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AN ETHICAL PROFESSION?

University of Wales Swansea

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by

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1. Introduction

The legal profession is often seen by the public "as the embodiment of guile and avarice", as illustrated by the following oft quoted (in America, at any rate) poem about the patron saint of lawyers, St. Ives:

Santus Yvo erat Brito

Advocatus et non latro

Res miranda populo

(St Yves was a Breton

A lawyer yet not a thief

A matter of wonder to the people)[1]

Derogatory quotations from literature could be noted - many will be familiar to you. The contemporary equivalent, I suppose, are the anti-lawyer jokes, also emanating largely from the USA, of the kind: Why have scientists given up experimenting on rats in favour of lawyers? Because you get fond of rats. Yet, conventionally, the law is presented as being one of the ethical professions.

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[1] Mellinkoff, *The Conscience of a Lawyer*, (1973), p.13.

Much has been, and still is, claimed for the professional ethic, not only by official spokespersons for professional groups - who would wouldn't they - but by sociologists and political scientists. Durkheim, in the 1890s claimed that the break up of the traditional moral order, caused by industrialisation, would be countered by the creation of a new social morality of communities based on occupational groups.[2] Tawney, in 1921, considered that "professionalism was the major force capable of subjugating the rampant individualism" characteristic of the emerging acquisitive society.[3]

Marshall in 1939 and Talcott Parsons in 1951 saw, as the essence of professionalism, a concern with the welfare of others, with that of clients or society as a whole, rather than self interest.

There were, and are, of course, dissenting voices, of whom probably the most influential was Weber and scholars in the Weberian tradition. These scholars saw the professional enterprise as essentially a method of protecting the market for a particular kind of service. The dissentients have now, arguably, become the orthodox, at least amongst sociologists. Thus Harold Perkin in 1989 states confidently that one of the main aims of professionals is to turn their knowledge into income yielding property, and that this is done by convincing the public and the State that they, the profession, should control the market for that expertise. The

[2]Durkheim, E. Professional Ethics and Civil Morals, Trans. C. Brookfield, 1957, Ec. p.12. The volume consists of lectures delivered by Durkheim between 1890 and 1900.

[3]Quoted in Johnson, T.J. *Professions and Power,* (1972), p.12.

benefits of this control are presented by the profession as being an assurance of professional competence, of independence, of fearlessness in defending the public interest, and of public service.[4]

This is also the view of the influential Magali Larson and it has been developed, in the context of the legal profession, by Rick Abel, one of the leading scholars in the field. For him, the principal reason why a profession adopts restrictions on its activities is to protect its members from competition, external and internal, and to "enhance the status of the profession by conferring an aura of disinterest".[5] This is of course a somewhat simplified account; in reality the economic self-interest of a profession frequently competes with its view of what is needed to maintain its status: professions are not in any case, homogenous, and individual members or groups within a profession may differ on either their economic, status or other goals.

Despite the current orthodoxy of the above analysis of the professional undertaking, the legal profession itself and its apologists continue to put forward the Parsonian view, without appearing to acknowledge, even in a footnote!, that there might be a contrary view. Thus in 1979 the Royal Commission on Legal Services (the Benson Commission) listed the characteristics of the legal profession thus:

First, it has a governing body having powers of control and discipline over its members,

Second, its function is to give advice and service in a specialised field of knowledge, and it has direct responsibility to the court for the proper administration of justice.

[4] Perkin, H. *The Rise of Professional Society,* (1989),p.7-8.

[5]Abel, R. *The Legal Profession in England and Wales,* (1988) p.19.

Third, entry to the profession is restricted to those with a certain standard of education.

Fourth, the "profession is given a measure of self-regulation so that it may require its members to observe higher standards than could be successfully imposed from without" and which are above the standards required by the general law.

Finally, "a professional person's first and particular responsibility is to his client", subject only to the lawyer's responsibility to the court.[6]

No hint of market control in this.

A similar view was taken by the Law Society which, in its evidence to the Monopolies Commission in 1968, had said, "In order to maintain their own repute and standing and to retain public confidence in their abilities, [professions] imposed upon themselves a discipline and adopted ethical rules and restrictions, sometimes to their own disadvantage but always designed to establish their probity and competence in the eyes of the public". This sentence was quoted in the introduction to the Law Society's Guide to the Professional Conduct of Solicitors. After the 1986 edition it was dropped and no such general hortatory words preface the current Guide. Perhaps even the profession has become sceptical of this description of its own character. Certainly the recent public utterances of the immediate past President of the Law Society, Roger Pannone, have tended to stress that solicitors are not a priesthood, but run businesses.[7]

[6]Report of the Royal Commission on Legal Services (Benson Report) 1979, Cmd. 7648, para.

[7]See, for example, remarks made at the Law Society Research Conference in June 1994.

