

A matter of principle

In today's changing moral climate, the subject of legal ethics has never been more important. The SRA is about to introduce revised 'SRA Principles', but Francis Dingwall argues that they do not succeed in providing the sort of ethical code that solicitors need in order to address issues that arise in practice



Francis Dingwall is a practising solicitor and partner in Legal Risk LLP, solicitors specialising in professional regulation and professional indemnity insurance

“
The Principles contain serious limitations as a system of moral principles

Like the previous version, the revised Solicitors Regulation Authority (SRA) Principles lack key components required of an ethical toolkit, and they suck the life out of legal ethics if they are taken as an adequate account of the ethical duties of the profession. The aim of this article is to locate the missing tools, to allow the promotion of legal ethics as a meaningful subject.

Larger societal changes

Changes we are seeing across society bring into sharp relief the ethical conduct of lawyers.

1. Harvard University has reportedly removed a law professor in response to student protests over his having represented Harvey Weinstein, even though he had apparently also represented thousands of poor, powerless clients in his time. Is it unethical to draft a non-disclosure agreement (NDA) for an alleged #MeToo perpetrator in the far-reaching terms that may be desired by the client, so long as those terms are not unlawful? The House of Commons Women and Equalities Committee has expressed concern over the use of NDAs, and has suggested that both the SRA and the Law Society should issue clearer – and in the case of the Law Society, tougher – guidance than that

which they have recently published.

2. The Tax Justice Network has recently described the UK as “the world’s greatest enabler” of corporate tax avoidance. Is it unethical to advise a client on, and implement, any tax-avoidance scheme that HM Revenue & Customs (HMRC) successfully challenges? The SRA issued a warning notice in September 2017 which could not be tougher: it contains the chilling statement that “... where [tax avoidance] schemes are defeated [by HMRC] and solicitors have advised on the efficacy of such schemes, we will investigate this as evidence of misconduct which may result in disciplinary action”.

3. Vast swathes of the population cannot afford to instruct lawyers following the slashing of legal aid, with the result that many more are acting for themselves in litigation. Is it unethical, if a litigant in person tries to serve a claim form by email, for his opponent’s solicitors to wait until the limitation period expires before telling him that it has not been validly served? Last year, the Supreme Court indicated that solicitors who remain silent in the face of a procedural mistake by a litigant in person are not guilty of “playing technical games” (*Barton v Wright Hassall LLP* [2018] UKSC 12 and see also *Woodward and anor v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985).



Can the SRA show us the way?

The SRA's new Principles certainly claim to represent an ethical code. They are introduced as "the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold". The SRA claims to be an authority on legal ethics. It provides what it calls 'Ethics Guidance', most recently an item headed: *Government's Technical Notice on the impact of a 'no deal' EU exit scenario on EU lawyers practising in the UK* (which relates not to ethics but the right to practise in the jurisdiction). It publishes a *Question of Ethics*. The most recent entry concerns *Carrying out an AML risk assessment* (which relates to the requirements of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 rather than ethics). The SRA runs a professional ethics helpline which offers advice on the SRA Handbook. By way of contrast, the Professional Ethics Guidance Team offers "assistance with understanding your obligations in relation to anything".

It is apparent that what the SRA means by 'ethics' extends to its entire system of regulation. Ethics is usually defined much more tightly as a system – or set, or code – of moral principles, moral values, and moral obligations over and above legal obligations. Acting ethically means acting morally, doing what is right and refraining from doing what is wrong. As a subject, it is about identifying the moral dilemmas that arise in life, or in the case of legal ethics, in professional practice. The SRA

Principles contain serious limitations as a system of moral principles.

The revised Principles

There are seven Principles (seven is a popular number, with the seven pillars of wisdom, the seven deadly sins, the Seven Habits of Highly Effective People):

"You act:

1. in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice.
2. in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons.
3. with independence.
4. with honesty.
5. with integrity.
6. in a way that encourages equality, diversity and inclusion.
7. in the best interests of each client."

The first limitation of the SRA Principles is that some of the items in the list are vague and open to interpretation.

