

Inside Lawyers' Ethics

(By **Christine Parker** and **Adrian Evans**, Cambridge University Press,
Australia, 2007)

Boston Legal's Alan Shore spares no effort in helping his clients. In addition to being – for television – a devastatingly effective courtroom advocate, he wins his cases by using techniques of dubious ethics and legality such as bedding the judge, emasculating opposing counsel (a close personal friend), advising a client to flee the jurisdiction, paying a complainant to withdraw a complaint and spying on witnesses. Clients who commit murder or deliberately cripple others walk free and no tears are shed. This fictional character is a caricature in a show not known for its realism, but he nevertheless reflects something of the public's conception of lawyers: barracudas who focus exclusively on the interests of their clients and leave no stone unturned in seeking to serve them.

The morality of lawyers' actions is the focus of *Inside Lawyers' Ethics* by Christine Parker and Adrian Evans. The book takes a practical and applied approach to legal ethics, with the goal of helping "lawyers and law students to critique and evaluate professional conduct and lawyers' behaviour in practice by combining their own personal ethics with professional conduct rules and social ethical considerations" (p 5). Except when Shore's escapades lead him to break the law, his actions represent an example of the "adversarial advocacy" which Parker and Evans describe as the predominant conception of the lawyers' proper role. They characterise an adversarial advocate as a vigorous promoter of the client's interests, pursuing all arguable legal processes, but acting within the bounds of the law. The authors' critique of adversarial advocacy points out that it is often considered to be amoral; a chorus of academics and philosophers have questioned the traditional view that a lawyer is not responsible for either the means or end of legal representation so long as the letter of the law is not broken. In addition, they note that the rich have an advantage in securing this level of devoted legal representation, and that it creates a culture of "excessive adversarialism" which fuels inefficient and wasteful litigation. Dissatisfaction with lengthy litigation featuring an obstructively adversarial challenge to a legitimate claim led Grant and Marilyn Nelson recently to gift the University of Otago with one million dollars for a new Legal Issues Centre.

Parker and Evans present three competing approaches to adversarial advocacy. These models are drawn from existing commentary by a number of writers, but the authors make a significant contribution by synthesising and clarifying alternative visions of the lawyers' role. Their schema is a bit over-simplified in places, but in general it works well. The first alternative is "responsible lawyering". Its chief distinction is that the responsible lawyer is concerned with the spirit as well as the letter of the law. As Parker and Evans note, "The responsible lawyer is still an advocate for the client, but he or she has an overriding duty to maintain the justice and integrity of the legal system, even against client interests, in the public interest." (p 24). Where an adversarial advocate would be willing to exploit loopholes, mistakes made by other people, and procedures that can be used to defeat justice (eg taking advantage of the other

side's lack of resources), a responsible lawyer's actions would be tempered by a duty to comply with the spirit of the law and see issues decided not on purely procedural or formal grounds, but on their merits.

Both the adversarial advocate and the responsible lawyer believe that the lawyers' role permits them to take actions that would be unethical for a non-lawyer (eg failing to warn a potential victim that the client is contemplating violence), and that the lawyer's personal moral beliefs are irrelevant to the lawyer/client relationship. Lawyers using "moral activism" would not agree. This approach "encourages lawyers to have their own convictions about what it means to do justice in different circumstances and to seek out ways to act out those convictions as lawyers" (p 28). It views lawyers as having responsibility for discussing with clients the rightness or wrongness of their plans, and for making the legal system more just.

The final alternative to adversarial advocacy is the "ethics of care (relational lawyering)", which focuses on lawyers' responsibilities to people, communities and relationships. This approach "sees the ethical virtues of all three of the preceding approaches as overrated in comparison with the importance of caring for and respecting the needs and moral aspirations of each client, each witness, even each opponent with whom the lawyer may come in contact, as well as cultivating their own virtue as a person and a lawyer" (p 243). Closely associated with virtue ethics, it requires attention to the specific circumstances of each moral challenge rather than adherence to abstract and universalistic moral reasoning. Rules of professional conduct will be disregarded by relational lawyers if the circumstances warrant doing so. This ethics of care approach also holds that the goal of the lawyer-client relationship should be the moral worth and goodness of both lawyer and client.