Increasing public criticism of the legal profession throughout the 80s, unquelled by the extraordinarily complacent report of the Benson Commission, lead the two professions, barristers and solicitors, themselves to set up a joint committee on the future of the Legal Profession under Lady Marre. The report of this committee, in 1988, provides an interesting contrast to the Benson Report. It makes no attempt at all to define a profession, though a theme of the report is still that "many of the requirements placed by both branches of the profession on their members are for the protection of the public".[8] It recognises a need for deregulation but warns that a balance needs to be struck between that need and the need to safeguard "consumers" (not clients any more!). Self regulation is still the loadstone and is defined as an arrangement whereby "each profession imposes on its members high standards of education, conduct and performance above those required by the general law and, in addition, certain restrictive rules of behaviour which are designed to protect the public".[9] "The independence and the integrity of the individual solicitor or barrister, determined to place the interests of justice before expediency, are the citizen's best safeguard against tyranny whether by the State or by powerful private interests".[10] Stirring stuff. There is then a guarded warning to the government that if it favours too extensive deregulation the profession will be less likely to be prepared to undertake voluntary self regulation. This is a bit like saying to the state that we will stop opposing your tyranny if you don't leave us alone, an odd threat however veiled.[11] However, immediately after this rhetoric the Report

[8]*A Time for Change;* Report of the Committee on the Future of the Legal Profession (Marre Committee), Bar Council and Law Society 1988, para. 4.5.

[9]*Ibid.*, para. 4.17.

[10]*Ibid.*, para. 4.18

[11]*Ibid.* para. 4.19

states, "We doubt whether either branch of the profession has fully recognised the extent to which the General Council of the Bar and the Law Society are seen from outside as bodies concerned with self interest rather than public interest".[12]

Neither the Royal Commission on Legal Services nor the Marre Committee Reports had the desired effect of dissuading the Conservative Government from its deregulating path. Green Papers were issued in 1989 which the profession found very alarming. In its response to them, the Bar adopted a predictable line. It warned against the dangers of regarding the profession as primarily an economic activity, and considered that the starting point should be to ask what is a profession? To answer this question, significantly, it relied solely on the American jurist Roscoe Pound, whose definition had also been adopted by the American Bar Association (ABA). Pound, in 1953, defined a profession as a "group... pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose".[13]

Note the word "Incidentally"; the Bar enjoys the highest income of any professional group. It is about to debate a recommended change to its ethical rules to allow members to refuse to do legally aided work on the ground of insufficient remuneration. City solicitors are reputedly the most expensive in the World, senior staff earning as much as £400 an hour. Both sides of the legal profession have always found it difficult to be convincing about their

[12] *Ibid.*, para. 4.22.

[13] Quoted in *The Quality of Justice:* The Bar's Response (1989), para. 4.5 (General Council of the Bar). In fact the quotation comes from Pound's *The Lawyer from Antiquity to Modern Times* (1953), p.95.

dedication to public service rather than economic gain in the light of public perceptions of their generous remuneration. Way back in 1972, when conveyancing costs were under fire, the journal *The Conveyancer* thundered "No profession worthy of the name has ever been impelled merely by monetary reward. It expects, and has a moral right, to be paid properly for its skills and services".[14] The notion of having a "moral" right to high pay appears also in the Law Society's 1974 Guide to Professional Conduct. In a passage dropped from subsequent editions of the Guide it is stated:

> "One of the main objects of the Society is to ensure that the profession is manned by persons of integrity and a high sense of responsibility, free so far as possible from the temptations that arise through anxiety over financial problems. The maintenance of proper standards of remuneration on the one hand and on proper standards of conduct on the other, therefore, are complementary and must be two of the main functions of the Society and the absence of either would profoundly affect the public standing of the profession".[15]

This view may have been dropped from the Guide, but it has not been dropped by some Solicitors. Thus, in a solicitor's letter to the Law Society's house organ, the Gazette this year; "a professional is not paid for his work, but paid in order that he may work". In order to do his best for his client, the solicitor must be "freed of money worries". Predictably the

[14] Quoted by Thomas, P. and Mungham, G. *The Sociology of the Professions,* (1983), Ed. Dingwall, R. and Lewis, P.

[15] 1974 *Guide to the Professional Conduct of Solicitors,* p.6. para. 2.14.

writer pleads for enhanced fees, asking the Law Society to "confront the consumer groups and the OFT"![16] Plus ça change....

2. Are there codes of Legal Ethics:

The legal profession, therefore, considers itself to be a profession primarily concerned with the public interest and the proper administration of justice, a concern guaranteed by the voluntary adoption and enforcement of a strict ethical code. It might therefore be expected, in order to convince both state and public of the reality of this self image, that the relevant professional bodies would long ago have promulgated comprehensive and, by now, finely hoped codes of ethical conduct. An extensive body of case law, literature, of scholarship, analysis and commentary on these ethical rules, similar to that which exists in relation to other legal rules and doctrines would also be expected. In view of the fact that the practice of the law was one of the first occupations to be recognised as a profession, it might be expected that these codes of ethics would be of long standing.
But this is not the case.

Codes of ethics in the sense outlined above are a very recent phenomena in the UK, and also in other western European countries.

It is difficult to trace the history of ethical codes in relation to the profession in England and Wales as they are simply not mentioned in the standard sources; generally the word ethics

[16] *Law Society Gazette,* 2nd February, 1994. p.?

does not even appear in the indices.[17]

In the case of solicitors, the Law Society first received statutory power to make rules binding on the profession in 1933. These rules, according to the Society, "put into written form what had previously been regarded as the best practice of the profession...."[18] The rules made, moreover, deal with "but a small (though important) sphere of solicitors' conduct; there exists at the same time an extensive unwritten or "common law" code of conduct".[19] Solicitors - or the public - would have had great difficulty finding out these "best practices" for there existed no official (or even unofficial) guide to them. The first semi official guide was published in 1960 when Sir Thomas Lund produced his Guide.[20] Lund's book does not purport to be comprehensive, and he provides no source references to the Council opinions on which he relies. The first official Guide was published by the Law Society in 1974. New editions were published in 1986, 1987, 1990 and 1993.

