BOOK REVIEW

INSIDE LAWYERS' ETHICS

BY C. PARKER AND A. EVANS
Cambridge University Press,
New York 2007

I INTRODUCTION

Codes of Professional Conduct regulate the way lawyers behave and the way they interact with clients. They provide the foundation and the structure of the legal profession in any common law jurisdiction. Yet despite strict regulation, the notion of lawyers' ethics appears laughable to members of the community who are not lawyers. Lawyer jokes about unethical practices abound. The era of the fictional lawyer hero appears to have ended and news media thrive on stories about lawyers who have behaved improperly. News stories about lawyers whose work is of benefit to society would seem to lack popular appeal.

It is in this context that Parker and Evans introduce *Inside Lawyers' Ethics*:

> 'Legal ethics is often described as an oxymoron – lay people find the concept amusing and lawyers can find ethics impossible.'[1]

Parker and Evans point out that most teaching of ethics in law schools and Practical Legal Training (PLT) programs is done through deontological methods, primarily by teaching Professional Conduct Rules. They argue that in legal practice this kind of training does not equip lawyers with the ability to think and behave ethically,

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1 Christine Parker and Adrian Evans, *Inside Lawyers' Ethics*, Cambridge University Press: New York, 2007, front page (unnumbered).

but only trains them to look to the Rules to determine the answer to an ethical dilemma, thereby enabling lawyers to hide behind a rule instead of using ethical reasoning.

In Australia, each state and territory has its own Codes of Professional Conduct. Each Code is a reproduction or a variation of the *Model Rules of Professional Conduct and Practice*, published by the Law Council of Australia. On paper, it is not difficult to articulate the requirements of an ethical legal practitioner according to the various Codes. Students and practitioners alike know, for example, that they have a duty to their clients[2], that they must avoid conflicts of interest[3] and that they must not disclose a client's confidential information[4]. Teasing out the many strands of what these duties actually mean in a practical sense in the frenetic daily life of a modern lawyer is handled with sensitivity and clarity by Christine Parker and Adrian Evans in *Inside Lawyers' Ethics*.

II THE CONTEXT OF THIS BOOK

Inside Lawyers' Ethics questions and challenges traditional methods of teaching and learning legal ethics, and invites the reader to analyse the meaning of ethics and ethical values in order to answer the question of whether it is in fact possible to be a good person and a good lawyer. In particular, the book challenges the idea that legal ethics should be based on a set of rules. In the spirit of reflective practice, the authors base their work around a series of questions rather than the provision of answers. This is central to their opposition to the notion of ethical practice being a rule-following exercise. Parker and Evans challenge the traditional role of lawyer as zealous advocate for the client. They argue that good lawyers should

2 See, eg, Rule 1, Law Council of Australia, Model Rules of Professional Conduct and Practice, March 2002.

3 See, eg, Rule 9, above n 1.

4 See, eg, Rule 3, above n 1.

be holistic in the way they advise clients.[5] They argue that good ethical reasoning demands that lawyers do not make any assumptions about the right thing to do.[6] The authors maintain that 'the best lawyers are those who have come to grips with their own values and actively seek to improve their ethics in practice.'[7]

Inside Lawyers' Ethics expands an earlier article written by Christine Parker (drawing on work in collaboration with Adrian Evans) in which she set out to describe four approaches to legal ethics which she described as "options on an a la carte menu – one could choose which approach one prefers for the purpose of guiding one's own life as a lawyer or assessing others."[8]

The text has relevance to experienced practitioners as well as law students and law teachers. It has particular significance for law graduates who are about to embark on a career in law. While all lawyers have (or should have) an interest in legal ethics generally, most lawyers have been trained to focus only on Rules. This book challenges those lawyers who use black letter legal reasoning to resolve ethical dilemmas to use ethical reasoning instead. The book is written not only for law students and new lawyers, but all lawyers who may choose to apply a different reasoning process to ethical issues after reading it. The authors have set out to change the way lawyers approach and resolve ethical questions in every-day practice. This writer believes that they may not change the way all lawyers approach these matters, but they will certainly spark an awareness of the difference between merely applying rules as opposed to ethical reasoning.

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5 See Parker and Evans, above n 1, 77.

