations as to some of its provisions may tend to discourage already hesitant states from adopting the 1983 Code, even though he also has favorable comment on many of its provisions. Other readers may question some of his factual statements about the practices of lawyers and judges, made without documentation or statement of sources. Some will disagree with his views on policy or with his interpretation of cases that lend themselves to more than one interpretation. His caustic comments sometimes made about lawyer attitudes and practices[18] will not sit well with those who want to believe only the best of the legal profession. Some of his more colorful language, typically Wolframese, will displease some readers and please others.

Whatever the validity of such reservations by readers, it can

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pages. Ninety-five footnotes contain over 100 citations to judicial decisions, frequently accompanied by summaries and comments, and some 15 articles and other secondary authorities, also usually accompanied by summaries and comments.

17. *E.g.*, p. 619, commenting on the assumption that the adversary method "will make truth and justice apparent to the judge and, if different, the fact finder," he asserts:

> Unfortunately, the tools of the trade also, and too often, include dirty tricks, subterfuge, misleading and prejudicial argument, distortion, obfuscation, and manipulative efforts to evade the rules of evidence, and an assortment of other forensic outrages that try judges' and adversaries' souls rather than fairly try a contested question of fact or law.

Id.

18. *E.g.*, p. 339; on a client's consent to his or her attorney representing conflicting interests:

> Even if perfectly well informed clients can be assumed, it does not invariably follow that it should be one of freedom's proudest boasts that a client should be able to commit self-evisceration in the course of a legal representation.

Id.

However, such statements are the exception and the discussion is normally clear and direct without adornment.

hardly be denied that this is an outstanding work on the legal profession and its ethics and responsibilities, the equal of which does not presently exist in American literature. Judges, practitioners, scholars, and students will find it a valuable working tool and an outstanding resource of information about the legal profession and its ethics and responsibilities. While some readers may dislike the author's criticism and skepticism about the claims and practices of the legal profession, his comments should be read in context. The substance of his central thesis is that the legal profession performs a vital and indispensable service for the public and that this should be reflected in and reinforced by the ethics and responsibilities and the practices of the profession. If that message receives wider recognition as a result of this book, that in itself will constitute an important contribution.