



“THE LEGAL MIND’S RESPONSIBILITIES & ETHICAL DUTY TOWARDS JUSTICE”.

KEYNOTE ADDRESS BY THE DEPUTY PUBLIC PROTECTOR, ADV K MALUNGA, ON THE OCCASION OF THE INAUGURATION MEETING OF CANDIDATE ATTORNEYS ASSOCIATION, ST JOHN’S COLLEGE, HOUGHTON, WEDNESDAY 2 OCTOBER 2013

“Meeting ethical and professional responsibilities can provide lawyers with arguably their most significant professional challenge. Lawyers face issues in a complex and difficult context, and have significant additional factors to consider in respect of the public interest, greater public accountability and transparency.”¹

1. Introduction: What is the difference between juristic (professional) responsibilities and ethical duties?

Some of the great philosophers like Emmanuel Kant² propose that our duties as human beings are philosophically based on three fields, of which two are relevant to

¹ New South Wales: A Guide To Ethical Issues For Government Lawyers, Second Edition 2010

² Kant’s writings will be cited according to the following system of abbreviations:

Ak *Immanuel Kants Schriften*. Ausgabe der königlich preussischen Akademie der Wissenschaften (Berlin: W. de Gruyter, 1902-). Unless otherwise footnoted, writings of Immanuel Kant will be cited by volume:page number in this edition.

Ca *Cambridge Edition of the Writings of Immanuel Kant* (New York: Cambridge University Press, 1992-) This edition provides marginal Ak volume:page citations. Specific works will be cited using the following system of abbreviations (works not abbreviated below will be cited simply as Ak volume:page):

G *Grundlegung zur Metaphysik der Sitten* (1785), Ak 4

the topic of my discussion with you as you are preparing to embark on your journey as a lawyer. These fields are: physics (the study of the physical world), ethics (the study of morals), and logic (the study of logical principles).

One of the principal aims of Kant's *Metaphysics of Morals*, especially of the *Doctrine of Virtue*, is to classify our duties as human beings. According to Kant and those who support his theories our duties are divided between **juridical duties** and **ethical duties**, which establish the division of the *Metaphysics of Morals* into the *Doctrine of Right* and the *Doctrine of Virtue*.

Juridical duties are duties “*that may be coercively enforced from outside the agent, as by the civil or criminal laws, or other social pressures*”³.

Ethical duties are not externally enforced. Instead, the subject himself or herself, through his/ her own reason and the feelings and motives arising “*a priori from (his/ her rational capacities -- the feelings of respect, conscience, moral feeling and love of other human beings*” must compel himself/ herself to follow them (MS 6:399-404). Among ethical duties, the fundamental division is between duties to **oneself** and duties to **others**.

Ethical duties may be driven by a number of principles. According to some writers⁴ actions are ethical if and only if they are undertaken for the sake of morality alone (without any ulterior motive). Second, the ethical quality of an action is judged not according to the action's consequences, but according to the motive that produced it. Third, actions are ethical if and only if they are undertaken out of respect for the moral law (as opposed to some other motivation such as a need or desire).

Others such as Prof Allen Wood suggest that we should think of Kant's theory of moral reasoning as “*a theory about the way our different duties bear not only on our*

Groundwork of the metaphysics of morals, Ca Practical Philosophy

Translations below will be taken from *Groundwork for the Metaphysics of Morals*, translated by Allen W. Wood (New Haven: Yale University Press, 2002).

KpV *Kritik der praktischen Vernunft* (1788), Ak 5

Critique of practical reason, Ca Practical Philosophy

³ **Duties to Oneself, Duties of Respect to Others**, Allen Wood, Stanford University

⁴ <http://www.sparknotes.com/philosophy/kantsgrounding/summary.html>

individual actions, but on our maxims and on the choices through which we, as self-governing rational beings, shape our lives and give meaning to them.”

The formula that meets these criteria must express the principle that *“actions should be undertaken with pure motives, without consideration of consequences, and out of pure reverence for the law.”*

Juridical duties are based on the notion that the person *“of every rational being has dignity – that is, a worth that is above all price, a worth that must always be respected and cannot rationally be sacrificed in exchange for any other value”* (MS 6:462). *Respect* is the proper rational attitude toward something that has objective value. *Contempt* is treating something as without value, or else as having lesser worth than it in fact has. So treating any human being as if they lacked dignity is to treat them with contempt (MS 6:462-463).

