

## BOOK REVIEWS

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### LEGAL PROFESSION

*The Ethics and Conduct of Lawyers in England and Wales*

by ANDREW BOON and JENNIFER LEVIN

Oxford and Portland, Oregon, Hart Publishing, 1999

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It is now commonplace to note that the legal profession in England and Wales is in a state of change. This change has been driven by new arrangements in the delivery and funding of legal services,<sup>1</sup> together with increasing encroachment by Government into the self-regulatory mechanisms of lawyers' professional bodies.<sup>2</sup> Change has also occurred because the profession has increased dramatically in size, has more female and ethnic minority members, and a younger age profile. In the case of solicitors, the client base has changed,<sup>3</sup> and the last decade has seen the rise of large city firms. These events, and the way they are radically changing the nature of the legal profession, have spawned a number of academic books and articles on the legal profession in England and Wales. Until recently, this burgeoning literature has largely neglected legal ethics. This neglect has begun to be addressed by a number of new works in this area,<sup>4</sup> and this book provides a useful addition to this important aspect of professionalism.

The main purpose of the book is to examine the collective ethics of the legal profession, particularly as they are manifested in the profession's rules of conduct. Although there are now other providers of legal services, the authors restrict their study to those two groups traditionally thought of as the legal profession, barristers and solicitors. Rather than confine themselves to a description of the rules of conduct, the authors aim to provide critical discussion of the rules and to locate them in a historical, comparative and social context. This comparative element is mainly confined to the

<sup>1</sup> At the beginning of the 1990s, the Courts and Legal Services Act, 1990 provided for the introduction of conditional fee arrangements, extended rights of audience, and new providers of legal services. At the end of that decade, the Woolf "revolution" in civil procedure began to take effect. In addition, the Access to Justice Act 1999 is making fundamental changes to publicly funded legal services.

<sup>2</sup> This began with the Courts and Legal Services Act 1990 but the Access to Justice Act 1999 presents a threat of direct intervention by the Lord Chancellor in the case of certain rules of conduct and complaint handling.

<sup>3</sup> Solicitors used to serve private clients in the main. Now clients are companies and Government, through state-funded legal aid schemes.

<sup>4</sup> See, for example, K. Economides (ed.), *Ethical Challenges to Legal Education and Conduct* (Hart Publishing, 1998); R. Cranston (ed.), *Legal Ethics and Professional Responsibility* (Clarendon Press, 1995); S. Parker and C. Samford (eds.), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press, 1995); A. Sherr and L. Webley, "Legal Ethics in England and Wales" (1997) 4 *International Journal of the Legal Profession* 109; I. Sheiman, "Looking for Legal Ethics" (1997) 4 *International Journal of the Legal Profession* 139; P. Kunzlik, "Conditional Fees: The Ethical and Organisational Impact on the Bar", 1999 62(6) M.L.R. 850-878.

United States which has an extensive academic and practitioner literature in this area. The authors hope that this critical approach will increase awareness not only of the rules of conduct but also of the origins and potentials of professional ethics.

The book is also intended to contribute to the teaching of legal ethics at both the undergraduate and professional stages. Until recently, ethics was not considered a proper part of legal education, a factor explaining the neglect of this area as a subject of academic study. This is now changing, and, as Boon and Levin note, the “last 20 years have seen a large increase in activity around the issues of ethics and conduct”.<sup>5</sup> The study of ethics is not a part of the core syllabus of undergraduate programmes but conduct issues now feature in the vocational courses of solicitors and barristers. There is also a growing debate about the relevance of ethics to the practice of law. In chapter six, the authors provide a useful historical overview of legal education, and explore the possibilities and implications of adopting a more radical approach to promoting professional ethics. They make out a case for inculcating an explicit common ethic throughout all stages of legal education, believing that this will help to overcome the lack of homogeneity within the profession. If legal education does become the key to this, the book will provide a useful starting point for courses of study.

The book is in five parts. Parts I and II are essentially contextual, setting the scene for the more detailed study of the rules of conduct in the last three parts of the book. Part I explores the relationship of ethics and the professions and Part II examines the regulatory framework of the profession, including legal education and disciplinary mechanisms. Part III concentrates on the core duties of lawyers, particularly towards clients. This is developed in Part IV, where the key duties to clients are considered in more detail. Part V explores the ethics of dispute resolution, “the activity which, arguably, provides a defining social role for lawyers”.<sup>6</sup> There is also an epilogue, which considers the predictions for the future of the legal profession and its ethics.

