

THE ETHICAL DIMENSION FOR LEGAL PRACTITIONERS: HOW, WHERE AND WHEN?

A CLE SEMINAR ORGANIZED BY THE IRINGA CHAPTER FOR ALL ADVOCATES ON THE 08TH DAY OF AUGUST 2022 AT SUNSET HOTEL IRINGA

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Abstract

This topic covers the ethical dimension for legal practitioners. It focuses on How legal practitioners should conduct themselves, when should they be ethical and Where are they supposed to be ethical as legal practitioners. The presentations under this topic will attempt to answer the questions often raised by young practitioners on the scope of the ethical conduct for legal practitioners. This part of the presentation will discuss on the How, that is it will cover the meaning of ethics and legal ethics, the nature of ethics, the importance of legal ethics, categories of legal ethics, common traits for a successful legal practitioners and thereafter an interactive discussion will be opened and way forward will be suggested.

1.0 Introduction

There has been an increase of the number of practicing advocates in Iringa chapter² (which comprises of Iringa and Njombe) which is a blessing to the profession and the end uses of legal services. Most of these practicing advocates are junior practitioners. The increase in the number of practicing advocates has brought about variant of ethical challenges. This has necessitated the Iringa chapter secretariat via the Chapter Ethics committee to organize this Continuous Legal Education (CLE) seminar with the theme “the ethical dimension for legal practitioners: how where and when?”

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² Unofficial statistics suggests that there are now around 120 advocates in Iringa compared to the past 5 years where there were less than 50 practicing advocates in Iringa and Njombe

The purpose of this CLE is not at all to have an academic discussion on what are ethical values rather an interactive discussion on how are practitioners expected to conduct themselves, where are they supposed to be ethical and when are they expected to be ethical. Presenters will only inflame a discussion on the topical issue and the floor will have an opportunity to share a practical overview and at the end a way forward will be set.

1.1 Meaning of ethics

There is no a single definition of what ethics is. Different authors have attempted to define the term ethics.

Aristotle who is considered to be the “Goliath of Moral Philosophy defined ethics by making a distinction between virtue (positive) and vice (negative) aspect of human behavior.³ According to him if you see any conduct that is unethical you can identify it and if you see a conduct that is ethical you can also identify it.

Ethics is defined as “the science of the ideal human character”; and has been thought of in terms of: “moral action, conduct, motive or character; containing right or befitting; conforming to professional standards of conduct⁴

Ethics is also defined as moral principles governing or influencing conduct⁵. It is the branch of philosophy concerned with the nature of ultimate value and the standards by which human actions can be judged right or wrong⁶. Ethics may also be defined as ‘the study of what is morally right and wrong, or a set of beliefs about what is morally right and wrong.’⁷

In all these definitions there are common features:

³ D. Brian Dennison / Pamela Tibihikirra-Kalyegira (eds.), Legal Ethics and Professionalism. A Handbook for Uganda Geneva: Globethics.net, 2014 p.32)

⁴Ibid D. Brian

⁵ Concise Oxford Dictionary, 10th ed.

⁶ Britannica Concise Encyclopedia, 2006

⁷ (<https://dictionary.cambridge.org/dictionary/english/ethics>)

- ❖ Human behavior
- ❖ Moral principles
- ❖ Right and wrong virtue/vice

Legal ethics is therefore a term used to describe a code of conduct governing proper professional behavior of legal professionals, which establishes the nature of obligations owed to individuals and to society. In Tanzania ethics for private practitioners are codified in The Advocate Act, Cap 341, The Advocates (Professional Conduct and Etiquette) Regulations, 2018, The Advocates (Disciplinary and other Proceedings) Act of 2018, The Advocates (Remuneration and Taxation Costs) Rules of 2015 and The Notaries Public and Commissioners for Oaths Act, CAP 12

1.2 Nature of legal ethics

Though ethics concerns moral principles, and focuses on what is bad conduct and what is good conduct ethics are not religion. Ethics apply to everyone who has subscribed to be bound by them. Specifically for professional ethics, they are common rules to all within the profession.

Ethics are omnipresent in nature. By subscribing to the profession you are automatically bound by the set of ethical values of that profession.