1. The term "integrity" is highly problematic. In May 2019, Mostyn J demonstrated in *Adetoye v SRA* [2019] EWHC 707 (Admin) that despite Jackson LJ's best efforts in *Wingate and anor v SRA* [2018] EWCA Civ 355, confusion still reigns over the meaning of "integrity". He says there are still "conflicting messages from the higher courts". It is not surprising, as the *Stanford Encyclopedia of Philosophy* has a 21-page-long entry for "integrity" that starts: "Integrity is one of the most

important and oft-cited of virtue terms. It is also perhaps the most puzzling."

2. Even if Jackson LJ's formulation is accepted, it arguably does no more than require that the other Principles are each to be modified by the words "a high degree of" (for example, 'you act with a *high degree* of independence').

3. What does it mean to say you must act "in the best interests of each client"? Does it mean that the solicitor must decide what is in the client's best interests, and perhaps overrule the client's wishes? Where does it sit with client autonomy, and where (to take the tax-avoidance example) does it sit with a client's wish to pay as little tax as possible, preferably none at all, and to push the envelope in the interpretation of the law, even at the risk of losing to HMRC?

4. What does the SRA mean when it says solicitors must act "with independence", rather than "not allow their independence to be compromised" (as the previous Principle was expressed)? The SRA has indicated that it is intended to be "a more positive obligation." When coupled with Principle 1, does this mean that the SRA could take action against leading law firms that agree not to act against the banks on whom they are dependent for much of their work, thus (it has been argued in some quarters) depriving the public of access to the same class of legal advice that the banks can command?

5. It is disconcerting to discover that a principle which has been regarded as a vital ingredient since at least 1990 ("you must provide a proper standard of service to your clients") and which is listed as one of the "professional principles" in section 1(3) of the Legal Services Act 2007, has suddenly been demoted. Isn't the standard of service what being a professional is all about? With reduced access to legal advice, dilemmas are likely to arise as to whether it is ethical for a solicitor to offer an inferior service at an affordable price, and they are likely to increase with the introduction of artificial intelligence.

6. Like the previous version, the SRA Principles contain an *unlisted* overriding principle drawn from the SRA's (not the profession's) regulatory objectives as set out in the Legal Services Act 2007 – the duty to safeguard the public interest. This is only mentioned in the introduction to the SRA Principles, not in the body. The SRA has indicated (SRA Policy Statement: approach to regulation and its reform, November 2015) that in the context of the SRA's public interest objective, there is little that is obscure or difficult about the term "the public interest", but it adopts a definition made by the International



Federation of Accountants that requires a cost/benefit assessment of the extent to which for society as a whole the benefits of the action, decision, or policy in question outweigh the costs. That is an onerous task in a liberal democracy.

Conflicts

The second, more fundamental, limitation of the SRA Principles lies in its failure to provide a satisfactory mechanism for reconciling conflicts between the seven Principles. Reconciling such conflicts – moral dilemmas – is what lies at the heart of ethics. To say that we should follow the Principles is the easy part (subject to working out what they mean): it is obvious that we should do our best to follow them to all but the ‘mad, sad and bad’.

As noted above, the SRA Principles contain an unlisted overriding principle – the duty to safeguard the public interest: “Should the Principles come into conflict, those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors’ profession) take precedence over an individual client’s interests...”.

Not only is the “wider public interest” difficult to assess, but also this formulation does not tell us *where* to strike the balance, *where* the tipping point is at which the wider public interest takes precedence; that is the crucial question. Let’s consider our three examples again.

1. There are arguments on both sides as to whether it is in the public interest to allow NDAs in the far-reaching terms that may be desired by an alleged #MeToo perpetrator, so long as those terms are not unlawful. In addition to the obvious argument against, is the less obvious argument that an NDA may enable a complainant to obtain an early resolution on terms with which he/she is content ie, it may be in the individual opponent’s best interests? Pending any change in the law prohibiting the use of NDAs, is it not a vital component of the rule of law that the alleged perpetrator has a right to ask their solicitor to propose an NDA to the alleged victim?