The issues addressed in Part I of the book are fundamental to any understanding of professionalism and ethics. Thus, this part examines the sources of legal ethics and how they can be analysed and evaluated. It discusses the changes taking place in the legal profession, and how these external and internal changes will impact upon the profession’s ethics. It provides a summary of the external changes which are serving to undermine some aspects of self-regulation by the profession, for example, competition, consumerism and increased intervention by the state. The tensions between commercialism and professionalism are highlighted, and questions are raised about the role of ethics in this changing external environment. Problems internal to the profession are also discussed. One of the most significant of such problems is the lack of homogeneity among the members of the professional group. As a result of this, ideas of professional norms of behaviour become problematic and it therefore becomes difficult to build trust, and thus claim legitimacy for the group. If the dominant values of the group are those of the market place, with their emphasis on individualism and consumerism, this leaves little scope for the notion of shared values which is basic to an ethical framework.

The functions of lawyers are also discussed, particularly their role in the administration of justice. This is a problematic role because lawyers have a dual function. They have to represent the interests of their clients and thus adopt a partisan position but they also have to facilitate the operation of the law and have duties to the court and to society at large. In this, they appear to be unlike other professional groups. The authors note that the adversarial system, and a legal system which equates justice with

<sup>5</sup> A. Boon and J. Levin, *The Ethics and Conduct of Lawyers in England and Wales*, (Hart Publishing, 1999), at p. 107.

<sup>6</sup> *Ibid.* at p. vi.

the defence of rights, brings with it a particular approach to ethics. This adversarial approach is now being challenged as a result of reforms in the civil justice system and the authors see this decline as offering an opportunity for lawyers to review their ethical commitment. This part of the book also provides an historical overview of the concept of professionalism and the role of ethics within this concept. Ethics are seen as a part of the bargain professionals make with the state in return for autonomy and power. The authors raise the issue of whether ethics are any longer necessary, given the changing nature of the bargain which is now occurring.

Of crucial importance to a work of this kind are definitions of ethics and professionalism, and the relationship between the two. The conventional view on professional ethics is that they “represent the highest ideals of an occupational group providing important services to society in a spirit of public service”.<sup>7</sup> The authors note that this view has been challenged and that the claims of professionalism have been subject to scrutiny. Nevertheless, they do appear to accept, rather uncritically, that professions serve the public good, that all “professions share a commitment to the service of clients”,<sup>8</sup> and that they do so by the rules of ethics and conduct.

The authors consider the differences between ethics and codes of conduct, noting that professional ethics “is a term frequently used interchangeably with the rules governing professionals”.<sup>9</sup> The authors differentiate between rules and ethics, in that the latter are also a commitment to honesty, integrity and service in the practice of law. They maintain that professional ethics are principally concerned with the moral dimensions of professional work, which cannot be comprehensively covered by the rules of conduct alone. This must be true, in the sense that ethical rules must advance moral values, rather than serving the interests of the professional group. Professional codes and rules of conduct can be self-serving,<sup>10</sup> being more concerned with protectionism and professional conformity than correct behaviour.<sup>11</sup> The authors emphasise the idea of altruism underlying professional ethics and they make a proposition that “professional ethics claim *legitimacy* for those *norms of behaviour* which promote *trust* in the professional group”.<sup>12</sup> The idea of trust is essential to professional ethics, as a betrayal of trust in the individual professional-client relationship undermines the faith in the professional group. The authors do not, however, emphasise that “trustworthiness” can be good business practice and thus also be self-serving. What makes it ethical is “whether the purpose of the rule is to advance values that are *imperative in the public interest*, divorced from the self-interest of the practitioners concerned”.<sup>13</sup>

Part II of the book provides information on the establishment and evolution of disciplinary standards and codes of conduct and discusses the tension between the regulatory and representative functions of professional bodies. It provides a summary of the disciplinary and complaints framework, and asks what combination of self-regulation and external regulation is optimal in disciplinary matters. Finally, this part of the book makes the case for including a study of ethics in all stages of legal education as a means of addressing some of the problems facing the profession.

<sup>7</sup> *Ibid.* at p. 6.

<sup>8</sup> *Ibid.* at p. 175.

<sup>9</sup> *Ibid.* at p. 6.

<sup>10</sup> See P. Kunzlik, *op. cit.*, at p. 851.

<sup>11</sup> B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (Heinemann, 1967).

<sup>12</sup> A. Boon and J. Levin, *The Ethics and Conduct of Lawyers in England and Wales*, (Hart Publishing, 1999), at p. 9 (original emphasis).

<sup>13</sup> P. Kunzlik, *op. cit.*, at pp. 851-852.