The other nature of professional ethics is that they apply to all in the professional despite the fact that they are not codified. Putting it different to be enforceable ethics need not be codified.

1.3 Importance of legal ethics

Why is it important to have legal ethics? As legal ethics set up the moral principles on the conduct of legal practitioners, it is important that they are well articulated, certain and enforceable to enable legal practitioners to balance their duties well.

Ethics are important to maintain the integrity and the reputation of the legal profession. It is widely believed that the very efficacy and survival of every profession and vocation depends on its reputation in the eye of its own clientele, and in the ear of the general public.

2.0 Approaches of legal ethics

Though there is no a single definition of what ethics is, Legal ethics may be best approached into two senses, the narrow sense and the wider sense⁸. Many authors and great thinkers and philosophers have found these two approaches as best describing legal ethics⁹.

2.1 Narrow sense approach “*fear play*”

In the narrow sense, legal ethics is “the system of enacted regulations governing the conduct of lawyers.” It implies that, for legal ethics to operate, they must be codified. Therefore various enactments dictate the conduct of legal practitioners. This is also known as *fear play*, suggesting that legal practitioners will conduct themselves in a certain manner in fear of sanctions that will follow non adherence of the codified ethical conducts.

2.2 Broad sense approach “*fair play*”

In a wider sense, legal ethics are considered as a special case of ethical values in general containing the fundamental of lawyers’ moral lives. Lawyers are guided not by fear of sanction but by moral and values attached to human character. The rules of morality will guide you depending on the context you are operating. Ethical values are not guided by written principles but the values of morality. It is also known as *fair play*.

3.0 Categories of ethical values for legal practitioners

Ethical values are found both in the codes of conduct and in practice. The list of what amounts to ethical values is non exhaustive just like a list of what amounts to unethical conducts. Therefore under certain circumstances an advocate will be expected to conduct himself in a certain manner

⁸ Fauz Twaib (2008) The legal profession in Tanzania: the law and practice, Law Africa, Dar es salaam

⁹ For example American Professor and great thinker Michael Krauss Krauss

though that value he is expected to maintain is not in the codes of conduct. Some of the ethical of the categories of ethical values include the following;

3.1 Integrity

Every advocate is required to be a person of high integrity. This is provided by part II of the Advocates (profession Conduct and Etiquette) Regulations¹⁰. The requirement to act with integrity is when the advocate is discharging his duties towards the court, the client, the public, another advocate and the legal profession.¹¹ Regulation 3¹² says what integrity includes and regulation 6¹³ lists situations where it is considered there is lack of integrity.

3.2 Competence and quality service

A practicing advocate is expected to possess an appropriate professional training. Not only that, but also an advocate is expected to maintain that profession training and develop and pursue throughout his career. That being the case, it is expected of legal practitioners to accept clients in the areas that he/she is competent to handle without undue delay.¹⁴ And in case where he will need or seek assistance from experts or other advocates who are more experts in that area of the case, the advocate must inform the client before accepting instructions.

According to regulation 3¹⁵ competence entails not only formal qualifications to practice law but also adequate knowledge of the practice and procedures which the principles of law may be applied.

An advocate is also required to provide quality service to the client that is expected of a competent advocate and in case there is foreseeable due delay the advocate is required to inform the client¹⁶.

¹⁰ GN. No 118 of 2018

¹¹ Ibid regulation 5

¹² Soundness of moral principles, the character of uncorrupted virtue in relation to truth, fair dealing, uprightness, honesty, sincerity

¹³ GN No. 118 of 2018

¹⁴ Ibid Regulations 8,9 and 10

¹⁵ Ibid GN No 118 of 2018

¹⁶ Ibid Regulation 12

3.3 Honesty and candour towards clients

This is covered by part IV to GN No 118 of 2018. The regulations under this part require an advocate to act with honest and be candid when advising clients. The advocates should give an independent opinion based on evaluation of facts presented to them by clients and allow an independent and informed decision by the client. Of interest to this presentation is Regulation 18 which prohibits advocates from giving bold and confident assurances to clients in matters which are subject to decision or directives to be made or given by a court or any other institutions. Quite often advocates fall into a trap of giving assurance of a win to clients upon or when receiving instructions and sometimes clients would require you to assure them of an outcome they desire before they give your instructions. What you can best do is give an opinion on the merit or otherwise of the case based on the facts presented to you and analysis of the law and evidence provided.

