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Abstract

This article analyses the regulatory handbooks produced by the new regulators for solicitors and barristers, the main legal professions in England and Wales, following the Legal Services Act 2007. It focuses on the new codes of conduct and the 10 high-level regulatory standards that are a feature of each handbook. The article examines the ways in which key interests have been dealt with in the handbooks from the perspective of the historical narratives of the legal professions and their publications, including their previous codes of conduct. It is found that the barristers' and solicitors' codes project different ethical orientations towards the supposedly universal 'standard conception of the lawyer's role' based on the principles of neutrality and partisanship. The origins, meaning and significance of the high-level standards are considered. They are found not to reflect the content of the codes of conduct or to communicate cherished elements of the professions' historical narratives. It is argued that this is problematic in terms of the professional functions of regulation, education and communication.

Keywords: regulatory handbooks; codes of conduct; standard conception; regulatory standards, rule of law.

The Legal Professions' New Handbooks: Narratives, Standards and Values.

Andrew Boon*

I. Introduction

Many different types of enterprise use codes of ethics for educational, aspirational or regulatory functions.¹ For professions, they may also serve the purposes of claiming status² or jurisdiction³ and providing a source of public evaluation.⁴ A professional code typically presents distinctive aspirations or ideals which define and distinguish the vocation.⁵ In liberal societies, lawyers' identification with the value of justice is expressed as a formal commitment to the rule of law.⁶ By insistence on due process, known as formal legality or proceduralism, lawyers support the rule of law in two ways. First, they assert the individual liberty and personal autonomy of citizens, and others, and, second, in so doing, they assist the judiciary in controlling the executive in a constitutional separation of powers.⁷ These roles are linked in the ethics literature to a model; the standard conception of the lawyer's role ('standard conception').⁸ This model produces a theory of lawyer's ethics linking three principles: providing representation irrespective of clients' character or goals (principle of neutrality), using all legal means in representing them (principle of partisanship) and not then

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¹ MS Frankel 'Professional Codes: Why, How and with What Impact' (1989) 8:2/3 *Journal of Business Ethics* 109.

² MS Larson *The Rise of Professionalism: A Sociological Analysis* (Berkeley CA: University of California Press, 1977).

³ A Abbott *The System of Professions: An Essay on the Expert Division of Labour* (Chicago: University of Chicago Press, 1988).

⁴ Frankel, (n 1).

⁵ E Durkheim *Professional Ethics and Civic Morals*, trans. C Brookfield (London, NY, Routledge, 1992), SC Gilman *Ethics Codes and Codes of Conduct as Tools as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons* (2005) (last visited on 18/05/2016 at <http://www.uttamonline.com/notes/paper-4/Code%20of%20ethics.pdf>)

⁶ See generally TC Halliday and L Karpik 'Politics Matter: a Comparative Theory of Lawyers in the Making of Political Liberalism' in *Lawyers and the Rise of Western Political Liberalism* (Oxford: Clarendon Press, 1997) 50, T Bingham *The Rule of Law* (London, Allen Lane, 2010), BZ Tamanaha *On the Rule of Law: History, Politics, Theory*, (Cambridge: Cambridge University Press, 2004).

⁷ Ibid and see GC Hazard and A Dondi, *Legal Ethics: A Comparative Study* (California, US, Stanford University Press, 2004), Tamanaha, *ibid*, 95.

⁸ See eg D Luban *Lawyers and Justice: An Ethical Study* (Princeton NJ: Princeton University Press, 1988), T Dare *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role* (Farnham: Ashgate, 2009), WB Wendel *Lawyers and Fidelity to Law* (Princeton and Oxford: Princeton University Press, 2010).

being morally responsible for the consequences (principle of non-accountability). The standard conception is based on a reading of the American Bar Association Model Rules of Professional Conduct (ABA MR).⁹ Although these rules govern the single recognised profession operating in the United States, the attorneys, criticism and defence of the ‘role-differentiated behaviour’ the model is said to prescribe has dominated debate in the international legal ethics literature for forty years.¹⁰ The hegemony of the model reflects the high level of attention paid to lawyers’ ethics codes in the United States.¹¹ The codes of lawyers in England and Wales have received less attention¹² and none that considers in detail their formal engagement with the rule of law.

This article aims to inform debates on the ethics of lawyers by clarifying the origins and contemporary significance of norms in a significant common law jurisdiction other than the United States. It is important to define the scope of inquiry. In England and Wales the term ‘lawyer’ currently describes a wide range of legal occupations recognised by the Legal Services Act 2007: barristers, solicitors, notaries, legal executives, licensed conveyancers, trade mark attorneys, patent agents and law costs draughtsmen.¹³ Each type of lawyer has its own regulatory body and code of conduct. This article focuses on barristers and solicitors, both because they are the most important legal professions in the jurisdiction, and because of their historically complementary roles.¹⁴ The material considered includes material issued by the professions since they began issuing formal guidance. At the point when the Legal Services Act 2007 (LSA) was enacted, both used codes of conduct comprising fairly detailed, formally binding rules. Following the LSA, both regulators issued documents, called handbooks, containing a list of ten high-level professional standards (the standards), a code of conduct and assorted supplementary regulations. In conventional terminology the standards represent principles; a level of norms which set out how a profession seeks to realise its values.¹⁵ These norms were called principles only by the solicitors but the barristers called them core duties. In addition to the standards, both codes of conduct adopted a new format focusing on the outcomes that regulated parties were to achieve. In the codes of conduct themselves, solicitors abandoned rules while barristers retained rules, but in a role subordinate to outcomes. It is not proposed to consider these changes in format at length.

This article is divided into six main sections tracing the evolution of norms into the current standards. The starting point, sections II and III, is the link between the formation of the liberal state under the rule of law, the adoption of key events in this process as professional

⁹ See eg Luban, *ibid*, particularly Appendix 1.

¹⁰ See generally R Wasserstrom ‘Lawyers as Professionals: Some Moral Issues’ (1975) 5 *Human Rights* 1, 5, D Nicolson and J Webb *Professional Legal Ethics* (Oxford: Oxford University Press, 1999), Dare (n 8), Wendel (n 8).

¹¹ R Abel ‘Why Does the ABA Promulgate Ethical Rules?’ (1981) 59 *Texas Law Review* 147, D Rhode ‘Why the ABA Bothers: A Functional Perspective on Professional Codes’ (1981) 59 *Texas Law Review* 689, T Schneyer ‘Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct’ (2006) 14:4 *Law and Social Inquiry* 677.

¹² D Nicolson ‘Mapping Professional Ethics: The Form and focus of the codes’ (1998) 1:1 *Legal Ethics* 51.

¹³ LSA 2007 Schedule 4 Part 1.

¹⁴ RL Abel *The Legal Profession in England and Wales* (Oxford, Basil Blackwell, 1988).

¹⁵ Gilman (n 5).

narrative¹⁶ and the transmission of relevant values into written standards and detailed norms. It will be shown that historically, and through normative selection and representation, barristers and solicitors formally engaged with the rule of law in different ways. Section IV develops this theme by examining the evolution of norms presented in the current codes of conduct in relation to the most relevant interest groups: consumer, client, public, third party and profession. The barristers' and solicitors' formal normative engagement with the rule of law is measured against an index representing the principles of neutrality and partisanship. Where relevant, provisions from the American Bar Association Model Rules of Professional Conduct are compared. The approach aims to explain the development of the codes of conduct in a way that is sensitive to factors identified in the social science literature.¹⁷ The analysis will show that barristers share with attorneys a similar, though not identical, ethical orientation to the standard conception, while that of the solicitors, on the chosen measures, is markedly different. This raises the issue of whether the standard conception adequately explains the ethics of lawyers primarily concerned with transactions as opposed to litigation. Section V explores the origins of the high-level standards, the reasons for the selection of individual items and the priorities revealed by presentation, organisation and sequence. It is proposed that the values supported by the standards are counter-intuitive; solicitors claim promotion of the rule of law as a formal standard whereas barristers do not. The final section considers some implications of the analysis. It identifies potential problems in terms of the regulatory, aspirational and educational functions of professional norms.

II. Professional Narratives: Engagements with Liberalism and the Rule of Law

Hazard suggests that the professional rules of the legal profession in the United States, the attorneys, enforce three core values; loyalty, confidentiality and candour to the court'.¹⁸ These obligations derive, he says, from a narrative depicting 'resistance to government intervention in the lives, liberty, or property of private parties'.¹⁹ Hazard suggests that this commitment, which manifests as defence of due process, is a common legacy of the Anglo-American legal professions finding its rationale in a commitment to the rule of law. While this may be true, any legacy is in fact shared by barristers and solicitors in England and Wales. The parts most clearly identified with each profession derive from different histories, coinciding with different periods in the processes of political, legal and economic liberalism and hence with distinct elements of the rhetoric of the rule of law.²⁰ Barristers' history is tied to the establishment of rights and freedoms through trial advocacy and with liberalisation in the political and legal spheres. The solicitors' narrative is aligned with economic liberalisation and the evolution of a capitalist economy. It is not surprising, therefore, that a strong alignment with the neutral partisanship of the standard conception is clear in the barristers' historical narrative but less so in that of the solicitors.

¹⁶ H Porter Abbott *The Cambridge Introduction to Narrative*, 2nd ed. (Cambridge, Cambridge University Press, 2008) 13.

¹⁷ Eg intended audiences and processes of production (see further L De Groot-Van Leeuwen and W T De Groot 'Studying Codes of Conduct: A descriptive framework for Comparative Research' (1998) 1:2 *Legal Ethics* 155).

¹⁸ GC Hazard 'The Future of Legal Ethics' (1990-1991) 100 *Yale L.J.* 1239, 1246..

¹⁹ *Ibid.*

²⁰ See generally Halliday and Karpik (n 6).

