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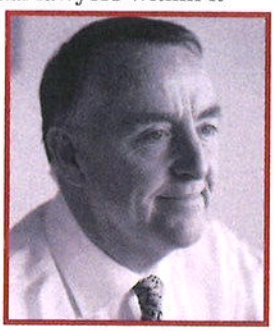
Conduct, Codes and Culpability

As the way legal services are provided begins to change, there are some fundamental questions about how the conduct of barristers will be regulated in the future. Will the conduct of solicitors and barristers come to be assessed on the same basis – and what is misconduct anyway?

The changing context

As the rules which set the structures within which lawyers practice have become more flexible, so have the codes which regulate their conduct. The BSB and SRA have introduced an "outcomes" focus to their Codes of Conduct. This, it is hoped, will allow innovative ways of providing legal services. But where there is choice, there is often uncertainty.

For barristers the long and winding road of entity regulation has just begun. Over time the relationship between the professional obligations of an entity and those of the individual lawyers within it will become more important. Who will be held to account if things go wrong?



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The number of organisations which are made up of lawyers from different branches of the legal profession is likely to increase. Lawyers in other jurisdictions may become more closely involved. Will different

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p.1 codes of conduct continue to be relevant if a problem arises?

As the overlap between the services provided by barristers and solicitors increases, to what extent will the fiduciary duties, which have been applied to solicitors, also be applied to barristers in solicitor-like relationships with clients?

The Codes

Each of the legal regulators in England and Wales produces its own code of conduct. This multiplication makes the regime overall look very complicated but the problem should not be overstated. The respective codes are marked more by their similarities than by their differences. This is not surprising given the role of "frontline" regulators, such as the BSB and SRA, within the overarching structure set up by the Legal Services Act 2007. It is also, of course, the case that the conduct required of lawyers derives from the decisions of courts and tribunals applying principles and law which often require no distinction to be drawn between, for example, a barrister and a solicitor.

It might be asked why different codes are required at all. There are now nine approved regulators of legal services each with their own fairly similar codes. Some aspects, such as the holding of client money or advocacy or the "cab rank" rule, do require specific provisions but these areas may become less profession specific as the different branches compete for work traditionally done by another. Where lawyers are providing the same service, it may be unfair that they are bound by substantively different rules of conduct. From a consumer's perspective it would be interesting to ask what conduct would presently amount to serious misconduct in one profession but not in another.

This is not to suggest that codes are unimportant. They serve to influence the behaviours of those regulated and indicate the circumstances in which a regulator may seek to use its powers. An investigation or prosecution by a regulator represents a significant impact on a lawyer whether or not it leads to an adverse finding at a tribunal. Codes are to be taken seriously, but they are by no means the whole story. Underlying codes is the concept of misconduct and although codes are re-expressed every few years, even changes of substance are likely to be marginal to the question of what is or is not to be regarded as culpable.

Culpability

It is necessary to clarify the terminology. The term "misconduct" is not used consistently across the regulatory terrain. The Bar Code of Conduct defines misconduct by reference to breaches of rules. This may be based on the assumption that a rule could not be breached by an individual barrister without sufficient culpability. Partners in solicitors firms, on the other hand, may breach, for example, the Solicitors' Accounts Rules without any personal culpability. Even where the responsibility for rule breaches is strict, culpability is still relevant in assessing seriousness. In this article "misconduct" is used to mean conduct which is sufficiently culpable to justify an adverse disciplinary finding against an individual. The concept of misconduct in this sense can be applied with reasonable consistency to both barristers and solicitors. So what does this shared concept look like?

Some conduct is easy to characterise as misconduct once the facts are proved, but in many cases the judgement, expertise and experience of the tribunal is required. Is conduct sufficiently culpable to amount to misconduct? If it is, how serious is the misconduct? It is the application of a tribunal's view of culpability to particular facts that lies at the heart of disciplinary proceedings. At this heart is uncertainty.

The question is to be answered by a tribunal on the basis of what would be regarded as misconduct by a consensus of professional (including judicial) opinion. How is a lawyer to know how to conduct himself in uncertain situations? This is a particularly acute problem where the situation raises what may be no more than a shadow of doubt about propriety.
The material facts are hardly ever identical, which means that tribunal decisions have limited value as precedents. On a regular basis, however, tribunal decisions are appealed to the courts and the resulting decisions provide authoritative restatements of the underlying principles. Lawyers' disciplinary tribunals are regarded by the courts as being expert and informed. They are considered to be well placed to assess conduct and seriousness in the areas for which they are responsible. A tribunal is likely to have had the advantage of hearing oral evidence. Its decisions, including as to sentence, are to be treated with an appropriate measure of respect. Nevertheless where a decision is wrong in principle it will be overturned. Even if a tribunal's decision is upheld the endorsement of the underlying principles applied is informative.

So how should the consideration of misconduct be approached? The starting points are the relevant professional rules, codes and standards. The answer may be relatively clear but if there is no specific answer, principles may assist. The Legal Services Act 2007 set regulatory objectives for regulators including promoting and maintaining adherence by authorised persons to "professional principles". These are: independence and integrity; proper standards of work; the best interests of clients; the duty to the court and confidentiality. These principles find their way into the rules and codes of all the legal regulators with additions and permutations. But a statement of principles does not set the standards actually required. It is no criticism of principles that they are expressed at a high level, but it is the application to particular conduct which matters. This leaves a lawyer to make a judgement as to whether particular conduct is or is not permissible.

In many cases the answer will be clear and little judgement will be required. Deliberately misleading the court, for example, would not be excused on the basis that an individual judged it was permissible in the best interests of a client. An honest and genuine decision, however, of a lawyer on a question of

professional judgement may not give rise to misconduct. The question must be one which requires judgement. The lawyer must actually address the issue and his or her decision must be one which a reasonable and competent lawyer could have made. It may not matter that numerous other reasonable and competent lawyers would have disagreed. Consultation with other lawyers (preferably senior and experienced) who were of the same view would be persuasive but not conclusive.

Sometimes allegations of misconduct arise not from professional judgements as to the proper course, but from incompetence. There is a distinction between the fault required to establish negligence and the culpability required to show misconduct. Although both involve a departure from the required norms, some extra element is required for misconduct. Misconduct does not have to involve a lack of integrity but it is more than making a mistake sufficient for liability in negligence. Negligence may be misconduct if it is inexcusable or deplorable. Sustained or persistent neglect of a client's interest may become misconduct.

All of this illustrates that misconduct cannot be determined by reference to codes alone but conceptual differences may actually be few.

Fiduciary duties

A significant part of the professional duty of a solicitor derives both directly and indirectly from his or her position as a fiduciary. A solicitor owes a duty of undivided loyalty to his or her client and from this duty comes, inter alia, the concept of conflict of interest. The duty also encompasses the oversight by the courts of any dealings between client and solicitor. The fiduciary duty does not arise from the formal status of a solicitor but from the nature of the relationship with a client in the context of the retainer. A relationship involving ascendancy, influence, vulnerability, trust and confidence may well be a fiduciary one. There is no reason in principle why a lawyer other than a solicitor should not be a fiduciary if the same elements are present. The context for the application of such a duty may become more significant if barristers come to have more solicitor-like relationships with clients.

What emerges from all of this is that it would be a mistake to see codes and rules as the only things that matter in considering conduct and culpability. Each of the legal professions has a long established legal (not to mention cultural) context within which acceptable behaviour is judged. Over time, to the extent that each branch becomes more alike, that context is likely to change but it would be a brave person who would say when.

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