6 Ibid 3.

7 Ibid.

8 Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics', (2004) 30 (1) *Monash University Law Review* 49, 74.

In encouraging lawyers to develop new ways of approaching and thinking about ethics, the authors also have a secondary aim. They conclude the book with a question: 'Have you, in reading this book, developed any better ideas as to what motivates you to be a lawyer?'[9] The final chapter which is entitled *Conclusion – Personal Professionalism: Personal Values and Legal Professionalism* discusses the significance of personal values in working as a lawyer in the context of work-life balance and personal motivation to assist a client. The authors confront the reader by suggesting that it is easy to "find a rule – whether of substantive law or procedure - which just might allow [one] not to think about [the right thing to do] too much."[10] In this respect, the text is also a philosophical monograph about the nature of personal morality and the necessity for lawyers to be aware of their own values, and "the interplay between…ethical reasoning, emotional (feeling) processes and professional practice."[11]

While this is certainly not the first book to analyse the various theories of legal ethics,[12] it stands out from other texts on legal ethics because of its practical approach to modern legal practice. For example, the book is divided into chapters covering areas of practice rather than the separate duties.

III THE ETHICS TEACHER'S PERSPECTIVE

In a clinical environment, where students have real clients and real cases from where to draw examples of ethical dilemmas, teaching ethics is easier because students are personally involved in ethical

9 Parker and Evans, above n 1, 258.

10 Ibid, 247.

11 Ibid.

12 See, eg, Ysaiah Ross, *Ethics in Law, Lawyers' Responsibility and Accountability in Australia*, LexisNexis Butterworths 2005, especially at p. 30.

decision making. As a legal practitioner who has taught legal ethics in a clinical education setting for several years,[13] this writer has found that one of the most common sentiments expressed by law students is that the concept of legal ethics is not completely comprehensible until considered in the context of real clients. In a real life context, ethical rules make sense. Client confidentiality becomes meaningful when a student has to deal with the inability to leave a telephone message because it would be inappropriate to tell another person that the client has sought legal advice. Acting in the best interests of the client takes on a new dimension when it involves having to file a defence by the end of the day to avoid a default judgement.

As a teaching tool, this book provides a series of excellent examples drawn from real cases to assist teachers make ethics classes more realistic. It is written in a style that is easy to read and does not assume any particular level of legal education, so it could be used at any year level. It could be used as an introduction to legal ethics in the first year of an undergraduate course, but could equally be used as the basis for discussions amongst students in later years, including post-graduate study and Practical Legal Training. For experienced lawyers, the text provides a thought-provoking insight into legal practice from a perspective that may not have been previously identified.

IV GOING BEYOND THE RULES

Ethical issues arise every day. Most experienced lawyers do not actively make a mental note that they are exercising ethical judgment every time they, for example, obtain instructions on a settlement offer or sign a pleading. On the other hand, whilst nail-biting, sleepless-night-inducing ethical problems are not daily

13 Within the Flinders University of South Australia, School of Law.

occurrences, Parker and Evans suggest that legal practice involves more ethical transgressions than might first be apparent.

The discussion in this text goes beyond the 'bare rules' as the start and finish of decision making. The authors argue that lawyers should exercise choice rather than purely following instructions. This is a bold departure from some texts on ethics[14] which tend to focus on rules and precedents rather than encouraging ethical reasoning. In choosing the appropriate ethical path to follow, the authors encourage us to examine not only the rules and what has been declared to be ethical ('the law'), but also our own personal values. The authors view personal values as intrinsically bound up with professional ethics. This challenges the notion that professional ethics and personal morality are separate and incompatible and that professional ethics must be given priority over personal moral views.

As suggested by the title, the authors' aim is to encourage the reader to exercise ethical judgment rather than simply applying principles from the outside without analysing one's own values and examining one's conscience. Earlier writers have suggested that lawyers must be 'amoral technicians' who must not allow their professional judgment to be clouded by their personal feelings.[15] Professional amorality has long been an accepted tenet of legal practice. In 1990, Edwards expressed the view that 'lawyers have a positive duty to serve the public good'.[16] He aspired to the long-accepted view that if zealous and partisan representation defines a lawyer's role, then the lawyer must suspend independent moral judgment.[17] The zealous neutral partisan is commonly held out as the model which lawyers should emulate: act in the best interests of the

14 See, eg, Gino Dal Pont, *Lawyers' Professional Responsibility* (2006) Thomson Lawbook Company; see also, Ysaiah Ross and Peter MacFarlane, *Lawyers' Responsibility and Accountability* (2002) LexisNexis Butterworths.