Parker and Evans discuss the limitations of each approach as well as positive features. They argue that the different approaches emphasise different values but nevertheless tend to complement one another. The authors personally view the considerations of adversarial advocacy and responsible lawyering as the "starting point for ethical practice in most ordinary situations", and the moral activist approach as "the ultimate criterion for ethical choices in tough cases" (p 22). Yet they also find the ethics of care to be persuasive in focusing on people, relationships, psyches and spiritual connectedness as more important ultimately than the law, thus their sense of justice and moral activism is tempered by these factors. The focus is on making personal choices, and the authors recognise that readers will find different approaches or combinations of approaches attractive and convincing. They contend that all lawyers should reflect on their values and views of legal practice, clarify and critically examine their own ethical preferences, and consider all relevant ethical considerations before acting when faced with difficult situations. I agree with the authors that most lawyers use a combination of approaches when faced with ethical challenges, and as this book encourages consideration of questions relevant to all approaches and empowers the lawyer to choose the most appropriate in the circumstances, it is more likely to be of use than a book which endorses a single narrow approach to making ethical decisions.

Having introduced the four approaches in the first two chapters, the book

then makes a significant original contribution to the literature by using them to analyse substantive areas of law and practice (including self-regulation, civil and criminal litigation, dispute resolution, conflicts of interest, charging for legal services and corporate lawyering). The professional rules and regulatory schemes discussed are Australian, but this is not a significant limitation for foreign readers as the book's main focus is on the proper role of the lawyer and the values and considerations underpinning ethical decision making, which is applicable to all lawyers in countries with adversary systems. Engaging case studies of ethical dilemmas drawn from actual cases are one of the book's highlights. The scenarios include a person with a history of convictions for political protest being denied admission to the profession; a mediator who sees a lawyer lie to the other side about his or her client's instructions; lawyers for a tobacco company who draft a "document retention policy" that leads to the destruction of thousands of documents to prevent their use in subsequent litigation; a Melbourne office of a national law firm that found itself acting for three different drug companies with conflicting interests; and many others. Relevant survey evidence is also included with respect to topics such as whether law students and lawyers would be willing to "round up" hours worked and thus over-charge the client by many thousands of dollars if the supervising partner requested it; whether they would report a family member's drug dealing to the police if they were prosecutors; and whether they would breach confidentiality if they believed that their client was returning, with her children, to a physically abusive relationship.

The book has a few minor weaknesses. Discussions are often truncated. For example, the case in favour of professional self-regulation and the arguments against it are separated by a discussion of the regulatory approach taken in the Australian States and Territories, and the discussions applying the different approaches to a case study involving a leading Jewish barrister who was asked to represent an alleged Nazi war criminal are separated as well. Repeated references in the footnotes neither include the full citation nor specify where the source was first cited, requiring the reader to search for the citation by pouring over all earlier footnotes (in very small type) in the chapter.

The discussion is not as thorough as it could have been in a few places. For example, the justifications given for self-regulation are incomplete. It also could be argued that the public does not appreciate the justifications for the adversary system, and the reasons why lawyers should do things such as preserving client confidences or vigorously defending the guilty. Having lawyers serve as expert advisers to regulatory bodies dominated by laypersons might not be sufficient to insulate them from populist pressures to re-write the rules of professional conduct or discipline lawyers who advocate zealously on behalf of apparently guilty clients. Other arguments include that lawyers may trust a self-regulatory system more and thus be more inclined to report their fellow practitioners for suspected disciplinary infractions, and that the profession's interest in maintaining its own reputation could conceivably make it more rigorous in pursuing wrongdoers. These arguments are far from compelling, but they should have been addressed before concluding that the arguments in favour of self-regulation are not convincing.

Overall, this book is a very valuable guide to relevant considerations in practical ethical decision-making. Parker and Evans wrote it "to help improve

the clarity and integrity of ethical reasoning in lawyering” (p 22). They have accomplished this aim. I look forward to using portions of it with my next Legal Ethics class.

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