3.4 Confidentiality

Part V of the Advocates (profession Conduct and Etiquette) Regulations¹⁷ provides for confidentiality and restrictions of disclosure of client's information. An advocate is mandated to treat with confidentiality all the information obtained for the client in the course of their dealing. This duty extends to even where their relationship ceases.

The ability to maintain confidentiality will mark you as a good lawyer that clients will be comfortable dealing with. In our geographical area (Iringa/Njombe) where almost everyone knows everyone/ is related to everybody the ability to maintain confidentiality should be your virtue. Special interest to Regulation 32¹⁸ where an advocate is warned to avoid to gossip with even client's spouse or family member about client's affairs even if the client's name is not mentioned or identified.

3.5 Prohibition to act where there is Conflict of interest

Part VI and VII of the Advocates (profession Conduct and Etiquette) Regulations¹⁹ provide for the advocate's duty to the client and restriction to act where there is conflict of interest. In cases an

¹⁷ GN. No 118 of 2018

¹⁸ Ibid

¹⁹ GN. No 118 of 2018

advocate discovers a conflict of interest however slight the advocate is obliged to inform the client of the conflicting interest and it will be upon the client to decide on the competence of the advocate to continue handling the client's case.

Prohibition of conflicts of interest and Duty to Impartiality In order to uphold legal professional privilege and the principles of independence and loyalty, the lawyer must avoid conflicts of interest. He or she therefore cannot represent two or more clients in the same case if there is a conflict or risk of a conflict between them. Likewise, the lawyer must avoid acting for a client if that client has confidential information obtained from another former or current client of the lawyer. Similarly, the lawyer may not use information in one case that was obtained confidentially in another case or a previous case. An advocate is also prohibited to engage in any case where his close people from firm, family or office are involved. Rules 35, 36, 45 and 46²⁰.

3.6 Dignity, probity, loyalty and diligence

An advocate must at all times maintain the principles of dignity, probity, loyalty and diligence. He/she must not be engaged in anything that damages the advocate's reputation, or that of the legal profession as a whole or the public's trust in the legal profession. The advocate must not under any circumstances facilitate the commission by a client or a third party of an illegal act punishable as a criminal offence, or an act that constitutes tax fraud.

3.7 Right to fair Remuneration

An advocate is entitled to legal fees and to the reimbursement of the expenses incurred in providing legal services and professional advice to clients. These fees and expenses are determined by agreement with the client, in accordance with the law and the ethical rules by which advocates are bound. Regulation 72²¹ provides that advocate must only accept fees that are fully disclosed, fair and reasonable. Advocates are also prohibited from misappropriating clients' funds entrusted to them. Regulation 72 (2) provide what factors to be used to determine what amounts to fair and

²⁰ Ibid

²¹ Ibid

reasonable fees. Undercutting or overcharging is strictly prohibited. At the outset of the representation, the lawyer should inform the client if the client is eligible for legal aid.

4.0 Common traits of a successful legal practitioners

A good advocate is a potential to clients who are in a situation where they need a legal guidance. Whether an advocate is good or bad depends on number of factors. It is only a good advocate who will be successful in the legal practice and his success will be consistent, progressive and sustainable. There are various common traits that determine the success of a legal practitioner²².

4.1 Passion for the job (zeal/enthusiasm)

If you have passion for the legal profession you will be happier, more fulfilled and you will perform better. A popular saying goes, “Chose the job you love and you will never work in your life”

4.2 Compassion for clients (kindness/care/consideration)

Be committed in helping and representing clients. If you are able to commit yourself to your clients you will find meaning and success in your profession life. Always make things a little better for others.

4.3 Great communication skills:

Advocates are communicators, they communicate with the client, with the opposing attorney and with the court. You should be able to get important ideas across in a formal legal writing, informal emails, in phone conversations, through discussions in official legal settings and in private conversations. The legal practice is not all about law but also business, an advocate should therefore be able to network with potential clients and be able to demonstrate your professional capabilities whenever you have an access to the potential client.