In simple terms, *“ethics are not what the [lawyer] knows he or she should do: ethics are what the [lawyer] does. They are not so much learnt as lived. **Ethics are the hallmark of a profession, imposing obligations more exacting than any imposed by law and incapable of adequate enforcement by legal process. If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skilful evasion.**”*⁵

2. Ethics as a compass for lawyers



⁵ Sir Gerard Brennan, Bar Association of Queensland, Continuing Legal Education

Against this background it is clear that ethics are about something more than rules – it is “*a personal commitment to doing what is right*”. To the legal profession our ethics represent “*our commitment to do what is right by the law, by our clients, our colleagues and by the community.*”⁶

Fundamental ethical principles for lawyers

Fidelity

- There is general consensus that “fidelity” primarily describes the loyalty owed by a lawyer to his/ her clients. A lawyer must ensure that the advice and service offered to clients serves the client’s best interests uninfluenced by any other motivation.
- As an officer of the Court a lawyer is bound to remain dedicated to the law and to the Court’s requirements.
- In dealing with colleagues, be they legal practitioners or staff working with you or representing the other side, a lawyer must ensure they honour their commitments and maintain a relationship conducive to the proper administration of justice.
- A lawyer’s fidelity to the community is most clearly seen “*in the commitment shown to enhancing public confidence in the law and the legal profession*”.⁷

Honesty

- Sometimes honesty can simply mean telling the truth through both commissions or omissions. The emphasis is on what is said but also on the absence of deceit with an emphasis on what is not said.
- In situations where the opposing party (private or the state) must prove its case beyond reasonable doubt, there is no compulsion on the defending or responding party to assist the opposing party to do this. Consequently, a defence counsel need not correct the mistake of opposing counsel where it would constitute breach of confidence or place his/ her client in jeopardy. A lawyer cannot, however, positively assert or affirm as correct an

⁶ The Lawyers' Compass - your ethics starting point: <http://www.ethics.qls.com.au/content/thelawyerscompass>

⁷ <http://www.ethics.qls.com.au/content/thelawyerscompass>

error made by the opposing counsel as this would amount to misleading the Court.

- in South Africa, counsel for the accused may still defend the accused that admits he that he is guilty of the offence he is being charged with, but the lawyer may not lead evidence contrary to the confession by the accused.⁸ He also may not put anything to state witnesses that would put in doubt the accused story, in other words, he is bound by the story which his client has told him. This must be thoroughly explained to the client, and the client may decide whether he/she wants to continue to be represented by the attorney in question. However, as stated in Rule 4.11 of the General Rules of the Council of the Bar, nothing prevents the lawyer from trying to convince the court that *“the evidence which the state produces is unreliable and look out for any procedural unfairness towards client”*.

Propriety

- In order to successfully apply for admission to practice law, a lawyer must prove to the Court that he/ she is ‘fit and proper’ - meaning that he/ she is *“of suitable character to warrant the Court’s confidence*. ‘Propriety’ is derived from the same root as ‘proper’ and relates to how you conduct yourself in relation to the external stakeholders in the administration of justice.
- Courts, even internationally, have confirmed that it is never permissible for a lawyer to deliberately lie or to mislead either by statement, by action or even by silence.

Competency

- There is general consensus that there is no obligation on lawyer to *“take on every matter that presents itself and instructions should only be accepted by a practitioner confident of their competency in regard to the matter presented.”*⁹
- On this issue the New South Wales Chief Justice de Jersey has noted¹⁰:

⁸ E A L Lewis Legal ethics: a guide to professional conduct for South African attorneys (1982)

⁹ <http://www.ethics.qls.com.au/content/thelawyerscompass>

¹⁰ *Vulic v. Bilinsky* (1983) 2 NSWLR 427, 483

“...it is plainly of great importance for a practitioner not to take on work beyond his or her capacity, but that should not give rise to undue timidity where the capacity exists. Where the capacity is lacking, it is not only potentially negligent, but in my view unethical as well, for the practitioner to act.”

PROFESSIONAL RESPONSIBILITIES

Lawyers occupy a critical position in the administration of justice and the rule of law. In most legal systems the role that lawyers play to the proper functioning of civil society are so critical that mere legal qualifications or membership of a professional association are not enough to equip them to practice law.