The Bar: The senior branch of the profession has been even more tardy than have solicitors in publishing a code of ethics or conduct. No comprehensive code was issued by the General Council of the Bar (or any other governing body) until 1980. This Code was clearly prompted by the investigations of the RCLS which recommended that the Bar promulgate written

[17] For example, no references to ethics or codes of practice appear in the index to *Lawyers and the Courts,* Abel, Smith, B. and Stevens, R. or in Holdsworth's *History of English Law.*

[18] *1974 Guide* op cit. para. 2.8.

[19] *Ibid.*

[20] Lund, Sir Thomas, *A Guide to the Professional Conduct and Etiquette of Solicitors,* Law Society 1960.

professional standards.[21] The Commission expressed no particular surprise at the absence of such a code, noting simply that as lawyers' work was now more complex, maintaining "a uniformly high quality of service by traditional methods alone" was insufficient. It did not elaborate on what were these traditional methods.[22] Perhaps this was a reference to such practices as giving newly called members of the Bar (such as myself in 1965) copies of a slim volume by Sir Malcolm Hilbery called *Duty and Art in Advocacy*, (1959), on the first page of which appears the following, "Where is this code (of honour) to be found, and how is it to be learnt? The answer to the first question is in the traditions of the profession. The answer to the second is in the Schools of the profession, its ancient craft guilds, called Inns of Court, where all matters of professional conduct are freely and daily discussed, and where the transgressor is answerable for his misconduct. It is, of course, incapable of being stated or written out in full like a Legal Code".

There existed also another slim and non-authoritative volume available, by Sir William Boulton, *Conduct and Etiquette at the Bar,* published between 1953 and 1975.

The Bar does now have its Code, still rather slim, published in 1990 in looseleaf form for ease of updating (there have been 3 updates since 1990).

A similar position existed in Scotland. Until 1988 the Faculty of Advocates (barristers) had "no written code of conduct, and the scope of the unwritten understandings [was]

[21]Benson Report, op cit. fn 6. para. 22.17.

[22]*Ibid.* para. 22.57.

unsettled".[23] Similarly the Law Society of Scotland had no written Code, a fact which caused criticism in the Scottish equivalent of the Benson Report.[24] One was promised in 1982. A somewhat slim document was produced in 1989.

The United States presents a considerable contrast. The first treatise on professional legal ethics was published in 1836.[25] This was followed by Sharswood's influential Essay on Professional Ethics in 1854. The first comprehensive code promulgated by the ABA, known as the Canons of Ethics, appeared in 1908. Since then there has been almost ceaseless activity revising, restating, commenting on, criticising and analysing these Canons and their successors, not only by the ABA itself, but also by the wider profession, academics and the public via the media. Revisions to the Canons were made in 1928, 1933, 1937, and 1954. In 1964 the Wright Committee was set up by the ABA to undertake a major revision, adopted in 1969 as the Model Code of Professional Responsibility. Most States adopted these rules within a few years. Eight years later another major revision was deemed necessary and the Kutak Commission was set up. Four drafts were circulated and engendered an enormous amount of debate both within and outside the Profession. Finally, the Model Rules of Professional Responsibility were adopted by the ABA in 1983. Although these were not adopted by states with the same speed as the 1969 Rules, by 1991 some 35 states had done so, some with changes. New York and California have distinctively different Codes. There is even a rival Code, circulated in 1982 by the American Trial Lawyers' Foundation which

[23]Patterson, A.*The Legal Profession in Scotland,* in Lawyers *in Society the Common Law World,* Ed Abel and Lewis (1988), p.103.

[24]Report of the Royal Commission on Legal Services in Scotland (Hughes Report) 1980 Vol. 1, p.287.

[25]Hoffman, D., *Fifty Resolutions in relation to Professional Deportment.*

has many adherents amongst criminal lawyers and personal injury litigators.

This account is provided not in order to argue that American lawyers are more ethical than those in the UK - many would argue the reverse - but to illustrate that, both in the past and currently, they take with greater seriousness the rhetoric of the profession that it is bound by ethical codes voluntarily adopted. I do not at this point wish to speculate on the reasons for this: the history of the legal profession in the USA is very different from that in the UK. It is clear, however, that a preoccupation with ethics long predated the Watergate events of 1972, in which a number of lawyers were involved in the cover up and various criminal and other unethical activities. Many commentators have attributed to this debacle the greater preoccupation with the subject of lawyers' ethics in the US compared with other jurisdictions. Watergate did, however, provide an impetus for the ABA to require all of its members to undertake some education in legal ethics. From this date most US university law schools started to teach legal ethics.

3. Academic and Scholarly Activity

Unsurprisingly, the lack of interest in codes of ethics shown by the profession in this country has been accompanied by a corresponding disinterest on the part of scholars and publishers.

There is no text on legal ethics published in England and Wales. The main text on the law relating to Solicitors, Cordery, is out of date both in terms of its publication date and in terms of its old-fashioned unanalytical black letter approach and usability.[26] There is another small

[26]Cordery, *Law Relating to Solicitors,* 8th Edition 1988 Ed. Horne FT, Butterworth.

volume, *Bird & Weir, The Law Practice and Conduct of Solicitors.*[27] Aimed mainly at young solicitors, it adds little to the Law Society's own Guide to Professional Conduct except to rearrange its contents. There are no texts which examine, in the context of legal practice, the ethical rules of confidentiality, conflict of interest, the relationship with the client and the potential conflict that poses with the needs of justice etc., etc. Journal literature is almost non existent.[28] Such a literature does exist in the context of medical law and ethics. Indeed it is ironical that, in the past two decades or so, academic lawyers have eagerly entered the fray in thinking and writing about medical ethics but have failed to show the same alacrity towards their own profession.