Parts I and II of the book are informative and draw upon a vast range of sources. They provide a comprehensive, if at times brief, discussion of some of the main debates around the legal profession and professionalism. There are, however, some important omissions. The effects of globalisation, information technology and specialisation are not discussed in any detail. These factors are referred to in the epilogue but they are far too important as contextual issues to be left to a postscript. Nevertheless, these two parts of the book do highlight a number of questions, such as whether a profession needs to have ethics in order to be considered a profession and whether it can define its own ethics. However, it does not address the issue of whether we need professionalism any more and what aspects of the professional bargain are worth preserving.

The remaining three parts of the book consist of detailed discussions of the important aspects of lawyers' professional duties. This makes it a valuable resource, providing comprehensive and often insightful commentary on aspects of professional codes. Part III is a general introduction to these professional duties, which are essentially concerned with the balance lawyers are expected to achieve between the rights of clients, third parties, the profession and society in general. The authors note that the lawyer-client relationship is no longer based on paternalism and that clients now have a much more powerful role in the relationship. This raises ethical issues, as the clients' interests may thus become strengthened at the expense of other legitimate interests. Lawyers do have obligations to third parties, although the authors note that these duties do not figure large in the ethics of the legal profession. In this context, there is a very brief discussion of *White v. Jones*, and the purpose of wasted costs orders. This part of the book also touches on the justifications for the divided profession and ends with a brief excursus into the Woolf reforms, unmet legal need, and *pro bono* work. It concludes, not surprisingly, that the legal profession's commitment to public service is ambiguous and asserts that "lawyers need to accept positive obligations to promote the public good",<sup>14</sup> but without really articulating why.

Part IV of the book explores the duties to clients and potential clients in more detail. This provides a very useful discussion of the issues around the duty of confidentiality and the separate rule about professional privilege, highlighting the areas which present ethical problems for professionals. There is a very enlightening discussion about the rules on money laundering and the conflicts which this can create for lawyers. The authors make an important point that ethical behaviour in this area serves a valuable commercial interest. Legal professional privilege is a valuable commodity which the profession should not lose. Another chapter is devoted to the rules on conflict of interests and confidentiality. These concepts are closely connected with the adversarial process but they are also relevant in areas of non-contentious work. The rules on conflict of interests have become more pertinent with the number of solicitors' firms which are merging, as well as in relation to buyers, sellers and mortgagees. The authors note that the Law Society's advice on personal relationships is thin. They also take up the point, introduced earlier in the book, that if civil procedures becomes less adversarial as a result of Woolf reforms, the rules on conflict of interest may have to be radically revised to accommodate a more co-operative and facilitative ethos.

A chapter is devoted to fees and costs, and the authors note that "despite their centrality to the role of the lawyer, remarkably little attention has been given to fees in texts on legal ethics other than in relation to the perennial debate over contingency fees".<sup>15</sup> They also note that complaints about lawyers' charges are the most common

<sup>14</sup> A. Boon and J. Levin, *The Ethics and Conduct of Lawyers in England and Wales*, (Hart Publishing, 1999), at p. 243.

<sup>15</sup> *Ibid.* at p. 285.

of all complaints received by the Law Society and the Legal Services Ombudsman and that most of these concern a lack of adequate fee information. The chapter contains much useful information, as well as giving the standard justifications as to why fee levels cannot be left to the operation of the market. More discussion on this point would have been useful, especially as the authors state that the same arguments about fee control apply for corporate clients. As the justifications for costs regulation include the fact that clients are not repeat players, the reasons for the same controls for corporate clients need to be more clearly articulated. What is less contentious is the statement that clients should be informed of the level of fees, be given regular updates, and that there should be effective, fair and accessible procedures for reviewing fees to rectify overcharging. The chapter also examines the different ways lawyers charge, and looks, in a cursory way, at the issues around conditional and contingency fees.

Part V deals with the ethical issues involved in dispute resolution. This is an area which has seen significant changes over the last decade. Not only has there been a diversification of dispute resolution mechanisms, there are also new provisions for funding, and new providers of, legal services. The implications of these changes for legal ethics "are profound",<sup>16</sup> as they could change significantly the role of lawyers in dispute resolution. The authors maintain that much of the rationale for the current ethics of lawyers is based on criminal representation. This adversarial approach has been criticised in relation to civil justice. The new litigation landscape raises ethical issues as the courts will now exercise a great deal of control over the process. The authors appear to approve of the new process, on the basis that approaches to litigation and bargaining "which depend on honesty and problem solving offer a more coherent theoretical basis for lawyer's role in dispute resolution".<sup>17</sup> In a chapter devoted to advocacy, the cab-rank rule, advocates' duties, and the advantages and disadvantages of higher rights are analysed. The final chapter in this part of the book examines the increased use of alternative dispute resolution techniques and the implications of this for lawyers. The authors note that the codes of conduct of lawyers in the United Kingdom do not impose obligations to advise on the most suitable methods of dispute resolution. They conclude that, as an adversarial approach is no longer considered appropriate, lawyers must adapt their role, in order to become facilitators of consensual dispute resolution. This is no doubt true but seems to ignore the fact that many lawyers have always worked in non-contentious settings where skills of negotiation and facilitation have been required.