Elements of the legal role later claimed by the Bar were present in medieval legal culture. The advocate's duty to accept clients, a feature of the principle of neutrality, is glimpsed in judicial speeches to new serjeants at law²¹ admonishing them never to be 'blind', unable to 'give counsel to anyone who should seek it',²² or the Scottish Court of Session rule that '[n]o advocate without very good cause shall refuse to act for any person tendering a reasonable fee, under pain of deprivation of his office of advocate'.²³ The political upheavals of the 18th century provided the opportunity for the Bar to claim a role in establishing 'the constitutional rights of freeborn Englishmen, and eventually of all men everywhere'.²⁴ Radical barristers, through collective action and individual cases, helped establish rights to due process, free speech, press and assembly.²⁵ Confronting the state, and the prejudice of juries drawn from the propertied classes, the claim to a neutral partisan role as a professional obligation was strategic. The shared Anglo-American ethical legacy draws on utterances by barristers such as Thomas Erskine and Henry Brougham.²⁶ Erskine, defending Thomas Paine against a charge of seditious libel arising from the publication of Part II of *The Rights of Man*, claimed neutral representation as a fundamental principle. Responding to the prosecution's jibe that it was a disgrace for a barrister to represent Paine, Erskine claimed that, were barristers to deny representation, '... from that moment the liberties of England are at an end'.²⁷ Brougham's partisan defence of Queen Caroline against charges of adultery brought by George IV asserted that the primary duty of a lawyer was to save his client 'by all means and expedients, and at all hazards and costs to other persons... though it should be his unhappy fate to involve his country in confusion'.²⁸

During the nineteenth century, the Bar's narrative accommodated the formalisation of a duty to the court.²⁹ In the twentieth century the advent of legal aid led to the mass processing of clients often found guilty.³⁰ This led to a formalisation of due process rhetoric to accommodate judicial insistence that 'the advocate, and the advocate alone, remains responsible for the forensic decisions and strategy'.³¹ This demand underpinned various practices, such as sentence discounting and charge bargaining, leading to the 'mass production of guilty pleas', and even the entering guilty pleas for innocent defendants.³² The duty not to mislead the court meant that barristers could allow a 'not guilty' plea only if they

²¹ JH Baker *The Oxford History of the Laws of England: Volume VI 1483-1558*. (Oxford, NY: Oxford University Press, 2003) 430-1.

²² *Ibid.*

²³ LE Teitelbaum 'The Advocate's Role in the Legal System' (1975) 6 *New Mexico Law Review* 1.

²⁴ RW Gordon 'The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections' (2010) 11 *Theoretical Inquiries in Law* 441, 467.

²⁵ WW Pue 'Lawyers and Political Liberalism in the Eighteenth and Nineteenth-Century England' in Halliday and Karpik (eds.) n 14 above, 167.

²⁶ DL Rhode 'An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context' (1991) 41 *Journal of Legal Education* 29, 30 and n 15 above, 1244.

²⁷ J Hostettler *Thomas Erskine and Trial by Jury* (Hook, Hants: Waterside Press Ltd, 2010) 93.

²⁸ Gordon (n 24) 189.

²⁹ A Watson 'Changing Advocacy: Part One' (2001) 165 *Justice of the Peace* 743.

³⁰ J Morrison and P Leith *The Barristers World and the Nature of Law* (Buckingham: OUP, 1992) 194.

³¹ *R. v Farooqi* [2013] EWCA Crim 1649, [2014] 1 Cr. App. R. 8, per Lord Judge CJ.

³² A Ashworth, R Young and M Burton *Criminal Justice* (Oxford: Oxford University Press, 2010) Chapter 8.

had not heard a confession or, having heard a confession, if they did not lead inconsistent evidence, such as an alibi. The barrister's role therefore demanded a kind of detachment from both client and bench. It facilitated the pragmatic disposition of even the hardest cases, such as those involving terrorism, 'in the best interests of clients'³³ while observing the duty to the court. The accommodation of the principles of neutrality and partisanship within a framework of due process is central to the ideology of the Bar.³⁴ It casts the barrister as a kind of priestly interlocutor between individual and state on behalf of the rule of law.

In the 1990s the Law Society campaign for the right of solicitors to appear as advocates in senior courts played into a government agenda for disrupting professional monopolies.³⁵ The Bar had assumed that its monopoly, and hence its independence, was a component in the constitutional independence of the judiciary³⁶ and, for a while, the judiciary agreed. The underlying threat of fusion of the professions, mooted in the government's Green Papers, caused the Lord Chief Justice to claim the proposals were 'sinister'.³⁷ High Court judges suggested they represented 'a grave breach of the doctrine of separation of powers' and required the concurrence of the judiciary.³⁸ The issue of professional and judicial independence was said to be 'more important now than ever because one of the great constitutional tasks of the courts today is to control misuse of powers by Government ministers and departments'.³⁹ The Bar had little experience of mobilising public opinion, and its campaign was dismissed later as 'apoplectic hyperbole',⁴⁰ but the government settled for promoting competition by whittling away the differences between barristers and solicitors.

The Courts and Legal Services Act 1990 (CLSA) introduced measures allowing solicitors to appear as advocates in senior courts. This changed the situation of the professions in relation to elite advocacy. By August 2015, 1,769 solicitors had a qualification allowing them to appear in the highest civil courts, 3,350 had the equivalent criminal qualification and 1,532 were dual qualified.⁴¹ This total of 6,651 higher court solicitor advocates compared with only 12,709 self-employed barristers who, in 2014, had acquired higher court rights on qualification.⁴² Until the 1980s, and despite rights of audience bestowed by the County

³³ Morrison and Leith (n 30) 154.

³⁴ W H Simon 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978) *Wisconsin Law Review* 29.

³⁵ M Burrage 'Mrs Thatcher Against the 'Little Republics': Ideology, Precedents and Reactions' in Halliday and Karpik (n 6) 137.

³⁶ Ibid 151.

³⁷ Ibid 148.

³⁸ 'Judges find "grave breach" of constitution in Green Papers' (1989) 139 *New Law Journal* 707.

³⁹ Ibid.

⁴⁰ R Abel 'The Politics of Professionalism: The Transformation of English Lawyers at the End of the Twentieth Century' (1999) 2:2 *Legal Ethics* 131, 132.

⁴¹ SRA 'Data for number of practising solicitors having higher rights of audience August 2015'

http://www.sra.org.uk/sra/how-we-work/reports/data/higher_rights_of_audience.page (Last accessed 29/09/2015)

⁴² Practising barrister statistics (<https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/>) (Last accessed 28/09/2015).

Courts Act 1846, the solicitors had displayed only mild and episodic interest in advocacy.⁴³ The success of its advocacy campaign emboldened the Law Society to consider a future without the Bar. When the judges argued that there should be one regulator for elite advocacy, the Law Society boldly claimed that it was better resourced for the role.⁴⁴

The solicitors' enthusiasm for advocacy was relatively fresh. Until the 1980s, their history was quite different from that of barristers, partly as a result of a later professionalization trajectory. Although a society was formed in 1739 to raise the status of different types of lawyers who were not barristers, the solicitors, as they became known collectively, only began to be influential following the creation of the Law Society in 1825.⁴⁵ The solicitors' and barristers' professions accepted a settlement of work jurisdictions which allowed barristers to consolidate their exclusive right of access to higher courts, leaving solicitors with a legal monopoly of land transfers. As the profession dealing with clients direct, solicitors gained a *de facto* monopoly of business transactions for the industrialist, financial and merchant classes. Their historic role therefore, lay in accommodating capitalism within the framework of the rule of law.⁴⁶ Their key principle was arguably confidentiality. Although solicitors and barristers offered clients advice protected by legal professional privilege (LPP), this was arguably less significant for barristers, who held no client records.⁴⁷

As a profession of business, a priority for solicitors was a collective reputation for probity. The task of securing this reputation was made more difficult by the size, diversity and geographical spread of solicitors. For much of the nineteenth and twentieth centuries, repeated defaults necessitated measures to reassure the public that money was safe in solicitors' hands. Between 1900 and 1905, for example, 220 solicitors were declared bankrupt⁴⁸ leading to proposals, in 1907, that they be required to establish separate accounts for holding client and office money.⁴⁹ Keen to preserve its porous jurisdiction, the Law Society was discreetly useful to government and became ringed by enabling and protective legislation.⁵⁰ In the 1930s, these statutory provisions began to define the professional narrative. Detailed accounts rules were established, requirements for compulsory indemnity insurance introduced, and a Compensation Fund for victims of dishonesty was established.⁵¹ These measures were so successful that, by the end of the century, Lord Bingham could

⁴³ D Sugarman 'Bourgeois collectivism, professional power and the boundaries of the state. The private and public life of the Law Society, 1825 to 1914' (1996) 3:1/2 *International Journal of the Legal Profession* 81, 104

⁴⁴ *New Law Journal* (n 38).

⁴⁵ Sugarman (n 43).

⁴⁶ T C Halliday and L Karpik 'Postscript: Lawyers, Political Liberalism, and Globalisation' in Halliday and Karpik (n 6) 349, D Nicol *The Constitutional Protection of Capitalism* (Oxford: Hart Publishing 2010) 38.

⁴⁷ Solicitors' competitor professions, such as accountants, cannot claim LPP when providing legal advice (see *Prudential PLC and Prudential (Gibraltar) Ltd v Special Commissioner of Income Tax and Philip Pandolfo (HM Inspector of Taxes)* [2013] UKSC 1, [2013] 2 AC 185) advantaging elite London firms in competition for international clients.

⁴⁸ Sugarman (n 43) 110.

⁴⁹ *Ibid*, 111

⁵⁰ *Ibid*, 119.

⁵¹ Hansard *HL Deb* 04 May 1939 vol 112 cc953-7 particularly Lord Mancroft at 955-956 and *HL Deb* 10 July 1940 vol 116, 855-62, particularly Viscount Simon at 862.

express an apparently genuine expectation of ‘the solicitors’ profession as one in which every member, of whatever standing, may be trusted to the ends of the earth’.⁵² One of the significant steps in this process was the introduction of the Solicitors Practice Rules, which are considered in the next section.

In summary, the legal professions actively participated in the development of the liberal state under the rule of law, but their different roles and professional trajectories allotted them different parts in that process. The Bar’s key role lay in relation to political and legal liberalism. Its narrative reflected a commitment to adversarial process and equated the barristers’ role in promoting the rule of law with due process, or legalism.⁵³ As transaction lawyers, the solicitors’ role lay in promoting economic liberalism. An essential element in this process was establishing client trust; by limiting opportunities for solicitor and own client conflicts of interest and ensuring client compensation for default. The key value was arguably client confidentiality, which, together with LPP, would come to be regarded as a cornerstone of the rule of law.⁵⁴ Therefore, of the core values identified by Hazard, the barristers are tied closely to loyalty and candour to the court while confidentiality is more fundamental to solicitors.