Education in ethics:

Legal ethics does not feature in the academic stage of legal education, and, until this summer (1994), there had never been any proposal that it should. It is interesting that the Ormrod Committee on Legal Education, reporting in 1971,[29] made the usual obeisance to the professional ethic. It considered "a self imposed code of professional ethics intended to correct the imbalance inherent" in the client/professional relationship as being one of the characteristics of a profession properly so called.[30] However, no further reference was made to this in the report nor in their proposals for either academic or professional education.

[27]Bird and Weir, *The Law, Practice and Conduct of Solicitors,* 1989 Waterlow.

[28]Unlike in the United States, Abel counted over 300 articles and 4 issue length symposia under the title legal ethics in the Index to Legal Periodicals between 1976 and 1979. See (1981) 59 Texas Law Review 639.

[29]Report of the Committee on Legal Education, 1971,Cmnd. 4595, HMSO.

[30]*Ibid,* para. 86. p.35.

Similarly, the Benson Commission, whilst stating that students needed to be impressed with "the importance of maintaining ethical standards" throughout their training, made no further reference to this nor were there any recommendations on it in their section of legal education.[31]

It is only in the last few years that the subject has made a somewhat tentative appearance at the professional training and continuing education stage. Professional conduct is one of the "pervasive" topics in the new LPC course for solicitors which began in 1993. Pervasive topics are taught both as discrete subjects on most courses and also in the context of other practical subjects, hence their pervasiveness. Ethics are also part of the new Bar Finals course.

The first academic conference on ethical issues and teaching them in England was held by the SPTL September 1993. There the President of the Society concluded that Law Schools had failed in their duty to inculcate and examine professional ethics.

4. What Guidance on ethical issues do the Codes provide?

Many of the rules of professional conduct are not concerned with ethics. Indeed there seems to be considerable semantic confusion surrounding the titles given to professional codes. As will have been seen from the discussion above, sometimes the rules are called ethical rules, sometimes rules of conduct or practice. Historically the word etiquette was frequently used. The Bar is fond of referring to its etiquette, and this word was part of the title of Boulton's book up to 1975. Hilbery refers to a code of honour. Neither word is not used in the current Bar Code of Conduct. This semantic confusion undoubtedly reflects a real confusion on the

[31] Benson Report, op cit fn. 6., 39.47.

part of the profession as to the nature and scope of its codes of conduct. In reality, and in the main, the Codes deal with the traditional concerns of the profession - the regulation of entry, with other restrictive practices designed to eliminate competition and preserve or enhance status. Much of this is dealt with in considerable detail - for example the solicitors rules on advertising, the obtaining of practising certificates, preventing fee sharing; barristers rules relating to wigs, eating dinners, not eating dinners in the company of solicitors, and so on.

As already noted, many consider that this indicates that the profession is not really concerned with ethical rules, only those rules which enhance their economic position or protect their mysteries. The complaint is not new. In an entertaining article in the 1867 *Fortnightly Review,* entitled "Legal Etiquette", Albert Dicey wrote "The Bar rules... have a twofold aim: firstly, to promote honourable conduct; secondly, to check competition. All the rules which have the first aim may be summed up under the one law - thou shalt not hug attorneys [solicitors]".[32] The article is a barbed attack on the rules governing the Bar which concludes, "...though much may be said...for giving a certain protection to the learned professions, no observer of the times can be blind to the fact that while the public feeling in favour of protection diminishes, each day increases the sentiment in favour of free trade".[33] Such sentiments could have been written (with due regard for changes in language) by many modern commentators on the legal profession.

[32] 1867 *Fortnightly Review,* Vol. 2 (NS), 169 at p.173.

[33] *Ibid.* p. 179.

Thus Rick Abel in 1988, "Most ostensibly 'ethical' rules serve the Weberian objective of market control rather than the Parsonian goal of protecting clients and society".[34] This is, I feel, too sweeping a view of the modern Codes in England and Wales. Whilst it is true that much of the detail is concerned with issues that, at first blush, appear to have little to do with ethics, many of these rules do have an ethical basis and provide the kind of detail which is essential if the public is to be protected. A prime example is the Solicitors Accounts Rules which, with the Indemnity Rules, occupy 130 pages of the Guide. it is of course significant that this is the one area where the profession itself has a clear interest in controlling the fraudulent, or negligent, activities of its members, not only because it is an area where lack of public confidence could prove fatal to the continued survival of the profession as a self regulating body, but also because the burden of paying compensation to clients defrauded by a solicitor falls on the profession as a whole and this is becoming increasingly burdensome; fraud by solicitors appears to be on the increase.

Where the codes do deal with broader and more basic ethical concerns, however, it is difficult not to agree with both Dicey and Abel that, in the words of Dicey, the rules are "extremely uncertain and of indefinite character".[35] This, in turn, makes it unlikely that the profession will either want, or be able, to enforce these rules adequately.

