PROFESSIONAL NEGLIGENCE, PARALEGALS AND MODERN LEGAL ETHICS BETWEEN THE BOOKENDS

by Harry Cohen*

Over the past few months three books have come to the office which deserve some attention from the legal profession. Each is unique in its own way and serves a useful purpose. The first of the three is *Professional Negligence*¹ by Australian National University law professor David F. Partlett. The book deals fundamentally with tort liability of professionals, mainly, M.Ds. and lawyers, but includes discussion and analysis of other professionals such as accountants, architects, engineers and the like. The decisions discussed are mainly English and Australian but there is plenty of material from the United States. Besides being a fine research tool, this 394 page volume (excluding the index) includes a wealth of references to much of the literature on the subject.

Insofar as lawyers are concerned, (and perhaps for all professionals) the related problems of professional liability and professional competence have always been with us. Clearly distinguishing between them has been difficult. Is a lack of competence a matter of fault or negligence or is it something more than a slip or error? Professor Partlett concludes that most successful actions against professionals involve some kind of mechanical error such as a failure to comply with the statute of limitations or a failure to prosecute actions resulting in dismissal under jurisdictional requirements.² Few successful negligence actions involve failure of professional skill and judgment.³

What is competence? May incompetence be caused by negligence? Is incompetence caused by fault? Such things as insanity, lack of education, lack of ability may not be caused by any fault on the part of the practitioner. Legal scholars have not begun to in-

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2. Id. at 178.

3. Id.

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vestigate and research these kinds of problems. Our present disciplinary system looks and sounds like the criminal justice system and may regulate wrongdoing but not competence.\textsuperscript{4}

By and large, Professor Partlett is dealing with “liability of professionals for negligence,”\textsuperscript{5} although at times he seems to be involved with the broader concept of competence.\textsuperscript{6} He discusses the idea of a profession and the tension which exists between professional protective devices, tort liability and general societal and legislative controls.\textsuperscript{7} Besides very good discussions of professional negligence, contract liability, liability to third persons, liability for misstatements, Professor Partlett spends some time on theories of loss shifting and reallocation\textsuperscript{8} and the shifting and spreading of losses through insurance and alternatives to the fault system of the common law.\textsuperscript{9}

Space limitations prevent a thorough review of the many incisive analysis of various professional liability problems discussed. Nevertheless, an example can suffice. In the section on liability for misstatements, “American Patterns of Liability” unfolds.\textsuperscript{10} Professor Partlett saw “two distinguishable threads”\textsuperscript{11} in the caselaw relating to liability for misstatements, the plaintiff reliance cases and the third party beneficiary decisions. \textit{Ultramares Corporation v. Touche}\textsuperscript{12} and its progeny is discussed at length and the question is asked: “Should not the law be more honest and, instead of meddling with the ingredients of the deceit action, openly develop a third, sui generis, category of liability in addition to deceit and negligence — a strict duty to provide accurate information?”\textsuperscript{13}

Thereafter he discussed the California will cases like the classic

\textsuperscript{4} Marks & Cathcart, \textit{Discipline Within The Legal Profession Is It Self-Regulation?} (1974) U. ILL. L. R. 193, 230. The authors look into the question of competence at page 200 et. seq. and believe that we need to formulate a “professional review of performance.” \textit{Id.} at 203.

\textsuperscript{5} D. F. Partlett, \textit{supra} note 1 at 13.

\textsuperscript{6} \textit{Id.} at 7-12. In many ways Professor Partlett begins the discussion of a separate standard for competence. \textit{Id.} at 182.

\textsuperscript{7} \textit{Id.} at 5-12.

\textsuperscript{8} \textit{Id.} at 242-252.

\textsuperscript{9} \textit{Id.} at 365-386.

\textsuperscript{10} \textit{Id.} at 69.

\textsuperscript{11} \textit{Id.} at 70.

\textsuperscript{12} \textit{Id.} at 71.

\textsuperscript{13} \textit{Id.} at 76.
Lucas v. Hamm, 14 where the court found that an attorney owed a duty of care to a potential beneficiary of a will which the lawyer had written. From this extensive analysis Professor Partlett concludes:

This necessarily brief resume of American law can but give an impression of patterns of liability for misstatements. To even speak of an American law in the area is to give currency to a misleading notion that the law is monolithic. Nothing could be further from the truth. The multiplicity of State jurisdictions with courts of varying persuasions, traditions, dockets, and quality, guarantees a fractured and atomised body of law.

Nevertheless the following conclusions may be presented.

1. Ultramares is a decision generally repudiated. Negligence has, accordingly, come to dominate liability for misstatement, bringing in its train the uncertainties, vagrancies and mysteries that bedevil Anglo-Australian law.

