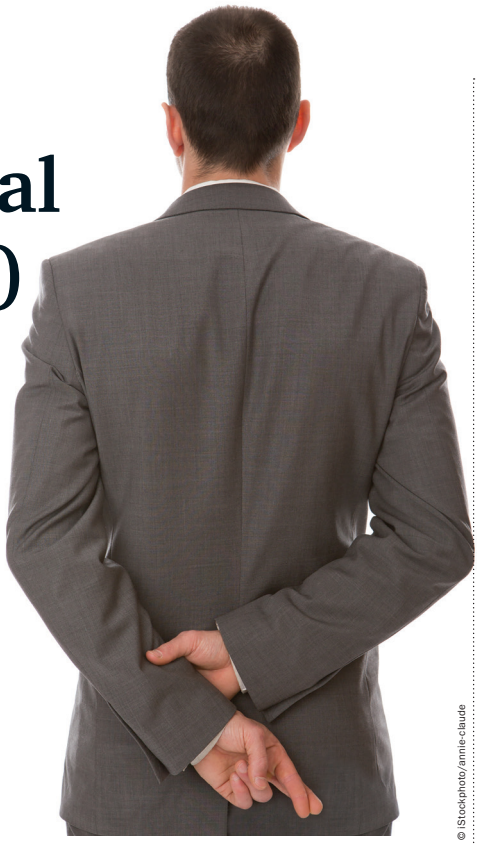
Misconduct outside of legal practice (Pt 2)

John Gould considers the characteristics which should mark outside conduct as professional misconduct

IN BRIEF

- Existing concepts and approach can obscure the basis upon which the facts of outside conduct should be considered.
- Whether tribunal decisions and regulators' policies apply principles consistently and transparently.



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In the first part of this article I suggested that in order for conduct outside of practice to be the proper concern of a regulator, it should be both serious and demonstrably relevant to practice (see *NLJ*, 23 October 2020, p14). The standard should be that required of a solicitor outside of practice, not a well-behaved member of the public and that standard has to be set on the basis of the requirements of practice not any notion of general ethical worth.

I also cast doubt on two concepts commonly used in allegations to establish a connection between outside conduct and legal practice. These were rules requiring the upholding of the rule of law and the maintenance of public confidence in lawyers.

In this second part, I am going to suggest that relevance would be more appropriately established by two other concepts which I am going to call "risk" and "brand". I do so because I believe that the existing concepts and approach actually obscure the basis upon which the facts of outside conduct should be considered. Legal regulation is based both on the regulation of activity and the regulation of title. Reserved activity is regulated essentially to manage the risks in key areas of legal work and title is regulated because of the public interest in maintaining the reliability of the brand represented by the title.

A rule specifically for conduct outside of practice (avoiding the word brand for the moment) might require that, outside of practice, a lawyer must not act in a way which either indicates an increased risk of misconduct within practice or demonstrates that they are unsuitable or unfit to use the title. In other words unsuitable to represent the brand.

Relevance

The approach I suggest involves tests of relevance to practice which are within the expertise of regulators or tribunals—is this conduct sufficiently serious? Does it indicate a greater risk of misconduct within practice? Does it indicate that a person is unsuitable or unfit to represent the "brand"? The answers in particular cases are fact specific but the questions are not. Outside conduct which demonstrated that a person was untrustworthy in their private life could indicate an increased risk of misconduct in practice but might not. The ethical standards expected of a lawyer outside of practice are lower, or at least different from, those which apply within practice. Integrity is the standard of the profession in practice and that standard cannot simply be applied to conduct outside of practice.

It does not follow that morally doubtful conduct outside of practice automatically demonstrates a lack of ethical fitness for practice. Even respectable people, for example, lie in ways which they don't consider matter, without any additional propensity to be untruthful when it does. Show me someone who says they have never lied and I'll show you a liar. The requirement is for a person who can be relied upon to act with profession specific integrity in practice.

It should not be thought that the setting of these standards is just a matter for the professions themselves. The statutory protection of title is the protection of a public interest. It is in the public interest that the right to use the title carries with it an assurance that identifiable brand values will be maintained. If that were not the case, access to legal advice and representation would be hindered.

The brand conveyed by the title is not just about appearances but also about the substance of behaviours of individuals associated with the title. Brand is a useful term because it reminds us that the relevant reputation and behaviours are in the context of the supply of legal services rather than a freestanding view of ethical merit or reputation.

Regulators appear to have little difficulty in setting out what does or does not make a person suitable for the purpose of admission to the professions. The SRA, for example, has its Assessment of Character and Suitability Rules. For the purpose of admission, these rules refer to conduct outside of practice. A solicitor in practice should surely be expected to meet at least the standard of an inexperienced person looking to be admitted. The rules relating to different types of outside conduct for the purpose of admission are reasonably coherent and practical to apply.