To illustrate this contention I wish to look at the guidance given to solicitors on what might be regarded as the fundamental ethical principle governing their work, the one which must form the basis of many other ethical rules, such as the duty of confidentiality or the conflict

[34]Abel, R., *The Legal Profession in England and Wales,* 1988, p.30.

[35]Dicey, *op cit.* fn. 34, p.171.

of interest rules. This is the rule, or rules, governing the solicitor's relationship with the client.

What is, or should be, the nature of this relationship? Is the lawyer a "Hired Gun", contracted solely to follow the client's instructions, provided they are lawful? Or is the solicitor an autonomous professional person who must be left alone by the client to exercise his judgement on how the matter should be conducted, having regard, of course, to the client's best interests? If the latter, how are those best interests to be determined? Is the relationship some combination of these approaches? Some kind of collaboration between client and lawyer? If so does this collaborative approach imply some notion of informed consent by the client, similar to the doctrine often advocated in the medical context? Does the lawyer have any duty to act as some kind of moral arbiter of the client's wishes? Do the answers to these questions differ according to whether the lawyer was able freely to choose his client or had no option but to act, as is the case (in theory at any rate) with the English barrister operating under the cab rank rule? Do the answers to these questions depend on the nature of the client, criminal, civil, corporate, individual, privately paying or legally aided, adult, child, well or sick etc.? Is the lawyer personally responsible, morally or legally, for his choice of tactics in pursuing a claim? Does he owe any responsibility to persons other than his client, such as the court, the other side or some other third party such as the victim of a crime? Can a lawyer, in Lord Macaulay's words, "with a wig on his head, and a band round his neck do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire"?[36]

[36]Macaulay, *Essay on Bacon,* 1914 Ed. Longmans, p.37, cited in Luban, D., *Lawyers and Justice,X1.*

To give some concrete examples.

-You represent a client in an action where the chief witness for the other side will give evidence that you know to be true. That witness also has a very bad character. Do you attempt to undermine the credibility of his evidence by attacking his character? Would the answer be different in a criminal as opposed to a civil case? Suppose your client did not know of the witnesses bad character, or that it might be possible to bring it up at the trial. Do you tell your client? Do you consult him on tactics and, if so, do you always acceed to his views, or only sometimes? If the latter when?

-Your client is a company being sued under the environmental protection legislation. The Managing Director instructs you that you should use every procedural delaying tactic in the book in order to wear down the other side and build up the costs. He knows that legal aid is unavailable and that the solicitor for the plaintiff is probably acting on a *pro pono* basis, and that therefore will not get costs under the current law even if the case is won. Do you agree to use these tactics? How enthusiastically do you pursue them?

-Your client acknowledges that he owes a poor widow a substantial sum.. He is rich and can easily pay it, and there is no defence to her claim other than the fact that the debt is statute barred. Do you plead the Statute of Limitations? (Or do you refuse to represent the client?). Suppose it is the widow who owes the statute barred debt to the millionaire?

-You are a Government lawyer asked to give advice to a minister on answering a Parliamentary Question on whether or not Guidelines prohibiting the sale of arms to Babylonia have been adhered to. You know that they have not, or alternatively that the Guidelines have been altered secretly. Do you draft an answer that us untrue, or economical with the truth? You are the same government lawyer asked to advise whether a *nolle prosequi* should be entered by the Attorney General when the managing director of an arms firm is prosecuted by another arm of government for such sales. A *nolle prosequi* would blow the gaff on the secret change in the rules and would cause a political furore.

What guidance, then, can be obtained from the Law Society's Guide to Professional Conduct on issues like these which concern the basic relationship between client and lawyer?

Practice Rule 1 lays down what the Guide itself describes as the "bedrock" of a solicitor's practice:

"A solicitor shall not do anything in the course of practising as a solicitor.... which compromises or impairs..... any of the following:

(a) the solicitor's independence or integrity;

(b) a person's freedom to instruct a solicitor of his or her choice;

(c) the solicitor's duty to act in the best interests of the client;

(d) the good repute of the solicitor or of the solicitors' profession;

(e) the solicitor's proper standard of work;

(f) the solicitor's duty to the court."

Note that nothing is said about seeking or adhering to the client's lawful instructions at this point. Evidently that is not a bedrock principle.[37] The bedrock is to act in the client's best interests. Who decides this? How? No philosopher, social worker, doctor or indeed lawyer can fail to be aware these days of the complexity and ambiguity involved in the notion of acting in another's best interests. And here that complexity is compounded by the solicitor's other duties, to the court and to the profession.

The commentary provided by the Guide on these principles is unenlightening. After stating that they "stem from the ethical duties imposed on solicitors by the common law" (which is an interesting statement in view of the oft repeated claim by the profession that their ethical rules go beyond the requirements of the law and are voluntarily assumed by a self regulating profession), the Guide simply advises "the words of the rule speak for themselves, and should be given a common-sense interpretation", a naive statement sure to cause much delight both to lawyers and philosophers. However, it is also stated that where there is a conflict between the principles in Practice Rule 1, priority must be given to "the public interest, and especially the interests of the administration of justice".

For further help from the Guide one must wait until Chapter 11, which is entitled "Obtaining Instructions". Here the first basic principle states that the solicitor should be able to give "impartial and frank advice to his client, free from any external or adverse pressures or interests...[38] "The commentary deals with conflicts of interest with third parties, but says

[37]The bedrock itself was introduced first as late as the 1987 Practice Rules.