2. The law has progressed to a point where two paradigms of liability may be isolated. First, those depending on the plaintiff's reasonable reliance upon a statement, and second, those where the plaintiff is affected by the failure of the defendant to carry out an obligation under a professional relationship.

3. In respect of the first paradigm many United States courts have acknowledged the primary role of reasonable expectations in determining the nature of liability. Thus liability for false statements may depend on proof of intent or negligence, or liability may be strict.

4. In respect of the second paradigm, those courts that have opened up liability have attempted to restrain liability within bounds which comport closely with contractual liability towards third party beneficiaries.

The rich experience of United States courts in dealing with these issues makes American law an excellent litmus test for Australian law and the next chapter shall bring to bear the American developments. 15

Professional Negligence is a very well executed and well crafted work and should be of great help to all lawyers in the English speaking world. It is hoped that Professor Partlett will use this volume as an extensive introduction to a second work on Pro-

14. Id. at 80.
15. Id. at 84.
professional Competence and demonstrate how the various countries—Australia, United Kingdom and United States—have handled the vexing problem of professional competence.

In Paralegals - Progress and Prospects of a Satellite Occupation, Professors Quintin Johnstone and Martin Wenglinsky studied the new paralegals in the United States. Professor Johnstone, of Yale, brings to this study his extensive knowledge of the legal profession while Professor Wenglinsky is a sociologist who teaches at Quinnipiac College.

In the study, the authors interviewed paralegals who practiced in New York and dealt with various New York agencies which employed paralegals. The resulting chapters of the study deal with the work of paralegals, who they are, their perceptions of the job, the employer's impressions of paralegals and the future of the occupation. The impressions one receives from a reading of this book is that paralegals do a great deal of work which involves fact finding and a great deal of preparatory work for such things as divorce work and sale or loan closings. In divorce work they prepare documents for both uncontested and contested cases. Paralegals also interview witnesses. They are prevalent in offices that do considerable real property and estate work and are often engaged in locating and inventorying assets, securing appraisals, arranging for the sale of estate assets and for stock transfers.

Some law firms are giving paralegals broad responsibilities and it is reported that:

One paralegal, who had taken over the closing work of a senior associate who had recently left the law firm where she worked, volunteered during our interview that her duties are now so broad and she has so much discretion that in reality she is practicing law. Another real estate paralegal said that the firm has given her so much responsibility on closing matters and she handles so many closings that it is almost as though she were self-employed in a business of her own.

17. Id. at 41, 53.
18. Id. at 32, 35.
19. Id. at 320.
20. Id. at 33.
21. Id. at 38.
22. Id. at 36.
Although employers generally seemed to be satisfied with the work of paralegals, this was found to be attributable to “employer caution in assigning work to paralegals.” However, one complaint which did surface, especially from the large firms, was that paralegals were not “sufficiently productive and too often their work was inaccurate.”

There is a great deal of paralegal dissatisfaction.

The dead-end character of paralegal work is apparent in most all law offices where paralegals are employed. To those staying in the occupation, chances to move up are limited or nonexistent and opportunities for more pay and responsibility usually are quite restricted. Dull work also characterizes the occupational life of many paralegals. Repeatedly in our interviews paralegals expressed dissatisfaction with the repetitive, boring, and uncreative tasks regularly if not exclusively assigned them. It apparently is common among many paralegals to characterize much of what they do as “idiot work,” and other terms used by our informants to describe dull tasks they performed were “mindless work,” “robot work,” and “work that could be performed by trained apes.” Offices that have an inordinate amount of dull paralegal work were referred to by some paralegals as “meat grinders,” an apparent reference to the effect those offices were having on their paralegal staffs.

One of the problems of the paralegal in the American legal profession is the dilemma some of them find in law offices. They are partially trained but often they are ambitious and industrious legal neophytes. Here we find people who are thrust into law practice and who are told not to be lawyers. The authors of Paralegals - Progress and Prospects of a Satellite Occupation believe that they are here to stay, and with the growth of population and legal work, paralegals will be more and more necessary. Perhaps the most striking point the authors make in this work is to suggest that over the next decade or so, many law students dissatisfied over their lack of readiness to practice law, will demand the combining of paralegal experience with traditional law school

23. Id. at 55.
24. Id.
25. Id. at 84.
26. Id. at 213.
27. Id. at 215.
The authors believe that people entering paralegal training should be told about the restrictions and constrictions of their work, so as to lessen the number of disappointed aspirants, and the numerous withdrawals from the field. It is suggested that the paralegals stress their own unique expertise rather than comparing their work with that of lawyers. More incentives need to be given to those who do a good job but better supervision and guidance must be provided.

*Paralegals - Progress and Prospects of a Satellite Occupation* is a welcome addition to legal profession literature because it throws some light on what can be a dark corner of the legal profession. This work’s contribution is that it uncovers, to some extent, the validity and strength of the paralegal occupation.