15 See, eg, Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues', (1975) 5 *Human Rights* 1.

16 Harry Edwards, 'A Lawyer's Duty to Serve the Public Good', (1990) 65 *New York University Law Review* 1148.

17 See Edwards, above n 16, 1153.

client, do not impose one's own moral judgment, but remember that one is an officer of the court. This is the model that is most often misunderstood and most readily criticised by non-lawyers. It is the professional attribute that attracts comments such as, "How could you possibly act for him?"

Parker and Evans ask us to do more than shake our heads at negative media portrayals of lawyers and analyse our image problem through the eyes of an ethicist rather than through the eyes of a lawyer. Instead of us responding to criticism by reciting the fact of the existence of codes of conduct, of ethical obligations and the duties imposed on us as members of a profession, we are exhorted to ask, when confronted by an ethical dilemma: 'How do I really feel about this?' Parker and Evans argue that it is possible to act according to one's own conscience as well as behaving in an appropriately professional manner. Their suggestions and arguments are contrary to that put forward by Wasserstrom who claims that "there is nothing wrong with representing a client whose aims and purposes are quite immoral. And having agreed to do so, the lawyer is required to provide the best possible assistance, without regard to his or her disapproval of the objective that is sought."[18]

Parker and Evans challenge the notion that legal ethics is a branch of law and that Professional Conduct Rules are the guiding force behind ethical practice. 'The professional conduct approach may cater to the need for certainty, predictability and enforceability in a context where people often consider ethics to be subjective and relative. However, it is, by definition, not an 'ethical' approach. It explicitly abandons ethics for rules.'[19] The authors acknowledge that the rules are a source of information 'that lawyers can and should use to make decisions about what is the right thing to do in different situations…[b]ut these rules do not provide a basis for considering

18 Wasserstrom, above n 15, 8.

19 Parker and Evans, above n 1, 4.

what values should motivate lawyer behaviour and choices about what kind of lawyer to be.'[20]

As lawyers it is to be expected that we look to laws for guidance of our own conduct. Years of training and practice in legal reasoning creates an automatic reflex to seek a rule, a reason or a precedent for doing something. When we seek an order from a court, we do so by virtue of a particular rule. When we seek a remedy, we do so because a statute or common law provides for it. So in seeking to regulate our own conduct as a profession, we look to the laws of lawyering which are set out in the various state legal profession statutes and also in the various codes of practice. Parker and Evans point out very early in their work that "[m]uch teaching and practical discussion of lawyers' 'ethics' in the legal profession is dominated by legalism. Legalism treats ethics as a branch of law – professional responsibility or professional conduct."[21] They point out that while this approach "may cater to the need for certainty, predictability and enforceability",[22] this is not an ethical approach because it 'explicitly abandons ethics for rules."[23]

This is a fundamental shift from the normative approach to ethical conduct. The authors argue that rules of conduct are "one of the sources of information that lawyers can and should use to make decisions about what is the right thing to do in different situations [but] these rules do not provide a basis for considering what values should motivate lawyer behaviours and choices about what kind of lawyer to be."[24]

After all, who writes the rules? Who decides what is to be enshrined and codified as "ethical behaviour"? Parker and Evans

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20 Parker and Evans, above n 1, 4.

21 Ibid.

22 Ibid.

23 Ibid.

24 Ibid.

strongly put a case for the need for lawyers to have an ethical perspective on what it means to be a lawyer in order to determine what rules should in fact be made. If we train new generations of lawyers to simply follow the "Rules" in order to behave ethically, then we are not training them to *think* ethically at all. This work may challenge the way that some legal educators have previously taught ethics. In order to assist with re-adjustment, the authors provide practical examples of ways to approach ethical dilemmas.