[38]*Guide to Professional Conduct of Solicitors*,Law Society 1993, para.11.01.

nothing about a conflict with the public interest or with the solicitor's duty to the court. Nor does it give any further help on the extent to which a solicitor must seek and abide by the instructions of the client. However, it does state that "a solicitor must not allow clients to override the solicitor's professional judgement, for example by insisting on the solicitor acting in a way which is contrary to law or to a rule or a principle of professional conduct."[39] What is the position if the client wishes to do something which the solicitor considers to be unwise or possibly immoral? Or that is not, in his or her view, in the client's best interest? Or even not very "sporting"? Are such judgements a part of the solicitor's "professional judgement" that should not be overridden by the client? There are obvious dangers here that the model of the solicitor - client relationship being promoted by this commentary is a very paternalistic one exemplified in the recent case of *Griffiths v Dawson & Co* in 1993.[40] In this case a husband sought a non consensual divorce from his middle-aged wife on the ground of 5 years' separation. The wife's solicitor failed to file an application under the relevant statutory provision to protect her position in relation to her husband's occupational pension rights. As a result she lost a considerable sum. Why had the solicitor not filed the application? It was not that he did not know of the possibility, nor that he forgot, nor that he was instructed to do so by his client, the wife. He failed to make the application because he considered it "unsporting". He was found liable in negligence. I have no information as to whether this led to any disciplinary action by the Law Society but doubt very much that it did.

[39]*Ibid.*, para. 4 of commentary on para. 11.01.

[40]*Griffiths v Dawson* (1993) *The Times*, April 5; May 1993 *Family Law*, 315.

Does the Guide provide any further help? Chapter 12 is entitled "Retainer". This chapter begins with some eight principles concerned in some way with refusing to accept a retainer on the ground of conflict of interest or similar. Not until principle 12.9 do we reach the point at which a retainer has been concluded. This principle states, "A solicitor must refuse to take action which he or she believes is solely intended to gratify a client's malice or vindictiveness". In principle 12.11 we get some guidance on this fundamental aspect of the practising solicitor's work, the relationship with the client in relation to the client's instructions. This states that the solicitor is "bound to carry out [the client's] instructions with diligence and must exercise reasonable care and skill". The commentary simply adds that a solicitor should agree at the outset what is the scope of the retainer and "subsequently to refer any matter of doubt to the client". No mention is made at this point of acting in the client's best interest, or of protecting the solicitor's professional judgement (as in 11.01) or of any duty to the court. The latter is referred to in principle 12.13 where the solicitor is told helpfully that he "must" reconcile his duty to the client with his duty to the court.

Finally, the inquiring solicitor (or, indeed, client) must go to Chapter 22 which deals with litigation and advocacy. Here appears more concrete guidance in relation to some commonly encountered dilemmas in relation to litigation and advocacy. For example, does the advocate have a duty to inform the other side of witnesses or facts favourable to them? No (except where prosecuting on behalf of the Crown). Does he or she have a duty to draw the attention of the Court to cases or statutes favourable to the opponent? Yes. May he or she call a witness whose evidence is known to be untrue? No.

Apart from these specific examples, the guidance given to solicitors is unclear in principle, generalised, evasive, or, where conflict arises, simple non-existent. Significantly, there is no equivalent of the principle laid down in the ABA Code, Canon 7: "A lawyer should represent a client zealously within the bounds of the law". Accompanying this Canon, the ABA provides explanatory Ethical Considerations which state that if there is any doubt as to whether a proposed course of conduct is lawful or within the Disciplinary Rules, then the doubt must be resolved in favour of the client. The lawyer should advise the client about non legal factors, including the lawyer's view of the morality of a course of action, but ultimately it is for the client to decide what to do. "The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law" concludes the Ethical Considerations.

The American approach reflects the traditional view put forward by the profession when under attack from government that it stands between the citizen and tyranny (as did the Marre Committee). The Law Society's Guidance is a long way from this, and also from the views of Lord Brougham, expressed when defending Queen Caroline against the charge of adultery brought against her by George IV in 1820, "An advocate, in the discharge of his duty, known but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty...."[41] It is also a fair way from the view of the American Trial Lawyers Foundation, who objected to the stress which they considered had been put in the ABA Code on the role of the lawyer as "an officer of the legal system and a public citizen having special responsibility for the quality of justice". The Foundation said, "The Kutak

[41]Quoted in Luban, D., *Lawyers and Justice,* 1988, p.54.

Commission sees lawyers as ombudsmen, who serve the system as much as they serve clients. This is a collectivist, bureaucratic concept. It is the sort of thinking you get from a commission made up of lawyers who work for institutional clients".... They firmly state, "we are the citizen's champions against official tyranny".[42] (This is, of course too simplistic an analysis; it could equally well be argued that official tyranny should be countered by an ethic that requires lawyers to refuse to act for oppressive corporate clients seeking to avoid their responsibilities, a view unpopular amongst lawyers). I do not wish to suggest that Lord Brougham or the Trial Lawyers Foundation are correct in their analysis. What I am suggesting is that there is a serious debate to be held on this issue and that in England and Wales we have barely begun to consider it.

