

Legal Ethics in Court Practice—Commentary

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Introduction

My first comment is that my presence here today should be taken as a lesson to you all that next time you are minded to take up your pen and “write to the paper” you are better advised not to do so.

Having, on this occasion, ignored that advice and having, as a result, found myself here as a commentator, I must say that I have found his Honour’s paper very helpful for the way it gathers together a wide variety of ethical considerations and presents so many references in relation to them.

It is, of course, quite impossible to comment on all aspects and, in any event, I suspect I am really here to revisit *Kooky Garments Ltd.*

When considering my position in that light, I found myself wanting to clarify for my own benefit what were the ethical issues relevant to that case. This in turn led me to try and define for myself the same question posed by his Honour, namely, what are legal ethics?

The more I tried to think this through, the more did I become intrigued with his Honour’s question—do legal ethics include conduct which is merely a breach of etiquette?

The question, as posed, seemed to indicate that if legal ethics did include *merely* a breach of etiquette then there was no justification for the ethic beyond a wish, probably outdated, to preserve an element of civilized behaviour. Put another way, is there a distinction to be drawn between ethics on the one hand and mere etiquette on the other?

What follows is a brief attempt to pursue this question a little further and my suggestion that legal etiquette is an integral part of legal ethics.

Legal ethics

1 *What are legal ethics?*

I suggest that, very simply stated, they can be defined as rules of behaviour regulating the conduct of lawyers when providing legal services.

2 *Why is there a need to regulate this behaviour?*

The answer, I suggest, is because the nature of the task requires something more than just the provision of legal services.

In 1933 the Council of Legal Education in England invited Mr JE Singleton KC to deliver a series of lectures under the title of “Conduct at the Bar”. They were delivered in the Niblett Hall of the Inner Temple under the Chairmanship of Lord Atkin. The Masters of the Bench of the Inner Temple later resolved that the lectures should be published.

As part of his opening preamble Mr Singleton stated that his object was to show (inter alia):

How much good you can do whether you become great advocates or not, reminding you that a man who regards the Bar merely as a trade or business and does not understand that it is also a professional community with public ideals misses the heart of the thing.

3 *What is this element of “public ideals”?*

I suggest that this element can be deduced from:

- a) The nature of the services provided.
- b) The nature of those receiving the services; and
- c) The circumstances in which they are provided.

(a) The nature of the services

In a democracy the law is propounded by the community for its proper regulation and for the common good of the community.

In using the term “regulation” I mean this in the wider sense, ie, to include not only regulations inhibiting or prescribing behaviour, but also legal concepts such as the presumption of innocence.

Regulation in this sense involves the inter-action of: a) citizen–citizen; b) citizen–state; c) state–state.

Singleton suggests that the lawyer when involved in any of these disputes also has a wider responsibility, ie, to ensure that the law should be administered with an eye to ensuring that the wider community interest is recognized. This, I submit, is met by recognizing and giving effect to the purpose underlying the particular law.

(b) The nature of the recipients of the services

The law has become more complex. The lawyer exists to assist citizens to deal with the law.

By reason of his/her training (provided by the community) the lawyer is, because of his/her greater familiarity and facility with the law, a privileged person. That privilege can also be interpreted as power.

On the other hand, the recipient of legal services is in the main dependent and vulnerable.

Therefore, there is implicit in the relationship between lawyer and client a fundamental requirement that the lawyer must accept without reservation the responsibility arising from the trust which has to be reposed in him/her.

(c) The circumstances in which the services are provided

A lawyer is involved because clients cannot cope without assistance. At stake are variously the client’s freedom, economic interest or emotional interest.

In my view, the common factor to all these is almost invariably stress. This stress applies not only to the client but also to the lawyer and to the judge hearing the case because of the responsibility which devolves on them in their different roles.

From the point of view of the lawyer the provision of legal services therefore involves: a) a responsibility to ensure not only the protection of the client, but also to ensure that the law works, ie, the community interest; b) a position of privilege and power and hence trust so far as the client is concerned; c) a stressful background.

It is these factors which require that the conduct of lawyers be regulated by ethical rules.

These rules fall into two broad categories: a) rules determining the relationship with clients; b) rules determining how the lawyer carries out his/her functions.

4 *Rules relating to clients*

The overriding requirement here is, I suggest, to ensure that the client is assured of independent advice unequivocally free from any conflicting interest. That is to say, either the interest of the lawyer or the interest of any other person. If this element is not observed then the responsibility arising from the trust factor cannot be met or cannot be seen to be met.

5 *Rules relating to the manner in which duties are carried out*

These reflect the need to observe the public interest and also reflect the stressful nature of the circumstances in which the services are provided.

To my mind, the regulation under this head includes what, at first sight, might be seen only as the courtesies or etiquette within the profession, ie, to fellow practitioners and the courts. They include a demonstrated respect for the courts and a dispassionate dealing with other lawyers.

