Misconduct outside of legal practice

John Gould looks at the rules on out-of-office bad behaviour, in the first of a two-part series

IN BRIEF

▶ Analyses what is meant by professional misconduct where allegations relate to 'outside conduct'.

If my wife were a solicitor and she had murdered me during lockdown, and if (notwithstanding the many defences available to defence counsel) she had been convicted, I expect she would be struck off. That's obvious, but is it right? If it is right, why is it right? Would it make any difference if the murderer was one of the saintly and long-suffering associates with whom I work? Suppose the murder was by defenestration from a penthouse during a purely social event?

For the purpose of this article, I use 'outside conduct' to mean conduct which is not part of the actual delivery of legal services. This might include inappropriate behaviour towards a colleague or fare dodging on public transport. In this first part, I'm going to look at the principles which are said to characterise outside conduct as professional misconduct. I will suggest that two of the key bases for regulatory allegations are often little more than a convenient form of words.

It seems uncontroversial to suggest that legal professional rules and principles should be directed towards legal practice. It is not the function of regulation to attempt to make me a better person morally or even a better citizen. Professional tribunals should not be doing the work of the police or employment tribunals. Their role is not to provide a commentary on changing social attitudes.

Rules and allegations traditionally tended to focus on the reputation of the profession as the connector between outside conduct and legal practice. Bringing the profession into disrepute was a common formulation. There was very much an 'I know it when I see it' approach.

Solicitors were required to behave 'appropriately' outside practice. The courts' view has been that professionals outside of practice must not behave in a way which is morally culpable or brings disgrace onto themselves to the prejudice of the reputation of the profession. So, what principles can be identified as underlying the current approach?

Any professional misconduct must be serious. I would say that outside conduct needs to be very serious. Even quite bad behaviour outside of practice may not be serious enough to damage the reputation of the profession. Disgrace and moral culpability are strong words and rightly so.

Seriousness is not to be judged by the application of some hypothetical standard of the well-behaved citizen. Professional tribunals exist to regulate legal practice and the standard is that of a lawyer outside practice. The standard should be set on the basis of relevance to legal practice.

Relevance to practice is the key concept in assessing conduct outside of practice. All roads lead back to relevance to practice. In order to apply a consistent and justifiable regulatory approach to conduct outside practice, the principles upon which relevance is to be found need to be clear.

Sometimes, allegations relating to outside conduct involve the stretching of general principles such as the maintenance of public confidence and the upholding of the rule of law to cover behaviour to which they have little actual application. This tends to obscure the essence of why the particular conduct is both relevant to practice and objectionable.

The 2007 Solicitors Code of Conduct replaced a requirement not to damage repute with a positive obligation to maintain the public's trust and confidence. It is a rather unhelpful and confusing form of words for professional disciplinary purposes.

No one would doubt that maintaining the public's trust and confidence in the legal profession is an important objective for regulators and the courts. The public interest requires that people have access to lawyers they can trust. There are, however, a number of objections in principle to allegations framed as undermining public confidence.

It is an unreal concept. It is irrelevant, for these purposes, whether public confidence was, would or would not actually be undermined. It is not a question of evidence but of supposition of the opinion of the hypothetical reasonable member of the public.

Undermining confidence is not an appropriate characterisation of conduct; it is at most a possible effect or result of conduct. If used as the basis of an allegation it tends to circularity—your conduct is misconduct therefore it undermines public confidence therefore it is misconduct. It gives infinite scope for imagining the type of conduct which the hypothetical reasonable member of the public might view as undermining their confidence.

Professional conduct tribunals are expert in what is required of their professions, but they are no more expert in non-practice misbehaviour or public confidence than anyone else. The concept is essentially a presentational fiction.

Upholding the rule of law

It is commonly alleged that a criminal conviction of a lawyer (or possibly only a conviction for a serious offence or possibly leading to imprisonment) amounts to a failure to uphold the rule of law.

The Legal Services Act 2007 introduced a regulatory objective of maintaining the constitutional principle of the rule of law. That was a perfectly sensible objective for regulators but is not a sound basis for a disciplinary allegation against an individual lawyer. By committing an offence, a lawyer does not break the rule of law. The rule of law is not a rule which can be broken, any more than it would be possible to break 'the rule of Queen Elizabeth'. This is more than semantics. It does not follow that by breaking the law a lawyer undermines the rule of law. A lawyer may even plead not guilty (knowing they did it) without undermining the rule of law. It is not necessary for the lawyer to instantly announce that it's a 'fair cop', confess and congratulate the police on their diligence and acuity to avoid misconduct. A convicted criminal in prison is an acknowledgment of the rule of law.

Undermining the rule of law would be advising a client that using Reggie Kray to collect a debt would be cheaper than paying an exorbitant court fee or to pervert the course of justice. It may be little more than the reformulation of part of the public confidence or repute approach, law breaking lawyers make the profession look bad. To go beyond relevance and seriousness, we need to search for more satisfactory descriptions of factors connecting outside conduct to legal practice.

In the second part of this article, I will suggest that the concepts that should be used to analyse outside conduct should be 'risk' and 'brand' and I will explain how these concepts could be applied. NLJ

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