The third book is *Modern Legal Ethics*, by Professor Charles W. Wolfram of Cornell Law School. For years we have been without a first rate, up to date, hornbook type of textbook on legal ethics. Depending on one’s viewpoint, it is open to question if this book fills the need.

Professor Wolfram in his Preface points out the ambiguous uses of the terms “legal ethics,” and says that he continues to use the timeworn phrase but emphasizes that it is utilized in its broadest sense. There is an effort here, he suggests, of “shifting the agenda of discussion about lawyers away from the confining traditions of the etiquette and pettiness of law practice to a much broader and more socially and morally important plane.” Professor Wolfram’s text is expansive and full, but his emphasis seems to be polemic and subtly anti-lawyer.

In dealing with student work in this Journal we recently had reason to check *Modern Legal Ethics* on the question of lawyer dress and conduct in the courtroom. True to his intention, Professor Wolfram barely touches on this subject. In the index one found “Dress Codes” and under that heading was the word “Etiquette.”

28. Id. at 220.
29. Id. at 221.
30. Id. at 223.
31. Id. at 224.
33. Id. at v.
34. Id. at 1097.
Under "Etiquette" we found "Courthouse Rules." The following is all there is on the subject in the book:

Courthouse Etiquette

Occasionally, local court rules will specify in some detail appropriate court etiquette, such as whether lawyers are to stay at a podium when examining witnesses. Some such rules are designed to speed the proceedings, to avoid harassment of witnesses, or for similarly useful purposes. But others seem concerned with little but matters of taste. The least supportable of judicial decorum regulations are dress codes that specify minutely the appropriate attire for lawyers. A distractingly bizarre form of dress might be a direct affront to a court and warrant sanctions. (Footnotes omitted)

Modern Legal Ethics spends its space on subjects such as "Limitation by Certification" of advocates, Chief Justice Burger's ill-fated pet project, and on restrictions on the lawyer's extrajudicial freedom of expression. In this regard, there is commentary on the so called "oath" cases beginning with Konigsberg v. State Bar of California and In re Anastaplo.

It is interesting to note the theoretical discussion of the confidentiality principal. Professor Wolfram discussed Bentham's attack on the privilege as "anti-utilitarian" and objectively discussed the "Politics of the Privilege." Under that section he says:

From a political point of view, the vigor of the attorney-client privilege is palpably owed to the fact that lawyers make such laws and are benefited by them. The confidentiality principle reinforces the claim of lawyers as a group to professional status and strengthens their capacity to offer help to clients. It has also advantaged lawyers in their competition against nonlawyers who seek to provide legal services. Because nonlawyers cannot offer the protection of confidential communications to potential clients, lawyers are able to sell a more valuable product. The universality of the principle also means that lawyers

35. Id.
36. Id.
37. Id. at 627.
38. Id. at 201-212.
39. Id. at 632.
40. Id. at 637-639.
41. Id. at 246.
42. Id. at 247.
need not, because they are prevented from doing so, defend publicly the reasons why they agree to represent repugnant clients . . . .

A regrettable consequence of overstated claims for the confidentiality principle have caused it to come under suspicion. Too often judges and commentators treat the matter as if the only consideration worth discussing were the protection of client confidentiality. The fact is that a conflict of values is present in most of the hard cases between claims of confidentiality and claims for disclosure in order to prevent greater harms.43

The discussion of Confidentiality and Conflicts of Interest make up 26% of the 965 pages of the book, and if one includes the discussions on disclosing client wrongdoing the percentage would grow. There are many of us who teach Professional Responsibility courses who applaud this extended coverage, and yet the feeling one gets in reading these sections is that somehow Professor Wolfram is continually searching for arguments to be applied against lawyers.

An even greater criticism of Modern Legal Ethics may be one of significant omissions and lack of candor. In his review of this book, called The Ethics of Advocacy in the Advocacy of Ethics,44 Professor Monroe H. Freedman found that Professor Wolfram not only openly advocated certain conclusions and arguments on one side of legal ethics issues but he has also put forth arguments as fact which were not supported by his citations. Professor Freedman’s analysis is penetrating and the following quote is an example:

Here is Professor Wolfram’s proposition, which he puts forward not as argument but as fact:

Relatively few judicial decisions have dealt with the question of a lawyer’s duty to disclose client fraud or similar wrongdoing. Those that have, however, suggest an approach that is much less protective of client interests regardless of the cost and much more receptive to a disclosure obligation that is reflected in the adopted version of the 1983 Model Rules. Several jurisdictions have disciplined lawyers for failure to dis-

43. Id. at § 6.1, 247.
close client fraud under DR 7-102(B)(1) of the 1969 Code, even though it was evident that disclosure would require revelation of confidential client information.