III. Development of the Codes

A. A brief history of the conduct rules

The first Bar Code of Conduct 1981 (BCC 1981), created on the recommendation of the Benson Commission,⁵⁵ was based on a noted book on advocacy and Bar culture.⁵⁶ The ethical core was sandwiched by regulatory material. This grew, through eight editions, with the addition of material designed to defend the status of barristers as self-employed practitioners.⁵⁷ The Bar Code of Conduct 2014 recognised changes in the barristers’ core markets occurring since 1990. It was drafted so as to allow barristers to apply for practising certificate extensions enabling them to conduct litigation. Rules preventing self-employed barristers from sharing premises and forming associations with non-barristers were removed. Provisions in the previous code, prohibiting barristers from handling client money, paying referral fees and managing client affairs, were retained, but a way of holding money that did not contravene these rules was introduced.⁵⁸ The Bar was clinging as far as possible to its traditional role and identity while bowing to the necessity of competition with solicitors for core legal work.

⁵² *Bolton v The Law Society* [1994] 1 WLR 512 CA (Civ Div).512, 518.

⁵³ Tamanaha (n 6).

⁵⁴ *Three Rivers District Council & Others v Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48, [2005] 1 AC 610 (House of Lords) per Lord Scott para 34.

⁵⁵ *Report of the Royal Commission on Legal Services (Benson Commission), (Final Report)*, Cmnd 7648 (1979), Volume 1, 310.

⁵⁶ M Hilbery *Duty and Art in Advocacy* (London: Stevens and Sons Ltd, 1946).

⁵⁷ The General Council of the Bar of England and Wales *Bar Code of Conduct* 1981: Part II: Fundamental Principles, Part III: Barristers in Independent Practice, Part IV: Self Employed barristers, Part V: Employed barristers, Part VI: Acceptance and return of instructions, Part VII: Conduct of Work by a practising barrister.

⁵⁸ <http://www.barcouncil.org.uk/supporting-the-bar/barco/> (last accessed 11/12/2015).

The solicitors' first set of conduct rules, the Solicitors Practice Rules 1936 (SPR 1936), were created under the Solicitors Act 1932.⁵⁹ They were disappointing as a clarion call, comprising only a brief series of bans on touting, charging less than scale fees, sharing fees and entering agreements for referrals by claims farmers. The rules therefore reflected a preoccupation with protecting professional boundaries from the risks of solicitation for clients, dilution of lawyer control of practice and pollution by contact with non-legal work. This began a long running fight to protect the solicitor brand from the taint of inappropriate association and temptations for corruption. Additions to the SPR 1936, made in 1967, 1971 and 1975, introduced relatively minor requirements governing name plates, inviting instructions and supervision of offices.

After years of relative inactivity three sets of practice rules were produced between 1987 and 1990. The last of these was a reaction to threatened legislation on restrictive trade practices,⁶⁰ which never materialised. The substantive rules dealt with demarcation of professional boundaries (employed solicitors, not acting as a structural surveyor or valuer), proscriptions (fee sharing, receiving contingency fees, acting for borrower and lender on a private mortgage) and standards (supervision of offices, client care). The SPR 1990 were later supplemented by rules on confidentiality, conflicts of interest and advocacy. This last addition, first proposed only in 1990,⁶¹ anticipated the CLSA 1990 and the end of the Bar's monopoly of higher court advocacy. The rule itself simply stated '[a]ny solicitors acting as an advocate shall at all times comply with the Law Society's Code for Advocacy'.⁶² The Code for Advocacy was based on the Bar's core advocacy provisions, as set out in BCC 1981.

The practice rules were apparently not seen as having educative value. Before 1960 guides to solicitors' conduct took the form of amended versions of the Solicitors Acts.⁶³ This changed in 1960 when the Law Society published *A Guide to the Professional Conduct and Etiquette of Solicitors*.⁶⁴ Written by Sir Thomas Lund, the secretary of the Law Society, it went through various changes of title before emerging as *The Guide to the Professional Conduct of Solicitors (The Guide)* in 1990. Three editions were published under that name, the eighth and final edition appearing in 1999. Gaps and deficiencies in the practice rules were filled by *The Guide* with other 'rules', guidance and stand-alone codes, some made under statutory authority and others not. The rules were added as 'the Council's interpretation of the basic principles summarised in Practice Rule 1 [as presented in SPR 1990] as applied to the various circumstances arising in the course of a solicitor's practice'.⁶⁵ In 1999 the Law Society established a Regulation Review Working Party, the main task of which was to produce a comprehensive and enforceable code of conduct. This resulted in *The Solicitors Code of Conduct 2007 (SCC 2007)*.

⁵⁹ The Law Society *Solicitors' Practice | Rules 1936-2007* (London, The Law Society, undated).

⁶⁰ Department of Trade and Industry *Opening Markets: New Policy on Restrictive Trade Practices* Cm. 727 (1989).

⁶¹ Law Society *Standards and Guidance Committee minutes* 11th July 1990.

⁶² SPR 1990 r.16A.

⁶³ British Institute of Law Librarians ([http://biallpr.pbworks.com/w/page/53074043/Solicitors' Code of Conduct](http://biallpr.pbworks.com/w/page/53074043/Solicitors%27Code%20of%20Conduct) - current and old editions) (Last accessed 19/11/2015).

⁶⁴ T Lund *A Guide to the Professional Conduct and Etiquette of Solicitors* (London: Law Society, 1960).

⁶⁵ N Taylor (ed), *The Guide to the Professional Conduct of Solicitors* (London: The Law Society, 7th ed, 1993) 2.

The opportunity to articulate a vision of the solicitors' profession entering the new millennium was not fully seized in the SCC 2007. The lack of ambition was signalled by the chairman of the group emphasising the need for the rule book to be comprehensible to clients.⁶⁶ An academic member of the working party, Jenny Levin, suggested that the group perceived its remit as:

‘... ‘to provide a fair system of regulation which clearly defines the duties of solicitors and the standards of service and conduct which clients can expect, with the aim of inspiring both public confidence and client satisfaction in the profession’. It is deliberately low key. It is client-centred but also realistic and deliverable...’⁶⁷

The resulting code was, in fact, a major edit of *The Guide*; undoubtedly an advance in terms of presentation and accessibility. Deriving from the core duties there were 25 sections of detailed and binding practice rules and non-binding guidance. There was, however, little material not previously in *The Guide*, except that driven by new case law.⁶⁸ A chapter on litigation and advocacy was largely based on the Law Society's Code for Advocacy. The SCC 2007 replaced the SPR 1990, and *The Guide* from 1 July 2007, but, was itself replaced following the LSA.

B. Creation of the new handbooks

The LSA required a new government agency, the Legal Services Board (LSB) to ensure that approved regulators acted compatibly with and promoted the regulatory objectives.⁶⁹ The separation of professions' representative and regulatory function in the way required by the Act would, Abel claimed, ‘explicitly acknowledge the end of professionalism’⁷⁰ but the regulatory objectives of the LSA attempted to strike a balance between professional and consumerist agendas. Objectives such as improving access to justice, protecting, promoting the interests of consumers and promoting competition in the provision of services in the legal sector were balanced against others, supporting the constitutional principle of the rule of law, encouraging an independent, strong, diverse and effective legal profession and promoting and maintaining adherence to the professional principles.⁷¹ If the Act's regulatory objectives were largely novel, the professional principles were firmly grounded in the professions' codes of conduct. They stipulated that persons authorised to practice should act with independence and integrity, maintain proper standards of work, act in the best interests of their clients, keep the affairs of clients confidential and, when exercising rights of audience, or conducting litigation, comply with their duty to the court to act with independence in the interests of justice.⁷²

The new, independent regulators, for barristers the Bar Standards Board (BSB) and for solicitors the Solicitors Regulation Authority (SRA), both committed to producing new codes of conduct. The SRA decided quickly to apply to also regulate Alternative Business

⁶⁶ E Nally ‘Simplifying the Rules’ (2001) 4:1 *Legal Ethics* 8.

⁶⁷ J Levin ‘Work in Progress- The Law Society Regulation Review Working Party’ (2000) 3:2 *Legal Ethics* 122.

⁶⁸ *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 A.C. 222 (see further A Boon *The Ethics and Conduct of Lawyers in England and Wales* (Oxford, Hart Publishing, 2014) 358-362) .

⁶⁹ LSA 2007 s. 3(2) and s. 28(2).

⁷⁰ Abel (n 40), 146.

⁷¹ LSA2007 s.1(1)

⁷² *Ibid* s. 1.3(a) to (e).

Structures; entities recognised by the LSA for delivering legal services that could be owned or managed by non-lawyers.⁷³ The BSB was less sure about this step but eventually decided to regulate organisations owned and managed by barristers, and other lawyers, that wished to specialise in providing advocacy and litigation services and specialist legal advice. It then decided that it would also apply to be a regulator of entities, a step yet to be fully realised.⁷⁴ The LSB advocated Principles-Based Regulation,⁷⁵ and required applicants to regulate ABS to adopt it. The SRA resolved to use the same code of conduct in regulating both organisations and individuals⁷⁶ and the Bar eventually followed suit.⁷⁷ Thus, both professions were required to produce principles, high-level standards, as part of their rule books and to ensure that conduct norms were expressed as outcomes rather than rules. In 2011 the SRA Handbook was published containing the SRA Principles and the SRA Code of Conduct 2011 (SRA CC 2011). The BSB published the BSB Handbook in 2014 including the BSB Core Duties and the Bar Standards Board Code of Conduct 2014 (BSB CC 2014).

In presenting its plans the SRA made great play of abandoning rules in favour of a tripartite structure of obligations comprising Principles, Outcomes and Indicative Behaviours.⁷⁸ Principles were mandatory and framed at a high level of abstraction. The SRA stated that the principles represented ‘the fundamental ethical and professional standards that we expect of all firms ... and individuals when providing legal services’.⁷⁹ Outcomes were also mandatory but less broad, while indicative behaviours were favoured options for achieving outcomes. The SRA CC 2011 had twelve substantive chapters organised in four sections; ‘You and Your Client’, ‘You and Your Business’, ‘You and Your Regulator’ and ‘You and Others’. This order was apparently purposive and most likely a hierarchy. It largely repeated the sequence of SCC 2007, except for granting the regulator its own chapter and inserting it before ‘others’. The BSB CC 2014 used a structure somewhere between the SRA template and a conventional code of conduct. This was based on core duties, outcomes, rules and guidance. The BSB noted that the content of the code was familiar but ‘the layout is markedly different’.⁸⁰ One of the main differences was arrangement. The odd structure of the BCC 1981 was replaced in BSB CC 2014, with practice rules and administrative requirements separated into discrete parts.⁸¹ The order of substantive chapters was unconventional. It ran ‘You and the Court’, ‘Behaving Ethically’, ‘You and Your Client’, ‘You and Your Regulator’ and ‘You and Your Practice’. The decision not to make clients the subject of the primary chapter is intriguing; it may be seen as reinforcement of the message that barristers’ primary role was expert management of inherent tensions in the rule of law.

