

SLAUGHTER AND MAY

I N - H O U S E R

Ethics Conversation Toolkit: Are you an ethical lawyer?

April 2019

1. Introduction

1.1 What is this toolkit?

This toolkit has been designed to help any in-house lawyer who manages others to hold an ethics training session for their team. Essentially, it's a blueprint for a seminar to kick-start or bolster a dedicated ethics training programme. By having a general conversation about ethics following the structure suggested below, we hope that ideas will flow and you'll identify topics for some follow-on sessions. Once started, it's important to keep your ethics conversation going.

1.2 Why talk about ethics now?

Never has there been a more appropriate time for solicitors to ask themselves, and their teams, if they are ethical lawyers.

Why? Well, the SRA, our regulator in the UK, has completely rewritten the rules which apply to solicitors in England and Wales – currently in its Handbook. It plans to introduce replacement “Standards and Regulations” in November 2019. These new rules don't just apply to solicitors in private practice. They also speak to in-house lawyers – although you may feel that they were drafted predominately with private practice in mind, and don't translate to the in-house context as well.

1.3 What will the new rules say?

The new rules do not simply amount to a rearrangement of the regulatory deckchairs. There's more substance to the changes than that. In particular, there's going to be a split Code of Conduct going forward, one for regulated law firms and another one for individual solicitors. This will have the effect of making our personal regulatory responsibilities, as solicitors, much starker. But it's also going to shine a spotlight on the ethical responsibilities of individual solicitors.

This is because there will be a new and specific regulatory obligation to keep ethical (and not just legal) knowledge up-to-date. Rule 3.6 in the (draft) new SRA Code for Solicitors, RELs and RFLs (the “Code”) says:

“You [must] ensure that the individuals you manage are competent to carry out their role, and keep their professional knowledge and skills, as well as understanding of legal, ethical and regulatory obligations up to date.”

In effect, our regulator is very formally telling us as solicitors (and particularly those of us who manage others) that we need to be more than just competent legal technicians. And we should think about evidencing our compliance too. The introduction to the Code reinforces the justification requirements set out in Rule 7.2 of the Code by saying:

“You are personally accountable for compliance with this Code...and must always be prepared to justify your decisions and actions.”

1.4 How should I approach compliance?

So, what to do? How to comply? And how possibly to bring value to your employer, on the reputation management front, at the same time?

You could start by looking at the SRA's overarching and all-pervasive Principles – essentially these define what “ethics” means for the profession. We're not talking about legality here, or even morality – those are very different things.

Then you could test yourself on how those Principles apply in practice. In the abstract, everyone automatically assumes that they would do the right thing in any given situation, and that they must therefore be ethical. But law is a pressurised profession, so consider starting a conversation about ethics in practice with colleagues in your legal team. Simply by sharing stories and dilemmas, you'll get very close to complying with your new regulatory obligation to keep on top of ethical developments.

1.5 How might I structure an ethics training session?

The questions which follow are your toolkit for holding a departmental training session on ethics, the aim of which is to explore the question “What makes an ethical lawyer?”.

2. What's the missing Principle?

Most solicitors think they can recite the SRA's Principles without reference to SRA rules – after all, there are only a handful of them and, as they define the fundamental ethical responsibilities of the profession, surely every professional must know them instinctively?

So here are the seven (draft) new Principles – but with one missing:

SRA Principles



You act:

1. in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice.
2. ...
3. with independence.
4. with honesty.
5. with integrity.
6. in a way which encourages equality, diversity and inclusion.
7. in the best interests of each client.

So what is the missing Principle?



Is it:

- A) in a way which keep the affairs of clients confidential;
- (B) only where there is no conflict of interest;
- (C) in a way that upholds public trust and confidence in the solicitors' profession;
- (D) in a way which treats your clients fairly; or
- (E) in a way which does not take unfair advantage of third parties?



The answer is (C). In the new SRA Standards and Regulations, Principle 2 requires solicitors to act “in a way that upholds public trust and confidence in the solicitors' profession” (and, although it's less relevant for in-house lawyers, “in the legal services provided by authorised persons”). Not everyone gets this question right. It's a hard question to answer because all the other possible answers exist elsewhere in the detail of SRA rules, it's just that they are not SRA Principles.

Use this question as a springboard – are the Principles as you expected? Did you know that the other possible answers lie elsewhere in SRA rules? What would you do if one or more of these Principles came into conflict on a matter you were working on? Did you know that those Principles which safeguard the wider public interest take precedence over your employer's interests? Do you think your employer understands this, or needs to?

