



Introduction to 25th Anniversary Edition

Lawyers & Ethics: Professional Responsibility and Discipline Gavin MacKenzie

In 1990, I decided to write a book on legal ethics. It was a subject I had not studied in law school—I remembered that a seminar on legal ethics had been offered then, in the early to mid 1970s, but I didn't take it, and neither did anyone I knew. But in my first dozen or so years at the bar a significant part of my practice included representing lawyers in discipline proceedings, and I had developed an interest in the subject. No one in Canada had written a book on legal ethics since Mark Orkin in 1957, and I thought lawyers and law students might find a contemporary text useful.

It took me three years of evenings, weekends, and holidays—a year of research, a year of writing, and a year of revising. I wrote it in the library of our young family's home in the country north of Unionville, where I enjoyed the frequent interruptions of our children. The youngest, Brooke, was two the year I started work on the project.

It quickly became apparent to me that the Americans were years ahead of us in their thinking and writing about legal ethics. Monroe Freedman's 1975 book *Lawyers' Ethics in an Adversary System* opened up a whole new way of thinking about the subject. David Luban, Geoffrey Hazard, and Deborah Rhode were among the leading scholars who wrote thoughtfully about issues that had rarely been discussed before the 1980s. Charles Wolfram's comprehensive 1986 treatise *Modern Legal Ethics* became the model for the standard Canadian book I wanted to write. I wrote in the Introduction to the original edition of *Lawyers and Ethics* that in Canada "our literature is embarrassingly sparse by comparison".

That is no longer true. We now have our own rich academic scholarship on legal ethics. The many Canadian legal scholars who have led the way in creating it include Adam Dodek, Alice Woolley, Brent Cotter, Allan Hutchinson, Richard Devlin, Paul Paton, Randall Graham,

Stephen Pitel, and Malcolm Mercer. Wolfram, Freedman, Luban, and Hazard were all law professors and, with the exception of Malcolm Mercer, so are all these Canadian scholars.

I was, and am, a practitioner, not a legal academic, and my book was intended for lawyers working in the trenches and students who aspired to join us. It consisted of more description than prescription, though I did call upon lawyers to re-examine their role in society at a time when the business aspects of practice demanded increasing attention. In some chapters I advocated for reform. I envisioned the book as a hardcover volume I would place on a shelf and refer to from time to time until it became obsolete. My publisher decided that it should be published in two editions, a practitioners' edition that would be supplemented with reference to rule changes and new cases at least annually, as well as a softcover students' edition, which could be updated in future editions if there was sufficient interest in the work (the 6th student edition is being published this year).

One evening, a year or two after the original edition of the book was published, I had it in my hands at home as I looked up a passage I hoped to use in a case I was working on. Brooke, who must have been about six at the time, was surprised. "You're reading your own book," she said in a surprised tone of voice. "Yes", I replied, and I explained why. "But you wrote it," she said. "You already know how it will turn out."

But I didn't. I had my doubts whether the rate of change in the field would sustain a pace of a supplement every year, but my skepticism (at least in this instance) was unjustified. In the first supplement I made changes to the Introduction and 21 of the book's 27 chapters. I added sections on Discrimination and the Representation of Clients Under a Disability. Over the years, I added

sections on the Inadvertent Disclosure of Confidential Information, the Innocence at Stake Exception to the duty of confidentiality, Communicating with Represented Parties and Witnesses Prior to Trial, Dealing with Self-Represented Parties, Duties Arising from Responding to Requests for Proposals and Inquiries from Potential Clients, Conflict Management, Remedies for Breaches of Conflict Rules, Interim Suspensions and Costs in Conduct Proceedings, and Duties upon Leaving a Law Firm. Chapter 12 in the original edition consisted mostly of an argument that contingent fees should be allowed in Ontario, as they were in every other jurisdiction in North America; it became irrelevant when the Government of Ontario agreed. The case law evolved in many ways. The Federation of Law Societies' *Model Code of Professional Conduct* supplanted the Canadian Bar Association's *Code* as the basis for most provincial and territorial law societies' rules of professional conduct. The language changed: Chinese walls became ethical screens; the organization that had quaintly been calling itself the Law Society of Upper Canada these last 221 years decided to burst into the nineteenth century and become the Law Society of Ontario.

Brooke became a lawyer in 2013. She has authored many scholarly articles and an LL.M. thesis, and is the 2017-2018 recipient of the OBA Foundation Chief Justice of Ontario Fellowship in Legal Ethics and Professionalism Studies. She is much more of a legal scholar than is her father. She and I co-author a column titled "Conduct Becoming" in the CBA's *National* magazine. She is a practitioner, too. After a few years practising litigation at McCarthy Tétrault she and I started our own boutique litigation firm concentrating on civil appeals and professional responsibility work. Next year she will become the co-author of *Lawyers and Ethics*. So no, Brooke, you never know how it will turn out.

About the Author

Gavin MacKenzie, of the Ontario bar, is one of the co-founders of the Toronto litigation boutique MacKenzie Barristers. His litigation practice is focused on appeals, judicial review applications, professional responsibility, liability and discipline, and general civil and commercial litigation. He has appeared as counsel in over 200 reported cases, before all levels of court, including the Supreme Court of Canada and before many tribunals. He is often retained as an expert witness on professional responsibility and litigation.

Mr. MacKenzie was elected as a bencher of The Law Society of Upper Canada four times and as Treasurer from 2006 to 2008. He has served as chair of LibraryCo Inc., and as a Director of the Canadian Institute for the Administration of Justice, The Advocates' Society, and the Medico-Legal Society of Toronto. He was awarded an honorary Doctor of Laws from The Law Society of Upper Canada in recognition of his contributions to the profession. He was also honoured by induction as a fellow of the American College of Trial Lawyers. He has also served as an adjunct professor of legal ethics at Osgoode Hall Law School.