4.4. Willingness to listen:

²² Ramzy Ladah (2019) What makes a good lawyer? Common traits of successful attorney today, Abraham Lincoln University (alu.edu/alublog)

Effective communication is two ways traffic. (Listen=silent). Learn to listen to your client, to the witness, to the opposing counsel and to the court. You may get more relevant information that help you win a case when you listen. Listen and extract relevant information, analyze it and create a plan of action.

4.5 Knowledge of the law

At the university and the law school you learn the general law. When you decide to specialize then you should be able to know intensively your area of practice. Knowledge may be acquired from experience and through learning. Attend as many as possible courses both short courses and continuing legal education on your area of practice.

4.6 Strong writing ability

You must master your writing and drafting skills. Be able to prepare effective, clear and well reasoned legal document.

4.7 Creativity

Legal practice is an art. This is because each client that you handle has a unique set of goals, objectives and concerns. Lawyers should be able to sometimes think “outside-the-box” and craft solutions for clients. Approach every case with an open mind.

4.8 Good judgment

You are required to be able to make judgments both for your clients and for yourself. It is the client who is supposed to make a choice, but it is the responsibility of an advocate to make sure that the client knows and understand all important and relevant information to enable the client to make an informed decision. An advocate should be able to make judgment on whether to pursue a claim or not, to accept the offer from an opponent or not.

4.9 A healthy skepticism (not a pessimist or negative)

You must be aware that what you are informed by a client might not represent the full story. My experience on this is most clients if not all only tell a story that exonerates them. Do not fall into

a trap of totally believing your client before verifying the story. Take time to verify your client's or a witness's story before you believe it.

4.10 Perseverance

The practice of law is a tough field. To make it you need to be firm. It is a really rewarding profession if you put hard work on it and have persistence. Along the way you may meet clients who are just “pain in the neck”, opposing counsels who are just arrogant and rude for no reason or a judge who rules the wrong way on a key procedural matter. Or you may simply wake up in the morning to go for hearing and find out that the magistrate is absent and no reason is advanced for his absence. Perseverance while make you yield the rewards of our noble profession.

5.0 Concluding Remarks

Bennett W²³ holds a view that

“..There is a perception by many people that lawyers are moral eunuchs, unencumbered by qualms that limit the behavior of other people. This view posits that lawyers lack ordinary moral development, that they possess a character defect which prevents them from gaining the moral consciousness that other people develop naturally as part of growing up in society.”

How should advocates behave may not only be found in the codes of ethics but also in our day to day moral lives and societies set up. The development in technology especially the coming of the fourth industrial revolution makes legal practice more vulnerable to ethical violations. When you are able to balance your duties to your client, to the court, to the society, to the profession and the duty to yourself it will be easier to conduct yourself and flourish in the legal profession.

²³ Bennett, W. (2002-01-01) The Lawyer's Myth: Reviving Ideals in the Legal Profession: University of Chicago Press. Retrieved 3Dec. 2021, from <https://www.universitypressscholarship.com/view/10.7208/chicago/9780226042565.001.0001/upso-9780226042558>. pg 62

REFERENCE

W. Bennett. (2002-01-01) *The Lawyer's Myth: Reviving Ideals in the Legal Profession.*: University of Chicago Press. Retrieved 3 Dec. 2021, from <https://www.universitypressscholarship.com/view/10.7208/chicago/9780226042565.001.0001/upso-970226042558. pg 62>

D. Brian Dennison / Pamela Tibihikirra-Kalyegira (Editors), *Legal Ethics and Professionalism A Handbook for Uganda*

F. Twaib (2008) *The legal profession in Tanzania: the law and practice*, Law Africa, Dar es salaam

V. Mtavangu, *Balancing a duty to the Court and to the client: A dilemma of legal practice in Tanzania*, Open University Law Journal, 2013, Vol. 4, No. 2:147-166

Ramzy Ladah (2019) *what makes a good lawyer? Common traits of successful attorney today*, Abraham Lincoln University (alu.edu/alublog)