The authors raise a range of questions about the proper role and conduct of lawyers commonly found in legal ethics text books, such as:

> - To what extent is it our role as lawyers to act as a zealous advocate for any client that comes along?
> - Should we advocate for clients and causes that we personally find morally repugnant?
> - Can we trust the legal system to sort out issues of truth and justice?
> - To what extent should we consider broader duties to society, our relationships with our own families and communities and our religious faith and personal beliefs in deciding what clients to take on, or how to act for them?"[25]

The text is provocative and challenging. The authors outline a number of real scenarios which real lawyers have faced and pose questions asking the reader to question how he or she might have reacted to such situations. The challenge lies in recognising that there are multiple perspectives through which any ethical dilemma can be approached. Even more challenging is the notion that depending on which ethical position you take, the result may be different, yet one will still have acted ethically.

The book describes a three step approach to ethical decision making:

- Step 1 is to develop an awareness of ethical issues.[26]

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25 Parker and Evans, above n 1, 2.

26 Ibid 10.

- Step 2 is to apply ethical standards or principles.[27] The authors pose some provocative questions in relation to this step, for example:
    - To what extent should lawyers' ethics be determined by a special and particular social role that lawyers should play?
    - How should lawyers and clients relate to one another in relation to ethical issues?
    - What are lawyers' obligations to law and justice? Is it justifiable to help our clients test the limits of the law?
    - To what extent should lawyers in their daily work make suer they care for people and relationships, including themselves?[28]
- Step 3 is the practical implementation of the ethical principles.[29]

These steps are demonstrated by taking the reader through a series of real case studies.

V THE FOUR STRANDS OF ETHICAL REASONING

For those who have 'learnt' ethics by poring over Codes of Conduct, this work is challenging in its assertion that such a legalistic approach cannot, by its very nature, be ethical, given that following rules does not motivate choices in decision making. The authors have set out to teach us *how* to obey the rules. They do this by articulating four strands of ethical reasoning: adversarial advocacy

27 Parker and Evans, above n 1, 11.

28 Ibid 12.

29 Ibid 13.

(with a focus on individual client rights), responsible lawyering (with an emphasis on preserving the justice of the law as it stands), moral activism (with a focus on social critique and promoting law reform in the public interest) and the ethics of care (which emphasises the integration of personal ethics with legal practice).[30] Each strand emphasises "a different value that lawyers could or should serve in legal practice."[31]

The first strand of legal ethics - that of adversarial advocacy - is what might be described as the traditional view of the lawyer. The lawyer considers that her duty is to be the zealous advocate on behalf of the client. It is certainly true that the zealous advocate approach is more relevant to litigious practice, or at least 'has its roots in litigation.'[32] But the authors quite rightly point out that 'litigation is the potential conclusion of any contract.[33] As teachers and senior practitioners we teach novices to 'make it water tight', 'cover our backsides in case of a complaint' and to be mindful that something 'could end up in court'? Parker and Evans conclude that this 'leads to an attitude of precaution and anticipation of litigation directed at covering every circumstance and eventuality, which makes legal advice (even outside of litigation) time-consuming, complex and costly.'[34] This cannot be denied. This attitude is the source of most jokes about lawyers and the perpetuation of stereotypes. Risk management is now a fundamental element of any lawyer's practice. This might make us more prudent lawyers but it also makes us excessively adversarial. On the other hand, client-centred practice is based on the notion that the lawyer's role is to enable the client to make an informed decision.[35] The zealous advocate theory is not at odds with this. In fact, it is entirely

30 See Parker and Evans, above n 1, 21.

31 Ibid.

32 Ibid 69.

33 Ibid.

34 Ibid.

35 See David Binder and Susan Price, *Client Centred Counselling* (1989) 35, see especially 35-42 and 272-284.

consistent with the idea of acting in the best interests of the client, once the client has articulated those interests.