The Supreme Court reserves to itself the right to appoint legal practitioners, and even then only those who have shown they are ‘fit and proper’ persons to hold that office. In terms of section 22(1) (d) of the Attorneys Act 53 of 1979, any attorney who is enrolled as an attorney may be struck off the roll of attorneys upon application to the society if he/she is found not to be a fit and proper person by a competent court. This has a broad outlook and encompasses fraudulent misrepresentation of facts as well. The relevant case in this regard is Jasat v Natal Law Society 2000 (3) SA 44 (SCA). Scott JA stated at paragraph 12 that *“the Supreme Court has, in the past, emphasised that the profession of an attorney is an honourable one in which complete honesty, reliability and integrity is expected from its members. This is clearly a duty of the attorney towards the court and a duty of the attorney towards the client.*

As officers of the Court lawyers have a fundamental duty to assist and promote the administration of justice and to serve the community to that end. *“That’s why the practice of law is unlike any other business and will always be far more than a mere ‘industry’.”*

In terms of Kant’s principles of division of duties towards others and oneself, the professional responsibilities of a lawyer would affect the following external stakeholders:

- **Court:** As officers appointed by the Court our first duty is to the Court and the law it upholds. If ever the instructions of our client conflict with the requirements of the Court, those instructions must be refused.

- **Client:** Within the parameters set by a lawyer's duties as officer of the Court, they are duty bound to defend and advance the best interests of their client without regard to any other influence.
- **Colleague:** In an adversarial system a lawyer can lose sight of the fact that those representing the other side are, nonetheless, their colleagues and that their client is best served when they respect each other and maintain a good working relationship.
- **Community:** The functioning of civil society is dependent on its lawyers "*ensuring that public confidence in the rule of law and in the legal profession is maintained*". A lawyer's primary duty to the community is to ensure they do nothing to jeopardise that confidence. "Beyond this, lawyers share a collective responsibility to ensure access to justice is maintained for all people"¹¹

It is suggested¹² that a lawyer should follow some basic ethical and professional rules in pursuit of proper administration of justice, including the obligation to-

- *Represent his/ her client(s) ethically, zealously and within the bounds of the law;*
- *Competently analyze legal issues and exercise knowledge of the law applicable to his/ her client's case*
- *Communicate with his/ her client in a timely and effective manner*
- *Not create or properly manage a conflict of interest*
- *Follow the client's instructions in handling their case (unless they are illegal);*
- *Keep personal property and finances separate from his / her business assets,*
- *Keep client conversations confidential*
- *Avoid having any personal relationships with a client*
- *Act in the best interests of his/ her client*
- *Accept instructions to advise or represent a client, honestly, competently and diligently*

In relation to the duty of the lawyer towards the client, he/ she has the duty to take reasonable care, as outlined in the case of Leite v Leandy¹³.

¹¹ <http://www.ethics.qls.com.au/content/thelawyerscompass>

¹² Lawyers' & clients' responsibilities to each other, posted in Legal Malpractice by Lawyers.Com

¹³ 1992 (2) SA 309 (D)

“The practitioner has the legal responsibility to inform the client, even when the client is unrepresented, of his rights and duties. He does not have to go in detail about it, but he must explain all material facts and obligations of the legal proceedings, if he does so, then the duty is discharged. The duty upon legal practitioners is to be fair towards their clients, and this also extends further; to the public.”

In the case of Toto v Special Investigating Unit and Others¹⁴, the court outlined the duty of the practitioner towards the court as well as his duty towards the client. In this case the court stated that the attorney has the duty to towards the judiciary to ensure the efficient and fair administration of justice.

“The court should be able to accept and act on the assumption that the attorney is acting in good faith in any matter which comes before the court, and further to deserve such trust, the attorney therefore has the duty to act in good faith at all times. The proper administration would fail if legal representatives act mala fide in its dealings with the court. It is within the duty of a legal representative to bring to the attention of the court all cases and relevant authority that he/she knows about, even if such authority would adversely affect the strength of his/her case. A failure to do so is a gross breach of the duty”

In his book **Robin Palmer**¹⁵ lists the qualities of a “good trial lawyer” as follows;

- *clarity and orderly language,*
- *honesty and integrity,*
- *good judgement,*
- *objectivity,*
- *courage,*
- *alertness,*
- *tenacity,*
- *sincerity,*
- *humanity,*

¹⁴ 2001 (1) SA 673 (E)

¹⁵ Palmer, R and Mcuiod-Mason, D, Legal Practice Handbook; Basic Trial Advocacy Skills (2000) Butterworths pg 3

- *hard work and*
- *professionalism.*

All these qualities combined create that which is known as a good trial lawyer.