I have concentrated on an analysis of the solicitor's code of conduct. Of course there is a separate code for Barristers. Does this differ in approach? This code is much briefer than the solicitor's Code and short on detail. Its first stated principle is that practising barristers have an overriding duty "to the court to ensure in the public interest that the proper and efficient administration of justice is achieved".[43] Subject to this, a barrister must "promote fearlessly and by all proper and lawful means his lay client's best interests...." and he or she must act towards the client with good faith. In the context of criminal defence work, a barrister is told additionally that in advising on a plea, he or she must "make it clear that the client has complete freedom of choice", as the client also has in deciding whether or not to give evidence. There is little else in the Code to help, though in the context of the section

[42] See Giller, S. and Simon, R.D. *Regulation of Lawyers, Statutes and Standards,* Little Brown, 1991.

[43] *Code of Conduct of the Bar of England and Wales,* para. 202.

on the Cab rank rule, a barrister is told to refuse a brief if "the brief or instructions seek to limit the ordinary authority or discretion of a barrister in the conduct of proceedings."[44] There is no definition or discussion of that "ordinary authority".

The advice given to both branches of the profession on their relationship with clients seems to me to fail to deal seriously with an important and basic issue.

5. Growth of interest in legal ethics in England and Wales

There are now signs of the beginnings of serious interest in professional ethics and practice within the practising professions, the government and academics. First, in relation to government activity, the recent changes instituted by the Courts and Legal Services Act 1990 have placed the formulation of professional rules firmly within the public domain; they are no longer a matter for the professions alone to determine. "The professions are no longer masters of their own rule book" in the words of Anthony Thornton Q.C., Chair of the Professional Standards Committee of the Bar in 1993.[45] The Act sets up the Lord Chancellor's Advisory Committee on Legal Education and Conduct. Its function is to assist "in the maintenance and development of standards in the education, training and conduct of those offering legal services".[46] Its 16 members are appointed by the Lord Chancellor and must include 9 lay persons (in the sense of persons who are not judges, practising lawyers or teachers of law). In relation to changes in the rules of conduct for solicitors and barristers, an immensely complex procedure is laid down in Schedule 4 of the Act. In brief, and at the

[44] *Ibid.,* para. 501(c).

[45] At the SPTL Conference in 1992 previously noted.

[46] Courts and Legal Services Act, 1990, S.20(1).

risk of failing to do justice to this Byzantine process, the proposed changes must be sent by the Professional Body to the Advisory Committee who are charged with the duty of advising on the content. Once firmed up in the light of this advice, the proposals must be sent to both the Committee again and the Lord Chancellor, the Director of Fair Trading and 3 designated judges. After a great deal of tooing and frowing, getting advice and making representations, the Lord Chancellor may approve the proposed rules provided he and all the designated judges are satisfied that the proposal is compatible with the objectives of the Act. These objectives include introducing new and better ways of providing legal services, including encouraging a wider choice of providers, and also ensuring that the rules are not only enforced by the professional body, but are "appropriate in the interests of the proper and efficient administration of justice".[47]

It is this procedure that had to be navigated recently by the Law Society in order to obtain advocacy rights in the Supreme Court for suitably qualified solicitors (some 100 solicitors now have these rights). Advocacy rights are also being sought by the Institute of Commercial Litigators, whose members are not practising barristers or solicitors. This will raise the interesting issue, in the light of the previous discussion on the nature of the relationship between lawyer and client, of whether such rights can be granted to persons who are not considered to be "officers of the Court", and what value that concept has in the administration of justice.[48]

[47] *Ibid.* S.17.

[48] *Legal Action,* April 1994, p.5.

The fact that the State funds so much of the activities of lawyers, - through the costs of the courts, the judiciary, the criminal justice system, the costs of legal services to public authorities, the costs of the legal aid scheme and the costs of legal education, - means that the profession will never regain the autonomy it once enjoyed in regulating its own affairs out of public view. This will obviously mean that there can be a much more extensive and, I hope, lively public debate on the content and implications of the rules of professional conduct.

In relation to legal education, The Advisory Committee has already indicated an interest in legal ethics. The recently (June 1994) produced a consultation paper on the academic stage of legal education presents quite a contrast to both the Ormrod and Benson Reports. This paper is not content, as they were, with a single ritual nod towards the need to promote ethical standards. The issue is raised in several contexts. For example it is suggested that the traditional structure which requires the coverage of the core substantive subjects should be abandoned in favour of a more general approach including the ethical dimension of the functioning of the law. Legal Ethics, it states, "are more than professional ethics, although they [i.e., Professional ethics] are likely to form an element in some courses (and the Committee is certainly keen to encourage university study of this important area)"[49] It can be seen here, however, that the Committee concerned more with the ethical principles underlying the substantive law rather than professional ethics as such. It is important not to confuse the two concepts.

[49] ACLEC Consultation Paper, *Review of Legal Education, The Initial Stage,* para. 4.14.

Second, there are also signs that an interest in legal ethics is already developing amongst academic lawyers. As noted above, the subject is now included in the vocational stage of legal education for both the bar and for solicitors. This has engendered an interest in the topic amongst teaching these courses, although it has not yet engendered much in the way of academic analysis or scholarship. There is now an Institute for the Study of the Legal Profession in Sheffield University, established in 1992 and a new journal (the International Journal of the Legal Profession) published its first issue in May this year. I eagerly await their first article on legal ethics.