3. Some ethics-related questions, and themes to explore

After considering the SRA Principles, why not pose yourself and your team questions like these, based on the following six themes:

3.1 Theme 1 - If someone becomes a lawyer principally because of money/status, are they less likely to be ethical? Does being a “professional” make a difference?

Why did you want to become a solicitor?



Was it:

- (A) for the interesting work;
- (B) for the chance to do good/administer justice; or
- (C) for the money/status it brings?

If someone becomes a lawyer principally because of money/status, are they less likely to be ethical? Does being a so-called “professional” make a difference? Are commercial lawyers, who typically form close and longstanding relationships with their clients, at higher risk of suffering from what Professor Moorhead might call “professional minimalism”?

What is “professional minimalism”?

In summary, Richard Moorhead and Victoria Hinchley investigated empirically, in 2015, what shapes the professional ethical consciousness of commercial lawyers (see the *Journal of Law and Society*). They then suggested that both private practice and in-house lawyers’ professional ethics are challenged by the pragmatic logics of business. Their research indicates that professional ethics can exert minimal, superficial influence over a more self-interested, commercially-driven pragmatism. Both groups of practitioners could therefore sometimes be vulnerable to breaching the boundary between tenable zeal for the client and unethical or unlawful conduct. Although they conceive themselves as ethical, the extent to which practitioners are well equipped, inclined and positively encouraged to work ethically within their own rules is open to question.

As a result, professional ethics may well exert minimal, superficial influence over a more self-interested, commercially-driven pragmatism. Professor Moorhead has since said that it is important, therefore, to bring the topic of ethics to the fore and for lawyers to talk about it. Many assume that law school training on the topic is enough – it is not, the conversation needs to keep going.

3.2 Theme 2 - If lawyers work too hard, are they more likely to be unethical?

If lawyers work too hard, are they more likely to be unethical? What’s the difference between a hard-worker and a workaholic, and what ethical risks do workaholics pose? How do you guard against becoming a workaholic? Consider sharing some personal survival tips.

3.3 Theme 3 - Are millennials more likely to be ethical?

Are millennials more likely to be ethical? Is there a generational difference in approach to ethics, or it could simply be that ethical standards evolve? What can’t you do now, which you might have done when starting out?

In the very first (1960) Guide to Professional Conduct and Etiquette of Solicitors, Sir Thomas Lund said “I should point out at once that standards of professional conduct change as time passes. What is entirely proper for one generation may be slightly irregular for the succeeding generation and highly improper for the next”. Was Sir Thomas right? Are we almost bound to get things wrong, at some point, in ethical terms simply because we will always be judged with the benefit of hindsight? Is it fair that regulators and the public can judge what lawyers do seemingly without limitation in time (taking the Weinstein/Perkins NDA – which attracted attention almost 20 years after it was drafted – as an example), and what might we do to “protect” ourselves from this risk?

What is the Weinstein/Perkins NDA?

In October 2017, The New York Times published a story in which several women accused Harvey Weinstein of sexual harassment. In the following months, dozens of women came forward with further allegations against Weinstein, including Zelda Perkins, a former assistant of Weinstein based in London. Perkins said that she had endured several years of sexual harassment by Weinstein, and left his company, Miramax, after a colleague told Perkins that Weinstein had tried to rape her. Perkins sought legal advice from a law firm close to her office, who recommended seeking damages. Miramax was represented by a team from a City law firm, whereas Perkins' lawyer was just two years PQE. Perkins has said they initially advised that she should seek a year's salary in damages (amounting to around £20,000) – and went on to push for damages of £250,000 only after she sought guidance on the amount from one of her own senior colleagues. It has also been said that there were several intense negotiation sessions at the City law firm's office, culminating in a 12 hour session which finished at 5 am. A settlement agreement was reached and Perkins signed an NDA in October 1998. The terms included, among other things, that (i) if "any criminal legal process" involving Harvey Weinstein or Miramax required Perkins to give evidence, she would give 48 hours' notice to the City law firm before making any such disclosure, (ii) she could only talk to medical practitioners and legal representatives if they signed their own Miramax-approved NDAs, and (iii) she could not retain a full copy of the NDA, only certain clauses.