The second approach - that of the 'responsible lawyer' - regards compliance with the law and the spirit of justice to override the duty of advocate. This approach emphasises the role of lawyer as officer of the court and can be likened to the idea of 'social trustee professionalism'[36] (acquiring knowledge for the benefit of the profession itself and for the community). The lawyer's ethics are governed by the role of facilitating the public administration of justice according to law in the public interest.[37] The 'ethics of care' approach focuses on the clients' potential to harmonise their interests and work together, in the true spirit of client-centred practice. This approach sees the lawyer preserving relationships and avoiding harm. The relational lawyer views the nurturing of relationships and the community as more important than 'impersonal justice' and institutions, including the law. This approach, according to the authors, 'sees the client's best interests in the context of the client's network of relationships.'[38] The 'emphasis is on the goodness and worth of the individual client and preserving relationships'[39] rather than any wider social injustice. This approach can be seen to be in the spirit of 'sharing empathic highlights' as described by Egan[40]: 'They are *empathic* because they are driven by the helper's desire to understand the client as fully as possible and to communicate this understanding. They are *highlights* because they focus on the key points the client is making.'[41]

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36 See Daryl Dawson, (1996) 5 *Journal of Judicial Administration* 147, 153.

37 See Parker, above n 8, 56.

38 Parker and Evans, above n 1, 36.

39 Ibid 37.

40 Gerard Egan, *The Skilled Helper* (2002) Brooks/Cole, see especially chapter 6, 93-116.

41 Ibid 97.

The authors clarify that each approach has merit, but they express a preference for the 'moral activist' approach,[42] because they 'believe that ultimately as lawyers we are responsible for improving the way justice is done between individuals and the world at large.'[43] They see lawyers as 'agents for justice through law reform, public interest lawyering, and client counselling'.[44] This approach involves lawyers actively persuading clients to do the 'right thing' morally. This writer has two difficulties with this approach. Firstly, in deciding what is morally preferable, a lawyer who approaches ethical reasoning in this way is bound to make a value judgment in relation to her client's instructions. On the basis that lawyers have a monopoly over a clients' ability to access the justice system, how can it be ethical to persuade a client to act other than in accordance with her own wishes? Does this mean that a client cannot have representation unless the lawyer thinks that what the client is seeking from the system is morally acceptable? Secondly, if a lawyer is to engage in client-centred practice, then the lawyer must set aside being judgmental in order to allow the client to make an informed choice about what to do. If the lawyer decides that a particular choice is morally reprehensible, then the lawyer who is a moral activist might deny that legitimate choice to the client.[45]

In September 1995, The Hon Sir Daryl Dawson delivered a paper to the Law Council of Australia's 29th Legal Convention held in Brisbane. In that paper,[46] Justice Dawson reflected upon the idea of the legal profession 'being carried on as an industry, selling its product to consumers for whose custom the members…openly compete.'[47] Twelve years ago, when that paper was delivered, the

42 See Parker and Evans, above n 1, 22.

43 Ibid.

44 Ibid 23.

45 See also, discussion of the "total commitment model" cited in Harry Edwards, 'A Lawyers Duty to Serve the Public Good', (1990) 65 *New York University Law Review* 1148, 1154; see also Roger Cramton, 'Professionalism, Legal Services and Lawyer Competency', (1985) *Justice for a Generation* 144, 148, reprinted in Kirsti Langbein (ed) (1985) ABA: Chicago.

46 See Dawson, above n 36.

47 Ibid 147-148.

'emphasis upon the market place and marketing techniques'[48] was considered to be new. Dawson noted at the time, that this 'shift in language' reflected 'a fundamental change in the way in which the profession is practised.'[49] It is this change in practice, and the philosophical differences between the ways in which different lawyers might view their role, that provides the background for the writing of a text such as *Inside Lawyers Ethics*. 'The authors acknowledge that most lawyers are unlikely to talk in terms of the four strands of ethical reasoning described above. 'Yet we all implicitly act on intuitions and personal philosophies of life and lawyering that appeal to the logic in one or more of these four approaches."[50]

VI STRUCTURE OF THE BOOK

The book is divided into ten chapters. Each chapter contains text, case studies, discussion questions, and recommended further reading. For those who are part of the profession, legal ethics continue to become entangled with increasingly complex business structures and partnerships. The text addresses these modern practical issues. The authors also challenge some of the current norms of the profession (such as time-based billing) as well as ethical standards in negotiation and mediation. Unlike some other text on legal ethics, this work is not prescriptive, but suggests that there is more than one way to analyse an ethical dilemma and encourages reflective practice. There are lots of practical examples from real cases.