IV. The Obligations in the New Codes

⁷³ LSA 2007 Part 5.

⁷⁴ N Hilborne ‘Barristers lay out plans for range of new entities’ *Legal Futures* 1st July 2014 (<http://www.legalfutures.co.uk/latest-news/barristers-lay-out-plans-range-new-entities>) (last accessed 4/12/2015).

⁷⁵ Legal Services Board *Business Plan 2009/10* (London: Legal Services Board, 2009), para 30.

⁷⁶ *SRA Achieving the Right Outcomes* (London: Solicitors Regulation Authority, 2010).

⁷⁷ *BSB Review of the Code of Conduct: Consultation Paper on the proposed new Code of Conduct for the Bar* (London: BSB, 2011), 7.

⁷⁸ Nally (n 66).

⁷⁹ *SRA Handbook 2011* (Version 11, 2015) Introduction para 3(a).

⁸⁰ *SRA* (n 76) para 53.

⁸¹ *Ibid*, para 54.

The ethical orientation of the codes of conduct can be assessed by focusing on how key interests are protected. It has been suggested that at least nine groups are owed duties under the new codes.⁸² The analysis conducted here focuses on five key interests; consumers of legal services, clients, the public interest, individual third parties and the profession. This is because the main job of the codes is to manage potential conflicts between the duties owed to these groups. These duties are analysed in relation to the substantive constituent principles of the standard conception, neutrality and partisanship. There are different ways of constructing these principles but, for the purpose of this analysis, they are sub-divided into two indexes as set out in Table 1. Neutrality comprises, first, commitments to accept consumers as clients ('N1') and, second, to accept client objectives, including those with a moral component ('N2'). Partisanship involves, first, obligations to use all lawful means to achieve client objectives (P1) and, second, the absence of third party or public interest constraints on actions for clients (P2).

Table 1: Framework for analysing codes commitments to the 'standard conception'

Neutrality	N1: Duty to accept consumers as clients N2: Duty to accept client objectives, including those with a moral component
Partisanship	P1: Duty to use all lawful means to achieve client objectives P2: Limited constraints on actions for clients

A. Consumers

Although the LSA defines consumers broadly to include clients and some third parties, this does not do justice to a distinction often drawn in lawyers' codes of conduct. This recognises a difference between individuals not yet accepted as clients, but owed responsibilities as seekers of legal services, and clients. For the purpose of the present analysis, it is only the former group, seekers of services, that is referred to as consumers. They are potential beneficiaries of distinctive rules covering matters such as acceptance as a client, advertising and rules on conflicts of interest.

Because the BSB CC 2014 and the SRA CC 2011 adopt the wide definition of consumer in the LSA, they are only mentioned briefly in the introductions to the codes. Provisions protecting seekers of legal services are, however, far from absent. The BCC 1981 rule headed 'Acceptance of instructions and the 'Cab-rank rule'' is a strong example of an N1 obligation because it prevents barristers withholding advocacy services on the ground that the 'nature of the case..' or '...the conduct opinions or beliefs of the prospective client' are unacceptable to him or to any section of the public.⁸³ A rule with similar content was retained in BSB CC 2014⁸⁴ and it was strengthened by removal of an exception to the rule. The power to refuse briefs when no proper

⁸² These include courts, ombudsmen, employees, suppliers, court officials, agents and referrers (see further M Willis 'On the edge' (2011) 161 *New Law Journal* 815).

⁸³ BCC 1981 para 601(a) and (b).

⁸⁴ BSB CC 2014 rC29.

fee was offered⁸⁵ became controversial when the Bar Council ‘deemed’ graduated fees, for family and criminal legal aid work, not proper professional fee for the purpose of the exception. This meant that barristers were not obliged to accept that work. Although a rule on adequate fees was retained in BSB CC 2014,⁸⁶ the BSB decided that deeming a fee inadequate was a decision that a representative body, rather than a regulatory body, would make. The BSB thought that it could neither make that move itself nor delegate it to the Bar Council. It therefore left individual barristers to decide whether a legal aid fee was inappropriate and to ‘defend that decision if challenged’.⁸⁷ In the new rules, the cab rank requirement only applied to situations where instructions were received from professional clients, such as solicitors. Therefore, it could apply in litigation, where a barrister is instructed to attend a police station, for example, when the barrister normally did that kind of work.⁸⁸ It is assumed that the cab rank principle was not applied where a consumer approached a barrister entity direct because the screening service previously provided by solicitors had been removed. Nevertheless, the cab rank rule for advocacy places barristers high on the N1 index, even compared with the ABA MR. The rules for attorneys contain no similar duty to represent, but merely note that representation ‘does not constitute an endorsement of the client's political, economic, social or moral views or activities’.⁸⁹

The solicitors’ perspective on obligations to consumers purported to protect their freedom of choice. Rules against touting in SPR 1936 were gradually broadened in subsequent versions, until the SPR 1990 contained several rules that were arguably concerned with protecting consumer rather than client interests.⁹⁰ These rules were the product of concerted campaigns to prevent solicitors from being tied to specific arrangements for obtaining instructions. Apart from this, the general position in *The Guide*, and subsequently the SCC 2007, was that solicitors could decide whether or not to accept instructions.⁹¹ This right to refuse consumers, except where to do so would be discriminatory in law, was maintained in SRA CC 2011.⁹²

In the period following the CLSA 1990, the solicitors’ position on accepting consumers as clients was different in relation to advocacy. The Law Society was initially concerned that a House of Lords amendment to the Act would impose a cab rank rule on solicitors⁹³ but, in the event, there was no such requirement. The Law Society Code for Advocacy therefore copied only part of the rule in BCC 1981. As with the Bar’s rule this prohibited refusing instructions on the grounds that ‘the conduct, opinions or beliefs of the client are unacceptable to the advocate or to any section of the public’.⁹⁴ This rule was carried into the SCC 2007.⁹⁵ At this point there

⁸⁵ BCC 1981 para 604(b).

⁸⁶ BSB CC 2014 rC30.8.

⁸⁷ BSB (n 77) para 95.

⁸⁸ BSB CC 2014 gC89.

⁸⁹ ABA MR (1983) as amended r.1.2

(http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.) (last accessed 14/12/2015)

⁹⁰ SPR 1990 Rules 2 (publicity), 3 (referral fees) and 5 (offering services other than as a solicitor).

⁹¹ SCC 2007 Rule 2.01.

⁹² SRA CC 2011 O.2.1 and IB 2.5.

⁹³ ‘Donaldson advocates general application of cab-rank rule’ (1990) Law Society Gazette, 28th February, 1987 (3).

⁹⁴ *Law Society's Code for Advocacy* 1993 para 2.4.2(c).

was a negligible difference between the professions in relation to advocacy consumers; barristers were committed to accepting briefs while solicitors were not permitted to refuse them on moral grounds. The SRA Code 2011, however, expunged the obligation, leaving solicitors free to refuse advocacy consumers on moral grounds, provided no unlawful discrimination was involved. Therefore, while the barristers' rules placed them high on the N1 index, solicitors were no more committed to accepting consumers, even for advocacy, than any non-legal business.,

B. Clients

Lawyer neutrality in relation to client objectives is one the most controversial aspects of the standard conception. ABA MR 2007 provided that '[a] lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules'.⁹⁶ This seems to require lawyers to set aside moral considerations presenting or arising during representation. This position can be reconciled with the rule of law obligations of lawyers when the objectives consist of lawful entitlements.⁹⁷ The duty to pursue objectives is quite different from the corresponding duty on members of both professions in England and Wales. The obligation to pursue a client's best interests is more ambiguous because it does not appear to require the lawyer to accept the client's moral position. It is therefore necessary to consider the history of the obligation to understand what it involves. The BCC 1981 first referred to the obligation when requiring that a practising barrister 'promote and protect fearlessly and by all proper and lawful means his lay client's best interests...'.⁹⁸ This appears to make sense in the particular context of criminal defence because, as discussed above, the barrister was held to be responsible for the conduct of the case and had to keep the duty to the court and the client's 'best interests' in view. It is less clear why the solicitors also adopted a duty 'to act in the client's best interests' in the SPR 1987 as part of Practice Rule 1. It was not due to Lund, whose advice on the professional relationship consisted of a warning that conflicts of interest could lead to 'embarrassment'.⁹⁹

Neutrality in relation to client objectives clearly supports a central goal of the liberal state; promoting client autonomy and moral agency.¹⁰⁰ Promotion of neutrality in relation to client objectives is a plausible goal of the consumerist agenda promoted by the LSA. It did not, however, lead to changes in the SRA CC, which retained the historic focus on clients' 'best interests' and, therefore, potentially continued to obscure the issue of whether the solicitor or client was in charge of decision-making. Even as the client came more clearly into view in later editions of *The Guide*, the solicitor's obligation was described as doing 'his best for his client in the way that he thinks best for the client'.¹⁰¹ When the 'best interests' formula was introduced in the SPR 1987, a guidance note provided that a 'solicitor must not allow a client to override his professional judgement'.¹⁰² This kind of advice later disappeared, but retention of the 'best interests' formula arguably marked a transition from explicit to implicit paternalism. This was at

⁹⁵ SCC 2007 r.11.04.

⁹⁶ ABA MR 2007 DR 7-101(A)1 and see D Luban 'Partnership, Betrayal and Autonomy in the Lawyer/Client Relationship' (1990) 90 *Columbia Law Review* 1004.

⁹⁷ Wendel (n 8).

⁹⁸ BCC 1981 r2.03.

⁹⁹ Lund (n 64) Chapter 9.

¹⁰⁰ E E Sward 'Values, Ideology, and the Evolution of the Adversary System' (1989) 64:2 *Indiana Law Journal* 301.

¹⁰¹ The Law Society *A Guide To the Professional Conduct of Solicitors* (London: The Law Society, 1974).

¹⁰² SPR 1987, Commentary to principle 6.01, note 5.

odds with other parts of *The Guide* which, from the 1990s, made tentative steps towards recognising client autonomy as an issue. This was illustrated by the example of solicitors' sexual relations with clients. Lund refers to a disciplinary case where a solicitor used his position 'to cloak and further an adulterous association', but held that 'to be a co-respondent in a divorce suit is not in itself professional misconduct'.¹⁰³ In later editions of *The Guide*, solicitors were warned of a potential breach of the fiduciary relationship when entering sexual relationships with clients.¹⁰⁴ The guidance was watered down in SCC 2007¹⁰⁵ and omitted from the SRA CC 2011, partly as a result of trimming the code, but also because of a change of emphasis in material relating to clients. This began with the SPR 1990, and the introduction of a rule on client care¹⁰⁶ intended to reduce complaints. It increased the information that solicitors were required to give to clients, including details of internal complaints procedures. With the passage of time, client care came to dominate the normative framework of the code describing solicitor and client relationships.