2. In the field of tax avoidance, as we have discussed above, the SRA has indicated that a solicitor who advises a client on tax avoidance, and implements a scheme, risks being investigated for misconduct if the scheme fails. This indicates that the public interest in members of society paying their fair share of taxes altogether trumps the individual client’s interests. How does that square with the citizen’s fundamental right to obtain advice on the law, under the cloak of privilege (see *R v*

Derby Magistrates’ Court ex p B (Derby Magistrates) [1996] AC 487 (HL), and see more widely *Conduct Unbefitting: Solicitors, the SRA and Tax Avoidance* by Michael Blackwell (BTR 2019, 1, 31-54)) and his/her right to employ a solicitor to test the law in the courts?

3. Where litigants in person make minor procedural mistakes which cause them to lose valuable legal rights, it is regarded as lawful for solicitors to look on in silence. In terms of ethics, they are certainly acting in their clients’ interests. But could it be said that this offends the requirement for solicitors – who are, after all, officers of the court – to act in a way that upholds “the proper administration of justice”?

These three dilemmas cannot be resolved by the operation of the SRA’s overriding principle. It is necessary to search for a coherent account of the ethical duties of lawyers at a deeper level. This is harder to find in relation to lawyers than medical professionals. One can state with some certainty that the role of a doctor is to promote health. But one cannot say that a lawyer’s role is to promote justice, at least not directly, because justice is much more difficult to pin down than health. As with the concept of “the wider public interest”, in a liberal democracy there is much room for disagreement as to what constitutes justice, and it is arguably not for a solicitor to dictate it to their client, or for a regulator to dictate it to the legal profession.

The ‘standard conception’ of a lawyer’s moral duties provides a mainstream example of a coherent account of a solicitor’s ethical duties, to resolve the moral dilemmas that lawyers face. It has three components.

- **Neutrality:** as a solicitor, you should adopt a detached stance concerning the morality of your client and your client’s case. It is not wrong to act for a #MeToo perpetrator, or to implement their instructions to propose a far-reaching NDA, so long as its terms are not unlawful. Everyone, however morally repugnant, is entitled to exercise their legal rights.
- **Partisanship:** a solicitor is bound to pursue the legal but immoral objectives of the client. If NDAs are lawful, and you are acting for someone accused of sexual harassment, there is no bar to proposing a far-reaching one to the alleged victim, again so long as the terms proposed are not unlawful (although it is desirable that the victim be represented).
- **Non-accountability:** a solicitor is not responsible for the consequences of

fulfilling the role. If your client is accused of sexual harassment, and you draft and negotiate a far-reaching NDA with the alleged victim, you are not responsible for the fact that it leaves your client free to strike again because their wrongdoing has not been publicised.

Conclusion

Questions have been raised as to whether the ‘standard conception’ reduces lawyers to amoral legal technicians, playing the sort of ‘technical games’ discussed above, and whether it is consistent with integrity. In the US, the issue has been explored. One answer (see *Lawyers and Fidelity to Law*, by W Bradley Wendel) is to put the emphasis on the lawyer’s duty to pursue the ‘legal entitlements’ of the client rather than ‘zealous representation of the client’s interests within the bounds of the law’ – that is to say, the lawyer owes fidelity to the law. An individual lawyer cannot identify what is just, or what is in the public interest. But the law enacted by parliament is made expressly to resolve society’s disagreements over what constitutes justice and the public interest. As Wendel argues, lawyers “... do serve the public interest, but they do so indirectly, by treating the law with respect when representing and advising clients...” in a role that reflects “... both the lawyer’s fidelity to the law and the duties of care, confidentiality, candour, communication, diligence and loyalty that are owed to clients”. On that analysis, a good lawyer can be a good person.

The application of the standard conception enables us to resolve the three ethical dilemmas we have been examining. It calls into question the SRA’s Warning Notice on Tax Avoidance, and the interference by the House of Commons Women and Equalities Committee.

There is certainly room for argument over whether the ‘standard conception’ of a lawyer’s moral duties provides a satisfactory model, or if one of the other formulations is preferable – for example the ‘care conception’ of legal ethics. The standard conception depends on ‘equality of arms’, on an opponent or counterparty to a transaction being represented by an equally competent lawyer, which is tricky where – particularly following the slashing of legal aid – not everyone can afford legal representation. There is a debate to be had, and it is a debate which should be encouraged, but it will be stifled if the SRA Principles, or the SRA’s wider Standards and Regulations, are regarded as an adequate account of legal ethics.