That passage is supported by citation to three cases: In re Price ("failure to inform welfare office of client's receipt of funds making client ineligible for continuing Medicaid benefits"); In re Drexler ("elaborate scheme to conceal client's assets . . . in violation of court order"); and Bar Association v. Cassaro ("Fraudulent scheme to obtain worker compensation benefits").

A fair reading of the quoted statement, with Professor Wolfram's accompanying summaries of the holdings, is that lawyers have been disciplined where they learned about frauds committed by their clients and did not report them. As Professor Wolfram explicitly phrases it, he is discussing the "failure to disclose client fraud." That, however, is not a proper statement of the cases. Each of them in fact involved direct and active participation by the lawyer in the fraud, and the lawyers' own fraudulent conduct was the court's principal concern in each of the three opinions he cites. [Footnotes omitted] 45

Professor Wolfram disagreed with many of Professor Freedman's views on what he, Professor Wolfram, saw as the subject of the advising clients about their rights and interests. In an attack on Professor Freedman on page 697 of the book, it seems that Professor Wolfram went a little too far in his continued criticism of those who take a sympathetic view of lawyers and the legal profession. This is the way Professor Freedman saw it:

Another illustration of dismissing a position by distorting it is one in which I found that I was the victim, as the Second Circuit and others had been earlier in the book. Professor Wolfram writes:

One of the least supportable excesses of M. Freedman, Lawyers' Ethics in an Adversary System (1975), is the extension of arguments for client-oriented lawyer action from the area of advocacy to the entirely different field of client counseling. As a glaring example, arguments for a lawyer's exclusive focus on the interests of his or her client that Professor Freedman develops, in the context of the criminal defense function, he then applies without qualification to lawyers who advise clients about non-criminal matters when issuing securities. (Lawyers'

45. Id. at 9.
Ethics in an Adversary System), at 20-24. That passage follows directly after a criticism of lawyers who replace "a sound professional judgment about the limits of law with a wished-for ambiguity in legal proscriptions in a one-sided search for justification for a client's dubious projects.

In Lawyers' Ethics in an Adversary System at pages 20-24 I do deal with zealous representation of clients before the SEC. Beyond that, Professor Wolfram's characterization of the content of those pages is totally inaccurate.

The subject of counseling clients is dealt with elsewhere in Lawyers' Ethics, at pages 59-78, in a chapter appropriately titled, "Counseling the Client." The references to the SEC at pages 20-24 are in the chapter on "Zealous Advocacy and the Public Interest." The discussion does not relate to counseling clients, extends no arguments to that area from criminal advocacy, and has nothing to do with a one-sided search for justification for a client's dubious projects. Rather, that part of Lawyers' Ethics discusses abuses of the SEC—a government agency with criminal and quasi-criminal enforcement powers. Specifically, the concern is expressed that "The SEC has succeeded in intimidating the attorneys who appear before it," with the result that "zealous advocacy" has been sharply curtailed in securities matters. Former SEC Commissioner A.A. Sommer, Jr., is quoted as saying that the SEC attorney is becoming "another cop on the beat," with the result that "all the verities and truisms about attorneys and their roles are in question and in jeopardy." Also quoted is a New York Times reference to the SEC's enforcement practices as a "major assault" on the adversary system. The discussion then refers to abuses of the Commission with respect to appearances of lawyers "at a critical stage of the proceedings against their clients," with particular regard to "effective assistance of counsel and ... equal protection of the laws." There is comment also on the Commission's claimed power to discipline lawyers who appear before it as adversaries, and the due process implications of such a power. There is reference, too, to threats against lawyers to name them as defendants in order to intimidate them into foregoing "zealous advocacy" on behalf of their clients.

Thus, the pages in Lawyers' Ethics in an Adversary System to which Professor Wolfram refers (the only ones that relate to SEC practice) have nothing to do with client counseling or with one-sided searches for justification for a client's dubious projects. Having completely misrepresented the content, however, Professor Wolfram is able to dismiss it (and, by im-
plication, the rest of the book) with the suggestion of a “glaring example” of argument by non sequitur and by reference to “least supportable excesses,” which implies other excesses without documenting any at all.” [Footnotes omitted]46

It is interesting to note that of the three books discussed in this article, two of them were considered well crafted and objectively written. The third book, Modern Legal Ethics is also well crafted and is full of citations and knowledge. However, as Professor Freedman points out in his review of it, this is work intended for students and it is a flawed work of “faults in scholarship and candor.”47

It is also a book which is somewhat polemic against the legal profession. It is one thing to criticize lawyers and the legal profession. It is another thing to write a book posing as a student textbook which is a polemic discourse.

46. Id. at 13.
47. Id. at 14.