The SCC 2007 recognised the issue of client autonomy more explicitly with the introduction of a requirement to 'identify the client's objectives' and 'agree next steps'.¹⁰⁷ The SRA CC 2011 apparently took a backward step with the Outcome that 'clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them'.¹⁰⁸ This removed the need to agree next steps. It also continued to obfuscate the issue of whether solicitors must pursue clients' preferred options. Thus, in SRA CC 2011, despite there being several Indicative Behaviours dealing with taking instructions,¹⁰⁹ none mention the possibility of solicitors obtaining consent to act against client's best interests, but in accordance with their wishes. Therefore, despite the consumerist aspirations of the LSA, the solicitors have arguably gone backwards in promoting client autonomy since its passage. It probably did not assist promotion of a progressive agenda on this score that the Act adopted acting in clients' best interests as a professional principle.

The second part of the Bar duty to clients, to use proper and lawful means on their behalf, matches the high position of the ABA model rule on the P1 index. The partisan obligation is limited only by legal, court and conduct rules and implies that clients may judge the morality of actions taken on their behalf. The solicitors did not express a partisan obligation in relation to general work, but briefly adopted the Bar standard for advocacy clients. One of the provisions in *The Law Society Code for Advocacy* 1993 replicated the barristers' duty to 'promote and protect fearlessly and by all proper and lawful means the lay client's best interests'.¹¹⁰ When the advocacy code was absorbed into the SCC 2007, the chapter on litigation and advocacy did not refer to the duty to clients at all, suggesting that the general duty now applied by default. This impression was reinforced by guidance referring to '... your duty to act in your client's best interests'.¹¹¹ The solicitors therefore lost the phrase 'by all proper and lawful means' from their rule. Although guidance incidentally referred to '... robustly defending your client's

¹⁰³ Lund (n 64) 70.

¹⁰⁴ Taylor (n 65) r.12.07 Guidance Note 1(b).

¹⁰⁵ SCC 2007 Guidance to Rule 3 Conflicts of Interest, note 49.

¹⁰⁶ T Williams 'The Image of a Solicitor' (1999) 149 *New Law Journal* 1265.

¹⁰⁷ SCC 2007 r2.02.1(a) and (c).

¹⁰⁸ SRA CC O(1.12).

¹⁰⁹ *Ibid*, IB 1.25-1.28.

¹¹⁰ Taylor (n 65) *Law Society's Code of Advocacy*, 346.

¹¹¹ SCC 2007 Rule 11, Guidance note 5(b).

position',¹¹² the change effected a reduced commitment to P1. The result was that, in relation to clients, the barristers' code fell some way short of the ABA standard on N2, but matched it on P1. The solicitors' rules fell short of the ABA standard on N2, but matched the Bar on that indicator. The solicitors, however, fell short of both the other codes in relation to P2, even in relation to advocacy.

C. The public interest

One of the criticisms of the standard conception is that it appears to justify lawyers' actions on behalf of clients contrary to the public interest.¹¹³ Duties to act in the public interest, for example, reporting clients undertaking legal but environmentally risky activity, would reduce a legal profession's commitment to the standard conception, particularly in relation to N2 and P1. Such duties were largely absent in the codes. The exception was the duty to the court, expressed in the BCC 1981 as a duty not to 'knowingly or recklessly mislead' the court;¹¹⁴ a clear public interest provision directed to achieving justice. The duty was, however, limited because it only required barristers to persuade clients to correct evidential errors. The only sanction if they refused was that the advocate withdrew from representation. Clients retained the right to confidentiality over the issue, a consequence that pushes legal professionals in general up the N2 and P2 indexes.

The Bar's codes of conduct consistently reflected barristers' personal responsibility for the presentation of cases. This restricted the autonomy of litigants with the result that such provisions registered negatively on the N2 index. BCC 1981 required barristers to refuse instructions seeking to limit their ordinary authority or discretion in the conduct of proceedings in Court.¹¹⁵ The *Law Society Code for Advocacy* 1993 version of this rule stated that solicitor advocates were 'personally responsible for the conduct and presentation of their case'¹¹⁶ but neither the SCC 2007 nor SRA CC 2011 had a similar provision. The solicitors' rules therefore gave greater scope for clients of solicitor advocates to determine case strategy than clients instructing barristers. This raised solicitors, possibly unintentionally, on the N2 index relative to the Bar.

Apart from the duty to the court there are few public facing duties in either code. This is probably because such duties would cut across client rights to confidentiality and LPP. An example in BCC 1981 required withdrawal, but not reporting, where a client had improperly obtained legal aid.¹¹⁷ Such public-facing norms as did exist tended to appear as exceptions to general rules supporting confidentiality, rather than in sections dedicated to the public interest. This approach is evident in the 7th edition of *The Guide* which noted statutory obligations to report suspicions of money-laundering or terrorist activity, but did so in chapters on organising practices.¹¹⁸ A more significant public interest ethical provision was a rule in *The Guide* stating that confidentiality could 'be overridden in exceptional circumstances'.¹¹⁹ No test for exceptional circumstances was provided, but guidance notes suggested that solicitors who thought they were '... being used by a client to facilitate the

¹¹² Ibid, Guidance note 24

¹¹³ Nicolson and Webb (n 10).

¹¹⁴ BSB 1981 Para 302.

¹¹⁵ BSB CC 2014 r C15.1.

¹¹⁶ Taylor (n 65) *Law Society's Code for Advocacy* 346, r. 7.1(a).

¹¹⁷ BCC 1981 r.504c.

¹¹⁸ Taylor (n 65) Chapter 3.

¹¹⁹ Ibid, Chapter 16 Rule 16.02.

commission of a crime or fraud', should 'assess the situation in the light of their professional judgment'.¹²⁰ No rule on overriding confidentiality was included in SCC 2007 and overall, there was a retreat from recognising exceptions. The lead note in extensive guidance on confidentiality stated that solicitors 'should only provide such information as you are strictly required by law to disclose' when approached by public authorities.¹²¹

The BSB CC 2014 contained warnings against actions prejudicial to the administration of justice,¹²² but no indication that such duties extended beyond those already recognised in litigation and advocacy. None of the numerous reporting obligations in the new codes related to the client population.¹²³ Even the duty to report serious misconduct among solicitors was expressly subject to client confidentiality.¹²⁴ Previous hints that confidentiality could be breached in exceptional circumstances had been excised, with the result that public interest duties receded slightly in the SRA CC 2011. In contrast to the position of the domestic professions, the ABA MR made express provision for protection of the public interest. Model rule 1.6 permitted breach of client confidentiality to prevent 'reasonably certain death or substantial bodily harm'¹²⁵ or specific physical harms to another. Comment on the rule suggested that a lawyer may report a client who accidentally discharged toxic waste into a town's water supply to the authorities if there was a 'present and substantial risk' that persons would 'contract a life-threatening or debilitating disease and the lawyer's disclosure was necessary to eliminate the threat or reduce the number of victims'.¹²⁶ It also permitted disclosure 'to prevent, mitigate or rectify substantial injury to the financial interests or property of another' where this was likely to result or had resulted from the client's commission of a crime or fraud in furtherance of which the client had used the lawyer's services.¹²⁷ Although the rule was permissive rather than mandatory, it may have encouraged compliance by increasing the risk of common law liability. The absence of similar specific obligations to the public interest in the domestic codes placed solicitors and barristers higher on the P2 index than attorneys.

D. Third parties

ABA Model Rule 1.6, considered in the previous section, potentially operated for the benefit of individual third parties, particularly identifiable individuals threatened with death or bodily harm by clients. Neither the solicitors' nor barristers' codes currently contain any similar provision. The BCC 1981 had limited focus on the interests of individual third parties. Specific examples were limited to not alleging fraud without credible evidence,¹²⁸ and limitations on cross-examining witnesses, such as not asking questions 'which are merely scandalous or intended or calculated only to vilify insult or annoy'.¹²⁹ Despite containing a chapter entitled 'Behaving Ethically', the BSB 2014 contained little innovation, but was dominated by an outcome, and rule, concerned with behaving with 'honesty, integrity and independence'.¹³⁰ Six of the eight

¹²⁰ *Ibid*, Guidance note 1.

¹²¹ SCC 2007 Rule 4 Confidentiality and Disclosure, Guidance note 4.

¹²² BCC 2014 gC25.

¹²³ SRA 2011 O.10.04.

¹²⁴ *Ibid*, O.10.4.

¹²⁵ ABA MR r1.6(1).

¹²⁶ *Ibid*, Comment on r1.6, note 6.

¹²⁷ *Ibid*, r1.6(3).

¹²⁸ BCC 1981 r704(c).

¹²⁹ *Ibid*, r708(g) and see generally r708(h) to (j).

¹³⁰ BSB 2014 Chapter 2 Behaving ethically oC6 and rC9.

sub-rules in the chapter were familiar examples from the old code. The rules were not adapted, for example, to address recent controversies regarding the hostile treatment of vulnerable witnesses under cross-examination by barristers.¹³¹

The Solicitors Practice Rules imposed no specific third party duties. *The Guide* introduced a potentially onerous duty of frankness and good faith towards other solicitors,¹³² but the SCC 2007 only adopted one rule, also previously in *The Guide*, not to ‘use your position to take unfair advantage of anyone either for your own benefit or for another person’s benefit’.¹³³ Subordinate rules provided examples which were limited in scope; agreeing costs, dealing with unqualified persons and not making unjustifiable claims in letters before action.¹³⁴ *The Guide* also provided the most substantial provision relating to third parties in general, again in the guidance on confidentiality.¹³⁵ Advice to the effect that confidence could be broken where it was necessary to prevent a client causing serious bodily harm¹³⁶ was similar to the provision in the ABA MR. It is traceable to advice in Lund’s book that solicitors could inform police of a client’s intent to murder.¹³⁷ *The Guide* did not go that far, but advised that a solicitor ‘may reveal confidential information to the extent that he or she believes necessary’.¹³⁸ The SCC 2007 retained this guidance,¹³⁹ but it was not translated into SRA CC 2011. The current code retained the obligation not to take unfair advantage,¹⁴⁰ but the indicative behaviours did not stipulate reporting obligations or permissions. The latest rules for both solicitors and barristers therefore contained limited duties to third parties compared with those applying to attorneys. This lack of constraint in pursuing client interests arguably strengthened barristers’ and solicitors’ identification with the standard conception and hence raised their position on the P2 index. This is, however, a freedom rather than an obligation.