Next steps

So, equipped with the suitability rules and our concepts of relevance, seriousness, risk and brand, we can examine how they might be applied in difficult cases.

Many cases of outside conduct either pose a clear risk or are obviously inconsistent with the brand. In relation to criminal offences, the Suitability Rules divide them up between those convictions which will usually render a person unsuitable to be a solicitor and those which will not. Some offences also indicate higher risk in practice—an offence of dishonesty outside practice suggests an obvious additional risk of dishonesty in practice. If I am prepared to steal my Granny's money, stealing a client's funds may follow.

Where, however, there is no chance that the offence could be repeated in practice, risk based relevance is more problematic. Mr Farrimond attempted to murder his wife and was sentenced to six years in prison. He was suffering from a depressive illness attributed to the stress he had been under. The Tribunal considered an indefinite suspension appropriate but the Divisional Court on appeal decided that he must be struck off. His offence, it was decided, meant that he had failed to uphold the rule of law, shown a lack of integrity and undermined public confidence. In fact it seems to me doubtful whether any of these allegations were actually applicable.

The court deemed that it was inconceivable that a person serving six years' imprisonment should be able to call himself a solicitor or remain on the roll.

There was a passing mention of the risk that he might become stressed again on a return to practice. The concepts of public confidence, the rule of law and integrity, although nominally at the centre of the case, in fact added little or nothing to the court's reasoning. That reasoning, with all due respect, was fundamentally an assertion that a criminal offence leading to imprisonment is inconsistent with being a solicitor. An element of the brand was thereby determined but not explained. But what of other forms of outside conduct?

For outside conduct which is discriminatory a linking relevance is not hard to identify. There is a public interest in lawyers' practices being run in an inclusive and respectful way in order to ensure that no-one is excluded or deterred from the profession either as a client or employee. Bad behaviour towards employees even in a social context, particularly if it involves an abuse of power, or any form of unlawful discrimination outside of practice detracts from the attraction of the brand and access to legal services. It may also indicate an increased risk of unlawful behaviour in practice. If serious, it is likely to be relevant.

Conduct attributable to alcohol or drug abuse could indicate a higher risk and may be inconsistent with the brand. There may be a question as to culpability and undertaking successful rehabilitation could mitigate both risk and brand issues. Few brands would be enhanced by the provision of technical services by a person with a debilitating addiction.

A failure to pay judgment debts is likely to indicate both a risk of failing to honour commitments in practice and brand damage in terms of reliability. It may also be a rare example of conduct which fails to uphold the rule of law depending on the reasons for non-payment.

It would be possible to aggravate brand concerns outside of practice by self-identification as a lawyer in circumstances in which that would not otherwise be known and in which reliance on the brand is invited. Providing information outside of practice in a misleading way can be made sufficiently serious by reassuring self-identification.

The characterisation of outside conduct as misconduct by reason of inconsistency with the brand should not depend on whether or not it attracts media attention. If media coverage was a foreseeable risk, and follows, that may be an aggravating factor in relation to sanction.

The question which remains is how are the requirements of the brand to be determined if not simply by judicial opinion?

> *"If I were a consumer of legal services, perhaps for a big enough discount, I would be happy only to trust a lawyer as far as I could see him"*

'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'

I have rejected the use of the confidence of a hypothetical public as simply one aspect of brand with no evidential existence. The concept is particularly difficult to apply to types of outside conduct which arise not from a lack of ethical principles but actually from ethical principles. Is it really inconsistent with the brand to break the law in a restrained and dignified way during a protest in support of a high-minded principle that a substantial proportion of the public would applaud? Could not the reputation of lawyers actually be enhanced by being seen to fight for principle other than on the basis of a remunerated retainer? Was a lawyer arrested fighting segregation in Mississippi in the 1960s to be disbarred?

Conversely, are the views of regulators or judges on matters of social policy or values, clothed in public expectations which in all but the simplest cases do not exist, to determine what is or is not consistent with the brand?

Once professions determined what their brand was and what was inconsistent with it, but I am not suggesting that what is required of the brand is for the profession alone to decide. As I have said, the brand is an important public asset necessary to secure access to justice and the rule of law. What is required by the brand in conduct outside practice needs to be established transparently, with obvious legitimacy and with an objective foundation of relevance. That suggests the development of a code for outside conduct reflecting the requirements already in place for suitability and overseen by the courts.

Finally, I can't resist observing that I have adopted the assumption that a lawyer's ethical brand is to be set from the top down and is to be largely uniform across all regulated legal services. Perhaps a competition expert would say that the brands conveyed by different titles should be allowed to compete on the basis of different levels of assurance giving the consumer the opportunity to choose a lower level of assurance for a lower price. Perhaps even the most quoted of solicitor brand values—to be trusted to the ends of the earth—goes too far. If I were a consumer of legal services, perhaps for a big enough discount, I would be happy only to trust a lawyer as far as I could see him. **NLJ**

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