Finally, the profession itself is necessarily devoting more time to its ethics and rules of professional practice. This can be seen in the burgeoning size of the Law Society's Guide to Professional Conduct alone. In 1974 it had 200 pages. By 1993 it had grown to a somewhat unwieldy 840. This is obviously a response to the activities of government noted above. There is also considerable pressure from consumers themselves for the profession to improve both its rules and its enforcement of those rules. Well publicised scandals periodically undermine public confidence. However, it is too early to say whether all this increased activity in formulating rules and changing procedures is being accompanied by an increasing willingness to invoke disciplinary proceedings. A number of recent events have raised concern and to comment on them is difficult for obvious reasons. Has the Bar, for instance, undertaken any investigation on the conduct of those of its members who failed to disclose prosecution evidence to the defence in the case against Judith Ward, which, in the words of Lord Justice Glidewell, was "plainly relevant to the issues in the trial and.. therefore plainly disclosable"?[50] The judge quotes the current Bar Code of Conduct and adopted the

[50] *R v Ward,* [1993], 2 All ER 577, at p.611.

words of Lord Justice Lawton in a previous case to the effect that "the disciplinary bodies can be expected to take action".[51] The BCCI and Maxwell cases also raise the issue; what were the lawyers doing? In the latter case the House of Commons Select Committee on Social Security (concerned of course with the fate of the Maxwell pensioners) considered that a letter sent out by solicitors defending the Maxwell pension trustees to be "wretched", "untrue and misleading", made "without regard to any serious verification of the facts or adequacy of accounting control". The Guardian criticised the fact that there was a "lack of ethical guidance for solicitors caught in the conflict of interests between clients and truth", concluding that "far too little time is spent on ethics in British legal education".[52] On the other hand the Law Society acted with considerable speed recently when Frederick West's earstwhile solicitor, Mr. Ogden, was accused of attempting to sell his client's story to the press. Is it too cynical to attribute this speed to the fact that it is easier to discipline a small town solicitor who once advertised on the radio with the slogan, "If you are nicked, call Oggie", than to initiate proceedings against large City firms advising corporate clients?

The profession will have to address all these issues if it is to retain public confidence. It also finds itself currently between a rock and a hard place. On the one hand it is required to put more and more effort into devising practice rules, defending them to Government, and establishing a reasonable credible complaints and disciplinary system in the face of an increasingly cynical and sophisticated public. It has to do this to retain what it considers the hallmark of its professional status, self regulation. On the other hand, these very activities are proving very costly. Millions are being paid out each year from the Compensation fund;

[51] *Ibid.,* at p.601-2.

[52] *The Guardian,* 11 March, 1992

the contributions required from each solicitor to this fund went up from £215 in 1991 to £1798 in 1992/93. So much so that John Hayes, the Secretary of the Law Society, in a speech in May 1994, questioned the reasonableness of asking the profession to compensate the public for the activities of its dishonest or incompetent members. After all, he said, most businesses "were not required to bail out their competitors when things go wrong".[53]

6. What's the use of ethical rules?

Perhaps John Hayes would not, on reflection, be inclined to agree with Rick Abel's doubts on the utility devoting so much time to promulgating ethical rules. To Professor Abel there is no point. Not only are the rules often too vague to be enforced, but the profession's compliance mechanisms are totally inadequate. The rules, he concludes, do not "describe reality or even prescribe right behaviour, but rather [they] create a myth about what lawyers might be in order to disguise what they are".[54] The, implied conclusion (implied because even Abel seems unable to spell it out so bleakly) is that all of us engaged in the professional project should roll up our tents and steal away. Indeed in his more recent Chorley Lecture, Abel predicts the decline of professionalism and argues that if it remains at all it will survive solely as a "nostalgic ideal and source of legitimation for increasingly anachronistic practices" which "ill reflect the experience of a dwindling elite" of senior partners.[55]

The problem with this conclusion is that it simply does not address the clearly felt needs of both government and consumers for a legal profession which actually delivers what it has

[53] *New Law Journal*, 20th May, 1994

[54] (1981) 59 Texas L. Rev. 639.

[55] (1986) 49 MLR at p.41.

always claimed to deliver - professional legal services with some guarantee of economy, expertise, independence and integrity. Moreover, the considerable changes that have been occurring in the last two decades make it essential to conduct a long hard review of ethical and other practice rules. These changes include the vast expansion of the profession in the 1980s, the growth of mega law firms, the growth in the numbers of employed lawyers in both the private and the public sector, the need to integrate the workings of the profession in the UK with that of the rest of the EU, and the, in my view, inevitable *de facto* fusion of the two branches of the profession in England. If we all, practising and academic lawyers, philosophers, sociologists, civil servants and clients start taking ethical rules seriously then perhaps they will begin to represent and influence reality and not reflect a nostalgic ideal that never existed and was not intended to exist. It is not, incidentally, only in connection with the legal profession that there is a call for greater attention to be given to ethical considerations. It seems to be part of the spirit of the post Thatcher age. There is even a chair of business ethics in Manchester University, established in 1992. I, therefore, end on an upbeat note by quoting the Scottish lawyer, Alan Patterson, "Public trust in the legal profession has been eroded. As a consequence there has been closer scrutiny of the unwritten agreement granting professional autonomy, monopoly rights, and high status in exchange for high standards, a service ethic, and self discipline. Yet society is not tearing up this agreement. Rather, having seen that the profession failed to deliver its promises, society merely is renegotiating the bargain."[56]

[56] Op cit. in fn. 25 See also Roger Smith, *Legal Action*, January 1994, p.8, and Cyril Glasser, The Legal Profession in the 1990s (1990) 10 *Legal Studies. 1.*