E. The profession

Obligations owed to the profession could be invoked as constraints on neutral partisanship, but such provisions in the code tend to be either anodyne or imprecise. An example of the first kind of provision was a chapter in *The Guide* on relations with the Bar and other lawyers containing little more than exhortations to pay professional fees on time.¹⁴¹ An example of the second type is the rule in the BCC 2014 demanding honesty, integrity and independence. While this potentially constrained the conduct permitted under P1, it provided no assistance in defining the line between acceptable and unacceptable conduct. Rather, recent codes tended to focus on cooperation with regulators, including obligations to report fellow professionals, rather than substantive obligations. A duty on solicitors to report ‘serious misconduct’ was originally included as a single rule in *The Guide*,¹⁴² but the SCC 2007

¹³¹ BSB 2014 rC9.3-rC9.6.

¹³² N Taylor (ed) *The Guide to the Professional Conduct of Solicitors* (8th Edition) (London: The Law Society, 1999) r.19.01.

¹³³ SCC 2007 r 10.01.

¹³⁴ *Ibid.*, r17.03- r17.05.

¹³⁵ *Ibid.*, r16.02.

¹³⁶ *Ibid.*, Guidance note 3.

¹³⁷ Lund (n 64) 103.

¹³⁸ Taylor (n 132) r. 16.02, Guidance note 3.

¹³⁹ SCC 2007, Rule 4 Confidentiality and Disclosure Guidance note 13.

¹⁴⁰ SRA 2011, O(11.1).

¹⁴¹ Taylor (n 132) Chapter 20 ‘Relations with the Bar, other lawyers and professional agents’.

¹⁴² *Ibid.*, r19.04.

developed this as part of ‘a systematic and effective approach to management’.¹⁴³ Duties owed to regulators were expanded to four rules, covering co-operation, reporting, not obstructing complaints and production of documents.¹⁴⁴

The SRA CC 2011 chapter ‘You and Your Regulator’ included 13 outcomes and 12 indicative behaviours. They included measures requiring principals to report members of their own firms.¹⁴⁵ Barristers responded to the BSB consultation on its proposed new code by arguing that similar provisions would encourage abuse, such as reporting opponents as a litigation tactic, but responses from consumer organisations, arguing that it was unreasonable to expect consumers to police the profession, prevailed.¹⁴⁶ A chapter in the BSB CC 2014 therefore contained a relatively light three outcomes, and a reporting requirement,¹⁴⁷ but considerable guidance on expectations of barristers’ relationship with the BSB.¹⁴⁸ While these kinds of provision may help protect collective professional reputation by encouraging a culture of surveillance, they do not alter substantive obligations. While, therefore, onerous duties towards the profession may constrain partisan conduct on behalf of clients, the extension of reporting duties set out in the current codes is relatively neutral in terms of the indicators in Table 1.

F. An overview of the codes and introduction to the standards

Detailed analysis of the key provisions of the new codes of conduct confirm the usefulness of the standard conception as a measure, but call into question the assumption that it is a uniform standard.¹⁴⁹ Both domestic legal professions are at different points on four indexes for neutrality and partisanship when compared with each other and with attorneys in the US. The cab rank rule places barristers higher than attorneys and solicitors on N1 in relation to advocacy clients. The attorneys’ obligation to pursue client objectives suggests that they are higher on the N2 index, whereas the domestic professions’ obligation to pursue clients’ best interests gives them a low placing on that index. Attorneys and barristers are high on the first limb of P1 because they promise clients that they will act up to the limits of the law, while solicitors make no such promise. Attorneys have more explicit permissions to protect third party interests than either barristers or solicitors. The failure of the domestic professions to match the ABA Model Code in protecting third party interests increases their markers on the P2 index. While it would decrease markers for neutrality and partisanship, providing reporting permissions would increase the distinctions between legal professionals and business practice. These conclusions suggest some alignment of attorneys’ and barristers’ codes around role-differentiated norms consistent with the standard conception. The solicitors currently occupy low markers on these indexes, suggesting that their norms may be closer to business norms than those of barristers and attorneys. This may be because the standard conception does not adequately capture the ethical orientation of transaction lawyers.

The next section explores the origins and interpretation of the high level standards and compares those produced for solicitors and for barristers. As independent regulatory

¹⁴³ P Camp ‘Countdown to the Code: Taking the plunge’ *Law Society Gazette* 14th June, 2007, 18.

¹⁴⁴ SCC 2007 Rule 20 ‘Requirements of Practice’ 20.03-20.06.

¹⁴⁵ SRA CC R20.04(b).

¹⁴⁶ BSB (n 77) 14-15.

¹⁴⁷ BSB CC r C66.

¹⁴⁸ *Ibid* Chapter 4 ‘You and Your Regulator’.

¹⁴⁹ See eg Dare (n 8) 6.

standards, these lists are an integral part of the regulatory framework established by the handbooks. It is therefore necessary to consider the relationship between the standards and other normative sources, such as codes of conduct and professional narratives. In preceding sections it was suggested that these present quite different orientations to the rule of law and to the standard conception. It might therefore be expected that there would be significant differences in the high-level standards of solicitors and barristers. In fact, as will be seen, they are virtually identical, but such differences as do exist are contradictory and counter-intuitive. This conclusion forms the basis for Section VI, which considers the significance of the handbooks in general and in the light of these inconsistencies.

V. Core Principles and Duties

The SRA CC 2011 was not the first time that the solicitors' rule book had used principles; the Law Society originally selected five for the SPR 1987. Practice Rule 1 stated that 'a solicitor shall not directly or indirectly obtain instructions for professional work or permit another person to do so on his behalf, or do anything in the course of practising as a solicitor, in any manner which compromises or impairs or is likely to compromise or impair 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 solicitor's profession;
- (e) the solicitor's proper standard of work.'

In assessing the significance and meaning of individual items in such a list it is necessary to consider the context of creation. Both the prelude to the principles and principle (b) continued a preoccupation of the SPR 1936 with attracting instructions. As explained in *The Guide*, it was seen as imperative that solicitors' advice was not tainted by arrangements for obtaining work.¹⁵⁰ As regards a rationale for selection, it appeared that the principles addressed a range of key audiences; clients (c and e), third parties (a), the state (f) and profession (d). For evidence that such lists are also strategic it is only necessary to note that, just a year after the Law Society's first effort, SPR 1988 appeared with a new sixth principle, (f) the solicitor's duty to the Court. This was undoubtedly added in anticipation of the acquisition of powers to grant higher rights of audience.

The appearance of integrity and independence on the same line illustrates the proposition that the interpretation of such standards is not always obvious. Items in lists can be discontinuous, with each unit maintaining its individuality as a particular instance, and accretive, with each unit contributing to collective meaning.¹⁵¹ With any list, unanticipated dynamics develop when apparent 'strangers', such as integrity and independence, are held together. Without an appreciation of context the reason for the juxtaposition is unclear. One possible interpretation is that integrity refers to honesty, or a standard slightly less demanding than honesty, a reading supported by the fact that solicitors are often charged with lack of integrity in

¹⁵⁰ Taylor (n 132) Obtaining Instructions: Solicitor's independence and clients' freedom of choice r.11.01, 222.

¹⁵¹ R E Belknap 'The Literary List: A Survey of its Uses and Deployments' (2000) 2.1 *Literary Imagination: The Review of the Association of Literary Scholars and Critics* 35, 39-40.

disciplinary proceedings.¹⁵² Another is that integrity is distinct from honesty and refers to ‘wholeness’; conformity with the ethics of role. This reading is also consistent with the approach in recent professional disciplinary cases.¹⁵³ It is also consistent with usage in other professions, where lacking integrity may be linked with an integral feature of particular occupations. Accountants, for example, may lack integrity if they do not display objectivity.¹⁵⁴ A context that may link principle (a) with (b) is that SPR 1990 was produced in the shadow of government threats to eliminate restrictive trade practices in the professions.¹⁵⁵ The Law Society’s intention was to screen the rules while doing what was possible to protect ‘independence’ from multi-disciplinary and multi-national partnerships, competition, referrals and cross-selling, for example, of conveyancing and estate agency services.¹⁵⁶ The Law Society’s pressing concern was the threat to solicitors’ practices from pressures to limit their freedom of action.¹⁵⁷ Therefore, one of only two pieces of guidance provided on the principles suggested that solicitors would infringe them if they agreed never to act against an opposing party again as a term of a settlement.¹⁵⁸

The principles in SPR 1990 were to be reviewed by the Law Society’s Regulation Review Working Group, which was then engaged in the process which led to SCC 2007. In 2000 the chairman promised that the proposed code would ‘include values which distinguish the solicitors’ profession from others’, replacing the six principles in Practice Rule 1 with ‘ten commandments’¹⁵⁹:

1. Acting with integrity
2. Maintaining independence
3. Making the client’s interests paramount subject to duties to justice and professional conduct
4. Maintaining confidentiality
5. Avoiding conflicts of interest
6. Acting competently
7. Treating clients fairly
8. Maintaining client care procedures
9. Maintaining appropriate business systems
10. Acting so as to not damage the integrity of the profession

In line with the chairman’s promise that the new code would ‘be realistic rather than aspirational’ there were no explicit references to third party or public interests. The list even omitted the consumer provision, freedom to instruct a solicitor of choice, and the public interest provision, observing the duty to the court. Therefore, despite the proposed list being

¹⁵² P Case ‘Doctoring Confidence and Soliciting Trust: Models of Professional Discipline in Law and Medicine’ (2013) 29 *Journal of Professional Negligence* 87.

¹⁵³ *Hoodless and Blackwell v FSA* [2003] FSMT 007.

¹⁵⁴ J Maurice ‘Professional Ethics — All You Ever Wanted To Know’ (2007) 18:9 *Practical Audit & Accounting* 103.

¹⁵⁵ ‘Law Society - Practice rules revision yet again!’ (1990) *Law Society Gazette*, 17 January, 87 (14).

¹⁵⁶ J Loosemore and R Parsons ‘Solicitors - For sale – the legal profession (going cheap!)’ (1987) *Law Society Gazette*, 9 Sep, 84 (2501).

¹⁵⁷ M J Spears ‘Professional independence’ (1987) *Law Society Gazette* 15 Oct, 84 (2904).