For the academic who teaches practical ethics, especially in the clinical context, what is particularly important about the style of this publication is the way the authors present the reality of conflicting

48 Dawson, above n 36, 148.

49 Ibid.

50 Parker and Evans, above n 1, 37.

loyalties. Ethical issues raised by factual situations are presented from the perspectives of the different strands. For example, a scenario will be analysed through the eyes of the responsible lawyer (to whom client representation is a public duty), compared to the attitude of the moral activist (examining one's own inclinations and commitments in terms of what justice requires).[51]

The case studies and questions which are included in each chapter are useful teaching tools for the classroom, and will also be helpful for students who wish to extend their own knowledge of ethics beyond a traditional linear analysis of professional conduct rules based on judicial precedent. In cases where a breach of ethics has occurred, the matter usually ends up before the court in an application to have the practitioner concerned struck off the roll. The 'what ifs' postulated by the authors extend the reader's critical thinking beyond the simple 'is this right or wrong?' or "would I get struck off for this?'

The scope of the book is wide. The authors consider civil litigation, criminal justice, ethics in negotiation, conflicting loyalties, and the murky depths of lawyers' fees. There is also an excellent chapter on corporate lawyers, who have special needs and are often involved in delicate ethical matters not faced by lawyers who work in firms. In particular, the authors remind us that in-house lawyers act for the entity as a whole, not the individual managers – a fact that sometimes can be lost in the hectic everyday life of the in-house counsel. The complex interrelationship between business ethics and legal ethics is an important one to analyse and anyone who works in such a capacity would benefit greatly from reading these sections.

The plain language style in which the text is written is a pleasure to read. It is an excellent example of plain language not necessitating "dumbing down" but rather, exemplifying clarity and precision in order to convey the information and the messages. Each chapter

51 Parker and Evans, above n 1, 169.

contains case studies and discussion questions which are relevant and useful to both the experienced practitioner and the law student. For newly admitted practitioners, they raise deliberately provocative issues and force readers to make decisions about our own values, and how our values impact upon our work. For the teacher, they provide an excellent basis for class discussions.

The authors discuss a wide range of practical ethical matters. Chapter 4 on Civil Litigation and Adversarialism is particularly interesting and raises excellent questions and provides good practical advice. The authors demonstrate that different outcomes can occur depending on the ethical approach that is adopted in situations involving 'hopeless cases' or a dishonest client. The criminal context is similarly analysed (Chapter 5).

VII CONCLUDING REMARKS

Law has been defined by some commentators as a social activity and a social construct.[52] It is inevitable that legal ethics will continue to be examined, debated, re-designed and discussed. This book is a refreshingly different examination of legal ethics which invites discussion and the re-invigoration of debate about ethical behaviour in a wider context than the traditional adherence to Codes of Professional Conduct. The final question raised in the book perhaps summarises the aim of the work: 'Have you, in reading this book, developed any better ideas as to what motivates you to be a lawyer?'[53]

Teachers of legal ethics will be familiar with student angst in the face of reactions to their chosen career. Law students speak frankly of being accused by friends of having sold their souls and even of

52 Ainslie Lamb and John Littrich, *Lawyers in Australia* (2007) The Federation Press.

53 Parker and Evans, above n 1, 258.

disappointing their parents because of their decision to study law. Law students and lawyers alike experience attitudes ranging from quizzical to hostile, and often with undertones of suspicion and mistrust. The image of the lawyer as an amoral mercenary has deep roots. Popular culture today (including television programs, films, popular literary fiction and media stories about real lawyers) portrays lawyers in much the same way as Honoré Daumier's lithographs of lawyers and judges did in the nineteenth century. Shakespeare's *Merchant of Venice* poked fun at lawyers long before David E. Kelley created *Boston Legal*.[54] *Inside Lawyers' Ethics* will assist lawyers and law students to navigate the often difficult ethical trajectory throughout their careers and will be an excellent teaching tool for legal academics.

RACHEL SPENCER†

54 A U.S. television program.

† Rachel Spencer, Director of Professional Programs, School of Law, University of South Australia.