3.4 Theme 4 - Can clever people rationalise anything and how relevant is hierarchy?

Can clever people rationalise anything and how relevant is hierarchy? How can lawyers be challenged by colleagues, particularly if the colleague is more junior? Has a junior lawyer ever said "no" to you?

The Milgram experiment

Stanley Milgram, a psychologist at Yale University, carried out a study in the 1960s about obedience to authority. Participants were led to believe that they were assisting an experiment, in which they were given the role of a "teacher". They were told they were taking part in "a scientific study of memory and learning", to see what the effect of punishment is on a subject's ability to memorise content. The role of the "teachers" was to read a series of questions to a "learner", and to administer electric shocks of increasing severity to the learner when they gave an incorrect answer. The participants were not aware that the electric shocks were fake. If the participant wavered, the person running the experiment told them that they must continue. Contrary to expectation, this controversial experiment revealed that a high proportion of participants would fully obey instructions from an authority figure, albeit reluctantly, who instructed them to perform acts conflicting with their conscience.

How many “teachers” were prepared to administer potentially fatal electric shocks, when encouraged to do so by someone in authority?



Was it:

- (A) none;
- (B) 1/10 of 1%;
- (C) 1/3;
- (D) 2/3; or
- (E) all of them?



Whilst (B) (1/10 of 1%) was the predicted outcome, the answer turned out to be (D) (2/3).

Think about the Milgram experiment (you can watch it recreated on YouTube), and what it tells us. Was it about abdicating responsibility rather than being intrinsically unethical? Is it the case that lawyers are intrinsically ethical, but sometimes need to stop and think about ethics to avoid being “dragged along” with a consensus which might leave them in a difficult ethical position?

Note that the Milgram experiment itself has been criticised on ethics ground – it has raised questions about the research ethics of scientific experimentation because of the emotional stress said to have been suffered by the participants.

3.5 Theme 5 - Are DR lawyers more likely to be ethical than their M&A peers? If so, why?

Are litigators more likely to be ethical than their M&A peers? Does the work require it (because of duties to the court), or does transactional work attract those more likely to be “on the edge”?

Consider the Dahdaleh story. Does the SRA’s “proper administration of justice” principle (see SRA Principle 1 above) have less purchase with transactional lawyers given the client pressures and potential for straying outside their expertise?

What is the Dahdaleh story?

In 2011 the Serious Fraud Office brought charges against Victor Dahdaleh, an international businessman, in relation to £38m of bribes he was alleged to have paid in return for contracts for the supply of goods and services to a Bahraini company, Aluminium Bahrain B.S.C. (Alba), worth more than £2bn.

Two lawyers from the City law firm acting for Mr Dahdaleh allegedly, on Mr Dahdaleh’s instructions, met and pressured a witness who was due to appear on behalf of the SFO at Mr Dahdaleh’s trial. When the allegation came to light, the trial was postponed and the law firm in question had to stand down. The two lawyers are understood to have been referred to the SRA for investigation.

3.6 Theme 6 – how do your ethics fit with the wider culture of your employer?

Ultimately, there’s a need for the ethics of your legal team to fit with those of the wider organisation in which you work. Does everyone in the team understand what the ethics of the organisation are, and feel that there’s a fit? Are there examples of your team helping to drive the ethics of the organisation? Is your team viewed by the business as a beacon of good culture? This aspect of your ethics conversation should lead you into the “big question” below.

4. The big question – independence

Conclude your ethics training session by asking what the “independence” principle (see SRA Principle 3 above) means in the in-house context – where lawyers typically have just one client, and that client is their employer.

This is a huge topic, and one which probably merits a dedicated session to itself. Preliminary questions might include:

- 4.1 Is it inevitable that in-house lawyers are more like business people and less like members of a profession, or does that over-simplify the position? Where do the tensions lie?
- 4.2 What does the “in-house lawyer as gatekeeper” role involve? Can lawyers act as a barrier to wrong-doing, or are they simply reputational intermediaries? How often have you heard your commercial colleagues say “Our lawyers say we can do this”, and what does that mean?
- 4.3 When did you last say “no” to an internal client, and when and how?

5. What next?

We hope that this toolkit helps you to structure a dedicated ethics training session, as part of your SRA rules compliance initiative, without any further help from us. But we’d be equally delighted to help you with that ethics conversation, or with bespoke training on the new rules which addresses the very specific concerns of your department when operating in your particular business area.

For further information, please speak to your usual Slaughter and May contact.

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