¹⁵⁸ Taylor (n 65) 19.

¹⁵⁹ E Nally ‘Setting a standard’ (2000) *Law Society Gazette*, 7th Jan, 28.

longer than the previous version, it was also more client-focused. As Levin explained, '[t]he vision does not mention duties to society (too wide and uncertain) and neither does it mention duties to uphold the reputation of the profession (too self-regarding)'.¹⁶⁰

In 2003, while the Law Society was consulting on the new code, the chair of the working group wrote an article claiming an effort 'to link the core duties into the more detailed rules so that there is cohesion between [the] different layers'.¹⁶¹ A later article suggested that the Law Society Council had approved the code but that the Department of Constitutional Affairs had 'required some amendments to be made to the original draft'.¹⁶² These changes were not specified but the article then referred to six core principles. These were:

- 1.01 You must uphold the rule of law and the proper administration of justice.
- 1.02 You must act with integrity.
- 1.03 You must not allow your independence to be compromised.
- 1.04 You must act in the best interests of each client.
- 1.05 You must provide a good standard of service to your clients.
- 1.06 You must not behave in a way that is likely to diminish the trust the public places in you or the profession.

As in the working group's first list, there was no freedom to instruct a solicitor of choice. This, it appeared, was because insurers, trade unions and others had fatally undermined the principle. A commentary on the omission noted that 'in exceptional circumstances, where it is in the client's best interest and where there is no compromise of a solicitor's independence, it might be appropriate for a client to agree with a third party that they will use the services of a particular solicitor only'.¹⁶³ While the principle had disappeared, it was stated that such arrangements could still breach core duties 1.03 and 1.04. The more detailed code of conduct also provided that solicitors could not make arrangements that would fetter their freedom to make recommendations.¹⁶⁴ The duty of confidentiality had been removed from the list proposed by the working group, while the duty to the court was restored, albeit more broadly expressed, in the second part of the first principle.

The working party proposal to separate principles relating to integrity and independence survived. Integrity was said to refer to duties towards clients, the courts, lawyers and others,¹⁶⁵ including not knowingly giving false or misleading information and honouring professional undertakings. Independence meant avoiding 'pressure from clients, the courts, or any other source'.¹⁶⁶ This suggested that the original conjoining of the now separated items was no accident; solicitors' integrity was the goal and maintaining formal independence was the means to that end. The decision to separate independence and integrity afforded flexibility to argue, for example, that employed solicitor advocates would be sufficiently independent to prioritise the duty to the court.¹⁶⁷ In addition to the substantive changes to the list, there were

¹⁶⁰ Levin (n 67).

¹⁶¹ E Nally 'Regulation: Rules Review -- The Closing Stages' (2003) *Law Society Gazette*, 10 Apr, 34.

¹⁶² Camp (n 138).

¹⁶³ *Ibid.*

¹⁶⁴ SCC 2007 r9.03(2).

¹⁶⁵ Nally (n 161).

¹⁶⁶ *Ibid.*

¹⁶⁷ P Walker 'All in the line of duty' (2001) *Law Society Gazette*, 25 Oct, 15.

also changes in the expression of the principles. The working party's original item, making 'the client's interests paramount', had changed back to the Practice Rule 1 wording, 'acting in clients' best interests'.

The meeting papers of five Law Society committees over the relevant period revealed no reason for the reduction in the working group's list or the changes of emphasis.¹⁶⁸ The possibility that the new list was influenced by the Department of Constitutional Affairs is enhanced by the adoption, unheralded, of Principle 1.01. Neither profession had previously mentioned the rule of law in their codes or regulations, but it was a proposed regulatory objective of the LSA. It was not obvious why 'upholding the rule of law' appeared in the same principle as acting with independence in the interests of justice. Did the authors see these concepts as similar, or as what they seem to be, contrasting and balancing norms? If they were seen to be in conflict, there was no explanation of how they related. Guidance, first appearing in the *The Guide* but included with subsequent editions of the principles, suggested that conflicts between principles should be 'decided by the public interest and especially the interests of the administration of justice'.¹⁶⁹ This presumably applied to potential conflicts within a principle. If so, in the event of conflict, the proper administration of justice trumped the rule of law.

Just prior to the publication of the SCC 2007 the Chair of the SRA Board claimed that '[i]n about 70 words, rule 1 sets out what should be at the heart of what it means to be a solicitor. These core duties are the overarching framework within which the other 25 rules can be understood.'¹⁷⁰ Given that the changes appear to have occurred following submission of the draft code, it seems unlikely that any detailed mapping of principles and rules that had taken place would have survived. Nevertheless, and despite the lack of transparency regarding the process by which the principles for SCC 2007 were agreed, the SRA CC 2011 adopted the same first six principles. Moreover, four additional principles merely covered cooperation with regulators and conduct of business issues.

The Bar did not include a separate list of principles with its codes of conduct until the publication of BSB CC 2014. The introduction to BCC 1981 did, however, explain that the rules and standards were intended to ensure that self-employed barristers were '... completely independent in conduct and in professional standing as sole practitioners... to act only as consultants instructed by solicitors and other approved persons ... and to acknowledge a public obligation based on the paramount need for access to justice to act for any client in cases within their field of practice.'¹⁷¹ The code thereby identified role independence, ethical independence and neutrality in client selection as its three main values. In consulting on the proposed code for barristers in 2011 the BSB proposed eight core duties. These are set out in the second column of Table 1, together with two later additions; cooperation with regulators (CD9) and practice management duties (CD10).

Comparison of the core principles and duties of the professions in Table 1 reveals that the standards outlined are almost identical, with items relating to protecting client money (SRA) and confidentiality (BSB) representing the only substantive differences. This convergence

¹⁶⁸ Email from the Law Society Information Compliance Manager dated 4th December 2015 (on file with author).

¹⁶⁹ Taylor (n 65).

¹⁷⁰ P Williamson 'By The Book: Good Conduct' (2006) *Law Society Gazette*, 23 Nov, 17.

¹⁷¹ BCC 1981 para 104.

may be explained by emulation. Evidence of the operation of this process is most clearly observed in the transition of duties to the profession, from issues of reputation in the earlier codes to issues of trust in later versions. The BCC 1981 included a provision proscribing conduct ‘... likely to diminish public confidence in the legal profession or ... which otherwise bring the legal profession into disrepute’¹⁷² while the SPC 1990 provided that solicitors were not to do anything that compromised ‘the good repute... of the solicitors’ profession’.¹⁷³ The SCC 2007 abandoned focus on the profession’s reputation in favour of ‘the trust the public places in you and the profession’,¹⁷⁴ and both the SRA (Principle 7) and BSB (CD 5) continued in this vein. It seems reasonable to conclude that regulators refer to the principles of comparable occupations when compiling their own.

Table 1: Comparing the core principles and duties of the legal profession’s new codes of conduct

SRA Principles ¹⁷⁵	BSB Core Duties ¹⁷⁶
<ol style="list-style-type: none"> 1. uphold the rule of law and the proper administration of justice; 2. act with integrity; 3. not allow your independence to be compromised; 4. act in the best interests of each client; 5. provide a proper standard of service to your clients; 6. behave in a way that maintains the trust the public places in you and in the provision of legal services; 7. comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner; 8. run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles; 9. run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity; and 10. protect client money and assets. 	<p>CD1. You must observe your duty to the court in the administration of justice.</p> <p>CD2. You must act in the best interests of each client.</p> <p>CD3. You must act with honesty and integrity.</p> <p>CD4. You must maintain your independence.</p> <p>CD5. You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession.</p> <p>CD6. You must keep the affairs of each client confidential.</p> <p>CD7. You must provide a competent standard of work and service to each client.</p> <p>CD8. You must not discriminate unlawfully against any person.</p> <p>CD9. You must be open and co-operative with your regulators.</p> <p>CD10. You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way as to achieve compliance with your legal and regulatory obligations.</p>

Apart from the reference to the rule of law in the SRA Handbook, the influence of the public-facing norms characterising the LSA regulatory objectives was not obvious in the lists. Of the professional principles set out in the LSA, the strongest non-client obligation was that litigators and advocates complied ‘... with their duty to the court to act with independence in

¹⁷² BCC 1981 para.301.

¹⁷³ SPR 1990 r 1(d).

¹⁷⁴ SCC 2007 Core Duties r1.6.

¹⁷⁵ SRA *SRA Principles 2011* Version 15.

(<http://www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page>) 23/10/2015.

¹⁷⁶ BSB *Handbook Part:2, The Code of Conduct* (2014) B - The Core Duties.

the interests of justice’,¹⁷⁷ a form of words suggesting a wider obligation than simply a duty not to mislead the court. The regulators’ lists took a different line on this principle. The BSB standard was explicitly framed as ‘your duty to the court’, suggesting a limited obligation not to mislead as set out in BSB CC 2014. The equivalent SRA principle, upholding the proper administration of justice, was actually broader than both the LSA objective and the BSB standard, because it was not framed by reference to the duty to the court. This interpretation was supported by importation of the idea, from the SCC 2007, that conflict between principles should be resolved in a way that ‘serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice’.¹⁷⁸ The addition of ‘especially’ suggested a potentially broader scope of application than just litigation and advocacy. Given that such application was likely to occur in the area of public interest disclosures in breach of confidence and LPP, neither of which was supported by the codes, the guidance may have been misleading.

As with any list, the legal professions’ lists of standards have a ‘load-limit’; what can be represented within the context.¹⁷⁹ Whereas a list of six was deemed adequate before the LSA, both regulators now have 10 standards. In both lists, however, the additional four standards tend to relate to practice management issues. Load limits force compilers to consider matters such as priorities for inclusion and levels of generality. It is noticeable that both of the current lists present a range of norms that are not exclusively client-facing. They move from public-facing norms, through character, duties to clients to business requirements. This suggests that the lists do not just address regulated parties, but are intended to communicate with various audiences. The common ground for both regulators is that the persons they approve prioritise their duty to the administration of justice and acting with integrity, meaning, as argued earlier in this section, behaving consistently with role. Obligations to clients come behind these duties. The hypothesis that the standards and the principles address different audiences is supported by the fact that the order of the lists may be at odds with the sequence of substantive obligations in codes of conduct. The SRA code, for example, sets out the responsibilities litigators and advocates owe to the courts much later in the order than client responsibilities. While the regulators may claim that the sequences in the lists are random, this seems unlikely. The consultation document for the BSB CC 2014 stated that items in the draft list were not presented in any order of importance¹⁸⁰ but the movement of the duty to clients from CD6 to CD2, between the consultation and final version, suggests purposive ordering.