The Epilogue highlights some future developments "which may be a catalyst for changes in professional ethics".<sup>18</sup> These developments include specialisation, routinisation, bureaucracy, information technology, the decline of adversarialism, deprofessionalisation and globalisation. Some of these issues have been addressed in the book, but many need more elaboration as they are now no longer in the future, but very much a part of the legal landscape. In a sense, this is one of the problems of writing in this area. The rapid rate of change means that books are out of date before publication. This is highlighted by all the references to ACLEC in Parts I and II of the book. A major problem identified in relation to these changes is the possibility that the profession may split into specialist groups, without any distinctive ethical foundation.

Nevertheless, the book ends on an optimistic note. The authors believe that, despite the incursions into professional autonomy, it is unlikely that the profession will abandon ethics. Their view is that the state needs professionals, and the recent reforms,

<sup>16</sup> *Ibid.* at p. 314.

<sup>17</sup> *Ibid.* at p. 338.

<sup>18</sup> *Ibid.* at p. 397.

in relation to access to justice, assume that lawyers will retain high ethical standards. Ethics are seen as a way of balancing the conflict between commercialism and professionalism. Ethics could hold the key to the future of legal professionalism, as a way of tempering the new entrepreneurial spirit of the profession. As has been noted elsewhere, an appropriate model for the legal profession is “humane professionalism”, which recognises that the profession exists “not just for itself but for the common good”.<sup>19</sup> If this is to be achieved, each ethical rule of the profession must be analysed to test whether it truly serves the public interest, and is thus truly ethical. This book provides a useful starting point for such a project.

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### LEGAL PROFESSION

*Cause Lawyering: Political Commitments and Professional Responsibilities*, edited by AUSTIN SHERAT and STUART SCHEINGOLD, Oxford and New York, Oxford University Press, 1998, 545 and (bibliography) 5 pp., Paperback £14.99, ISBN 0-19-511320-9

This is a fascinating and important book. Fascinating because it examines a wide variety of situations in which lawyers have sought to use their professional skills to further political goals, to “do good,” at least by their own lights. Important because it documents the struggle of lawyers in several countries to vindicate human rights and to assert the rule of law in the face of repressive regimes of various shades. It reminds one that to be a lawyer can be a noble profession (even if that nobility may be shaded by the ambiguous or mixed motives of the lawyers concerned). It demonstrates that, even in more liberal countries, the legal process and creative and sometimes courageous lawyers can play an essential part in securing social progress (contentious though that concept may itself be).

The book opens with a chapter by the editors (“Cause Lawyering and the Reproduction of Professional Authority”) introducing the contributions which follow and putting them into the context of current debate (primarily in America) about the concept of cause lawyering and the issues to which it gives rise. The remainder of the text is presented in four parts. Part I includes contributions investigating the “Contexts and Conditions of Cause Lawyering”.<sup>1</sup> Part II, on “Cause Lawyering and the Organization of Practice,” then considers the impact of differing models of practice organisation upon cause lawyering. It contains three contributions focusing upon the American experience<sup>2</sup> before concluding with a chilling account of Israel’s use of planning laws to destroy the way of life of the Israeli Bedouins and of the efforts of lawyers from differing backgrounds, and different types of organisation, to afford the Bedouins some protection within the restricted legal process available to them.<sup>3</sup>

<sup>19</sup> *Seventh Annual Report of the Legal Services Ombudsman 1997*, (HMSO, HC 793) at p. 9.

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<sup>1</sup> C. Menkel-Meadow, “The Causes of Cause Lawyering: Towards an Understanding of the Motivation and Commitment of Social Justice Lawyers”; R. Abel, “Speaking Law to Power: Occasions for Cause Lawyering”; and S. Scheingold, “The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle”.

<sup>2</sup> A. Porter, “Norris, Schmidt, Green Harris, Higginbotham & Associates: The Sociological Import of Philadelphia Cause Lawyers”; J. Kilwein, “Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania”; and L. Trubek and E. Kransberger, “Critical Lawyers: Social Justice and the Structures of Private Practice”.

<sup>3</sup> R. Shamir and S. Chinski, “Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts”.