I therefore suggest that an observance of these two matters goes far beyond merely being courteous. Their observance is essential to ensure: a) the effective operation of the law in the wider sense; and b) allied to that, the lessening of stress by the imposition/acceptance of civilized debate and behaviour.

I suspect that today the maintaining of courtesies, particularly to the court, may be perceived as an attempt to place the courts upon a pedestal where they are seen to be free of criticism.

If I am right, then my answer is, that an acceptance of this view indicates a failure to understand that the outward forms of respect are much more than traditional courtesies.

They are rather, outward forms of behaviour having the clear purpose of ensuring that justice is dispensed calmly, dispassionately and in a manner which ensures that all participants in the court process are free from any intimidation.

So far as the judiciary is concerned, the courtesies are appropriate to reflect its rightful position within the doctrine of the separation of powers.

Observance of courtesies to court does not in any way detract from the independence of counsel in relation to courts.

Currently the judiciary is being subjected to closer public examination and criticism. This applies to the manner in which judges are treated and their accountability.

One cannot argue that judges should not be accountable.

I argue that they have always been accountable in that: a) in the main, their decisions are public documents; b) there are appeal procedures; and c) I have no doubt that there is an element of peer pressure.

I argue further that these accountability mechanisms have in fact proved to be effective. The question which we are now faced with is whether there should be a greater or different form of accountability.

It is probably going beyond the bounds of this seminar to debate this question too far, but I do offer the following comments.

a) If changes are to be made, they must be thought through very carefully. They should not be driven merely by an ill-defined and abstract concept of accountability.

b) Any changes made must not carry with them the chance of imposing any pressure on judges which may inhibit their ability to dispense justice between litigants freely and in accordance with their oath.

c) A clear distinction must be made between the judicial functions of judges as opposed to the administration systems under which they operate.

d) Any change must be viewed against one standard, namely—will the change improve the standard of justice which we have received from the courts up to this time?

It is my view that the relative lack of criticism of the courts in this country to this date is an indication that the existing accountability mechanisms have worked and if there is to be, for example, any loosening of the conventional limits of criticism of the courts then this must be done very carefully indeed.

Kooky Garments

As I see it, this case has raised three ethical considerations:

- a) The issue of unequivocal independence of counsel in relation to clients.
- b) The judicial response to the judge's perception that there had been a breach in this case.
- c) The commentaries on the appeal decision.

I have to say at the outset that it was the third issue which prompted me to rise from my slumbers out there in the provinces.

The tenor of the article did not accord with my view of how a judge's decision should be criticized. I felt that the overall tenor was necessarily to diminish the judge concerned. As

such, my reaction was, that even though there may have been a contrary view to those expressed by him, the manner in which it was done did not assist the process.

Whether my reaction was right or wrong is for you to decide.

The first issue is that which relates to the question of conflict of interest.

Mr Justice Teague has made the point that it is often easy enough to determine whether conduct falls on one side or other of a particular line, but it is difficult to determine where the line should be drawn.

As I see it, in the *Kooky Garments Ltd* decision, the following points were relevant.

The central issue in the case was the interpretation of documents.

A critical document had been prepared by counsel's partner.

The client alleged that the solicitor partner had been at fault in the preparation of that letter.

There was, accordingly, conflict between the firm to which both the counsel and solicitor belonged and the client.

In effect, two issues arose:

- a) If an independent lawyer had been consulted, it is possible that the issue could have been identified and then resolved in the same proceeding.
- b) Because the conflict involved counsel personally (through his firm) there was the possibility/perception that he was not acting entirely free from self interest.

To this point I do not see that the judge's conclusion can be argued.

What may be arguable is whether the judge's enunciation of a wider principle was correct.

As I read the decision, his enunciation went no further than saying that if there was an actual or potential conflict of interest, then a judgement was required before counsel decided to remain with the case.

It does not mean that counsel from the same firm can never act when his/her firm has been involved in the matter leading up to litigation. If the firm has been involved in this way, then a judgment is required. If that consideration produces a doubt, then get out.

In my view, this is a reasonable and correct statement of the ethical conduct involved. Informed consent is an answer, particularly in cases where conflict is with third parties. However there are practical difficulties in establishing proof.

The second issue is the question of the judicial response in such instances.

Looking at the position generally it seems to me that if a judge sees a situation where counsel has erred, then given the client's vulnerability and dependence, it is not just appropriate but behoven on the judge to react. How else, in many cases, would the client

ever know of the correct position? I suggest that judicial intervention as part of its inherent jurisdiction is an essential part of the regulatory process.

This will, of course, be determined in the particular case by the nature of the conduct which comes under examination.

The real question is the manner and extent of the judicial reaction.

Mr Dugdale in his commentary very fairly makes the point that before anything is done by way of reaction by the judge, the person who may be criticized must be given a proper opportunity to be heard. There cannot be any argument over this.

So far as *Kooky Garments Ltd* is concerned, we do not know to what extent counsel was given this opportunity. My impression is that there is enough in the judgment to indicate that the issue was discussed and that the judge's reaction followed that discussion.