VI. Conclusion: Presenting and interpreting narratives, standards and values

Analysis of the regulatory handbooks created since the LSA confirms that the legal regulators largely re-formulated longstanding professional norms. Despite the underlying consumerist and public interest rationale of the Act, the professions’ new codes did not make radical changes. The barristers’ rules set out in BCC 2014 continued to focus on an advocacy role, based on neutrality and partisanship, the underlying basis of which were similar to that found in the ABA Model Rules. The solicitors’ rules contained in SRA 2011 did not support role-differentiated behaviour in key aspects of the standard conception, but nor did they increase substantive commitments to consumers, to increasing client autonomy or to reducing harm to

¹⁷⁷ LSA 2007 s. 1(3)d.

¹⁷⁸ SC 2007 Guidance to r1, para 3, *SRA Handbook 2011*, The Principles.

¹⁷⁹ Belknap (n 151) 52.

¹⁸⁰ BSB (n 77) para 40(i).

third parties. Indeed, the trend in the solicitors' rules over time has been toward reducing what may be regarded as more ethically-based obligations and increasing bureaucratic requirements. As a result of the pattern whereby core rules tend to be reproduced and minor rules and guidance omitted, the normative obligations in both sets of rules seem to be hardening around core roles. This process is likely to continue when the SRA seeks to further reduce the size of the handbook for solicitors in 2016.¹⁸¹ It can be argued that contraction of the rules and guidance has a number of implications. Among the most likely is that it is indicative of movement towards regulation using only broad principles. This process may decrease normative differences between the regulated group and other occupations or place increased reliance on cultural understanding of practice norms.

In creating the high-level standards the SRA adopted the principles established in the SPR 1990, while the BSB appears to have been heavily influenced by the SRA's list. The strong similarity in the high level standards of barristers and solicitors focused attention on the small but remarkable differences that did exist. Each profession claimed a value that, according to their respective narratives, was the other's central rationale, but the profession more strongly associated with that value did not claim it. Thus, confidentiality appeared in the Bars' list but not the solicitors, while barristers, but not solicitors, claimed honesty. The most striking omission was, however, the failure of barristers to match the solicitors' commitment to maintaining the rule of law. The position in the lists of standards therefore contradicted the position maintained in the codes of conduct. The BCC 2014 reflected the ideology of advocacy and the values of neutrality and partisanship. The solicitors, in contrast, having initially adopted the Bar's advocacy norms as part of the higher rights regime, diluted them in SCC 2007 by withdrawing special duties to advocacy consumers and the higher standard for partisanship for advocacy clients. As a consequence, barristers and solicitors offer advocacy consumers quite different normative commitments.

It cannot truly be said that the BSB list of core values represented a 'distillation of collective experience and reflection'.¹⁸² As demonstrated, the Bar's codes of conduct consistently claimed a commitment to defending a particular conception of the rule of law that solicitors did not. Yet, the absence of any representation of neutrality or the cab rank rule in the BSB core values belied the Bar's fierce commitment to what it generally treated as an iconic institution. When consultants appointed by the legal oversight regulator opined that the rule was anachronistic and redundant,¹⁸³ the Bar Council and BSB issued a lengthy methodological and philosophical riposte¹⁸⁴ and legal critique.¹⁸⁵ A sometimes cynical blogging barristers' clerk said of the cab rank rule '[b]arristers really, really believe in it. Not

¹⁸¹ SRA *Looking to the future: Flexibility and public protection - a phased review of our regulatory approach* (<https://www.sra.org.uk/sra/policy/future/position-paper.page>)

¹⁸² Frankel (n1).

¹⁸³ J Flood and M Hvvid *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market* (last accessed 19/11/2015 on https://research.legalservicesboard.org.uk/wp-content/media/Cab-Rank-Rule_final-2013.pdf).

¹⁸⁴ S Kentridge *The cab rank rule: A Response to the Report Commissioned by the Legal Services Board* (http://live.barcouncil.netextra.net/media/203452/sir_sydney_kentridge_crr_response.pdf) p12. (last accessed 26/11/2015).

¹⁸⁵ M McLaren, C Ulyatt and C Knowles *The "cab rank rule": a fresh view* (https://www.barstandardsboard.org.uk/media/1460590/bsb_-_cab_rank_rule_paper_28_2_13_v6_final_.pdf) (last accessed 26/11/2015).

all barristers but the vast majority cling to its virtue and its values'.¹⁸⁶ Indicating that the values of solicitors and barristers were almost identical invited the conclusion that there was no need for separate regulation. By underplaying its unique commitment to legalism the regulator did not, in the public relations jargon, present the Bar's unique selling proposition. Inadequate attention to the Bar's narrative and codes when producing the BSB core values may yet prove problematic politically.

The solicitors' high-level principles can be criticised from a different perspective; they are so familiar that they are largely taken for granted. They were, however, relatively unexamined from the start. The consultation leading to the SPR 1990 received 489 responses but only six comments on the principles.¹⁸⁷ In the SPR 1990 the principles in the lists and the content of the rules were not congruent, a problem addressed by explanatory material in *The Guide*, but not since. When it reviews the SRA handbook in 2016, the SRA promises that it is 'keen to explore whether: we have the right number of principles... whether the current principles remain fit for purpose or need to be revised and/or whether any of the current content can, or should, be better reflected in our Code of Conduct'.¹⁸⁸ It has been argued here that this last point is an essential requirement for review. The SRA proposition that '... the current Principles may now be embedded and understood...' is unduly optimistic. In fact, lack of clarity in relation to the high-level standards potentially impedes the functions of regulation, aspiration and education.

In terms of regulation, lists of standards were a central pillar of the new principles-based regulatory method which the legal sector, and other important service sectors in the United Kingdom, were encouraged to use.¹⁸⁹ The system treats standards as mandatory and enforceable independently of codes of conduct. One of the justifications of this approach is that it deprives regulated parties of opportunities for manipulation presented by more detailed rules.¹⁹⁰ In long-standing debates regarding the form of ethics codes, a critical issue is the need to strike a balance between simplicity and detail.¹⁹¹ Ideally, there should be freedom to make ethical decisions in a context where there is clarity about the relevant values. It is therefore important that high-level standards are either self-explanatory or adequately explained.¹⁹² Whereas the code of conduct may be the obvious place to provide explanation, the trend towards trimming the codes potentially leads to reduced clarity. It also increases doubt about the currency of previous norms and removes the facility to organically grow new obligations, for example, by initially formulating them as guidance. Some alternative explanatory format may therefore need to be created.

¹⁸⁶ Notabarrister 'The Cab Rank Rule – What is it good for? (Absolutely nothing?)' January 2013 (<https://notabarrister.wordpress.com/2013/01/29/the-cab-rank-rule-what-is-it-good-for-absolutely-nothing/>) last visited 22/09/2015.

¹⁸⁷ Standards and Guidance Committee meeting 16th May 1990.

¹⁸⁸ SRA (n 181).

¹⁸⁹ J Black 'Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis' (2012) 75:6 *Modern Law Review* 1037.

¹⁹⁰ See e.g. J Black 'The Rise (and Fall?) of Principles Based Regulation' in K Alexander and N Moloney (eds), *Law Reform and Financial Markets* (Cheltenham: Edward Elgar, 2011) 24.

¹⁹¹ Gilman (n5) 24-5.

¹⁹² L Cunningham 'A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation and Accounting' (2007) 60 *Vanderbilt Law Review* 1411.

A prediction that the move to principles based regulation would increase uncertainty among solicitors¹⁹³ was borne out by a survey which found that two fifths of 1001 solicitors' firms thought the new regulatory standards were not clear.¹⁹⁴ The academic literature has also reflected uncertainty. Two recent articles argued that the principle that solicitors uphold the rule of law could be used to hold commercial lawyers accountable for work which assisted corporate clients' efforts to avoid regulation in other countries¹⁹⁵ or for schemes which '...while strictly legal, undermine the spirit of the law'.¹⁹⁶ Such interpretations of rule of law obligations did not reflect the traditional commitments to legalism. These defend the right of citizens, and corporations, to receive confidential legal counsel protected by LPP, even regarding possibly illegal activity,¹⁹⁷ provided their lawyers do not participate in such activity.¹⁹⁸ The apparent scope for debate on this issue illustrates why, if regulators bolt broad new principles to existing normative frameworks, they should explain what they mean.

In terms of the aspirational and educational functions of a handbook, it is important to consider potential for development, communication, interpretation, education and training and evaluation.¹⁹⁹ There is no evidence that the compilers of the various editions of the SPR saw their lists of standards as statements of values, but the compilers of the SCC 2007 certainly expected that their principles would be read and criticised as such.²⁰⁰ Any lack of clarity and incongruence between narratives, codes of conduct and values are a potential barrier to effective education. The final report of the Legal Education and Training Review, which was intended to help redefine education in the legal services market, recommended that 'all authorised persons receiving some education in legal values and regulators are encouraged to consider developing a broad approach to this subject rather than a limited focus on conduct rules or principles'.²⁰¹ If the values referred to are those reflected in the handbooks, designing an authoritative curriculum around them could be problematic. When legal professions refer to supporting the rule of law, are they referring to the standard conception of the lawyer's role or do they mean something more general, such as acting in the public interest? The answer is important. In a context where professions generally are marginalised, effectively communicating distinctive legal values to students, practitioners, the public and governments could play an important role in preserving a degree of autonomy for lawyers as groups with a fundamentally important social role. From that point of view, representations of narratives, standards and values must present a consistent, clear and grounded vision.

¹⁹³ Willis (n 82).

¹⁹⁴ The Law Society *Regulatory Performance Survey: Winter 2012/13* (London: The Law Society, 2013) 36.

¹⁹⁵ D Kershaw and R Moorhead 'Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession' (2013) 76 *Modern Law Review* 26.

¹⁹⁶ J Loughrey 'Accountability and the Regulation of the Large Law Firm Lawyer' (2014) 77(5) *Modern Law Review* 732, 758-759.

¹⁹⁷ *Three Rivers District Council & Others* (n 34) per Baroness Hale at para 61.

¹⁹⁸ *R v Cox & Railton* (1884) 14 QBD 153.

¹⁹⁹ Gilman (n5) 25.

²⁰⁰ R G Pearce 'MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values' (2004) 23 *Pace Law Review* 575.

²⁰¹ *Legal Education and Training Review: Final Report* (London, SRA, BSB, IPS, 2013) p.xiii.

