

FEDERATION OF EUROPEAN BARS CONGRESS. TORQUAY 16 OCTOBER 2008
CORE DUTIES OF THE LAWYER: TRAINING THE NEXT GENERATION

Sara Chandler

Introduction:

This paper will set out briefly the core duties of solicitors and barristers. It will describe the legal context of regulation in which the core duties are set. The paper will then look at the training given to law students at the vocational stage of training. The paper looks first at the Solicitors' Code of Conduct, and secondly at the Barristers' Code of Conduct.

1. Core duties and the Solicitors' Code of Conduct:

The representative association of solicitors, the Law Society of England & Wales is the rule maker for the solicitors' profession. The rules are set under Part 11 of the Solicitors Act 1974 and Section 9 of the Administration of Justice Act 1985, with concurrence of the Master of the Rolls and the approval of the Secretary of State for Constitutional Affairs under Schedule 4 to the Courts and Legal Services Act 1990, subsequently the Secretary of State for Justice under the Legal Services Act 2007.

The current rules were set by the Law Society in the Solicitors Code of Conduct 2007, and also the Solicitors' Account Rules 1998. The aims of the Code are to ensure that the profession is able to meet the needs of its clients and society. The overarching principles are contained in the Core Duties. The solicitor serves society by upholding the rule of law, and serves clients by making their clients' business their first concern. The regulatory authority of the Law Society is the Solicitors Regulation Authority (SRA) established in January 2006 and regulates 134,000 solicitors. Complaints about solicitors are made by members of the public to the Legal Complaints Service. The SRA publishes the Code of Conduct and Solicitors' Accounts Rules.

What are the Core Duties of a solicitor?

Rule 1 of the Code of Conduct cites 6 core duties:

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

The solicitors' rules are supplemented by guidance which is contained in Appendix 1 to this paper.

2. Core duties and the Barristers' Code of Conduct:

The Code was adopted by the General Council of the Bar of England and Wales in September 2004 and came into force on 31 October 2004. The General Council is the representative association of the barristers' profession and sets the rules. The powers of the Bar to set the rules are set out in the Courts and Legal Services Act 1990 and the Legal Services Act 2007. The regulatory authority for the Bar is the Bar Standards Board, established in 2006, which regulates 15,000 barristers. Complaints are referred to the Complaints Commissioner, and the Conduct Committee.

The purpose of the code is to provide requirements for practice, rules and standards of conduct. Self employed barristers are required to be completely independent, act only as consultants instructed by solicitors and other approved persons and 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. The fundamental principles underpinning the code are found in paragraph 301 of the code:

“a barrister....must not: engage in conduct whether in pursuit of his profession or otherwise which is dishonest or otherwise discreditable to a barrister; prejudicial to the administration of justice; or likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.”

The fundamental principles are contained in Appendix 2 to this paper.

Five values underpin the barristers' Code:

- Justice;
- Respect for the law;
- Client autonomy;
- Confidentiality and
- Honesty.

These values may give rise to conflicts and the barrister has to act with judgement as to which are appropriate in differing circumstances. A barrister has an overriding duty to the Court to act with independence in the interests of justice and to assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court. There is a concept of role morality which assists barristers in resolving conflicts between the differing values outlined above. Sometimes, barristers are placed in a situation when they will act for their client in a way in which they would not be able to justify morally for themselves. The adversarial system in the UK requires barristers to be skilled partisan advocates, and also requires there to be an equality of arms between opponents. The neutral decision maker is the tribunal not the lawyer. The “cab-rank” rule requires barristers to accept any case which is within their competence and ability to undertake, and a barrister may not refuse a case if offered under these conditions, unless other rules such as conflict of interest override the rule.

Rule of Law and Respect for Human Rights

Solicitors and barristers have as central core the duty to uphold the rule of law, and respect for the human rights of the individual is an important part of this core duty. Respect for the rights of all is encompassed within the Human Rights Act 1998, which brings the legislation of England and Wales within the European Convention on Human Rights. An important section of the barristers' code is the requirement not to discriminate. The spirit of the Codes of Conduct expects lawyers to go beyond the letter of the rules and to adopt a personal moral standard which places at its centre the defence of the rule of law and respect for human rights.

Legislation in addition to the Codes applying to solicitors and barristers:

In addition to the Codes, lawyers in England & Wales must have regard to rules governing court procedure, which are the Civil Procedure Rules 1998. Any lawyer acting for a publicly funded client who is eligible and within the scope of legal aid must comply with the Access to Justice Act 1999. Regulation of financial transactions has given rise to particular regulation governed by the Financial Standards Authority, and regulation in respect of lawyers' services are subject to money laundering directives brought within the legislation of England and Wales in the Proceeds of Crime Act 2002; Money Laundering Regulations 2003; and the Serious Organised Crime and Police Act 2005.

HOW IS THE NEXT GENERATION TRAINED?

Background:

All lawyers study a three year qualifying undergraduate law degree, or complete a conversion course (Graduate Diploma in Law). This is the preparation for vocational training. All law students who wish to qualify and practice as lawyers must undertake vocational training. For solicitors the training is the Legal Practice Course (one year full time or two years part time) and for barristers it is the Bar Vocational Course (one year full time or two years part time). This is followed by a period of apprenticeship under the guidance of experienced lawyers, known as the Training Contract (solicitors) and Pupillage (barristers).

The core duties of lawyers are integrated into the vocational courses and have been the subject of scrutiny by the profession and its' representative associations. The First Report on Legal Education and Training April 1996 of the Advisory Committee on Legal Education & Training (ACLEC) identified the ethical challenge facing the profession: "From the earliest stages of education and training, intending lawyers should be imbued not only with the standards and codes of professional conduct, but also more generally with the obligations of lawyers to help protect individuals and groups from the abuse of public and private power" ACLEC recognised that "familiarisation of the professional codes of conduct and the machinery for enforcing them was not enough." Trainee lawyers must be made aware

through effective training of their wider obligations to society. The Equality and Diversity Code July 2004 of the Bar Council is provided to assist barristers not to discriminate on any grounds, and to develop good equality of opportunity policies within their chambers and employment.

The Law Society has consulted over the last 6 years on a new framework for training known as the Training Framework Review. This is now in the hands of the Solicitors Regulation Authority. The Training Framework Review has established a list of competencies in which candidates for admission as a solicitor must be proficient. A candidate for qualification as a solicitor must demonstrate a practical understanding of the values, behaviours, attitudes and ethical requirements of a solicitor. Candidates are required to:

- Demonstrate appropriate behaviours and integrity in a range of situations in which understanding and knowledge of the rules of professional conduct have been tested;
- Demonstrate the capacity to deal sensitively and effectively with clients and colleagues from a range of social, economic and ethnic backgrounds, identifying and responding positively and appropriately to issues of culture and disability that might affect communication techniques and influence a client's objectives.

Bar Vocational Course and Legal Practice Course: how are the core duties and ethics taught?

Providers of legal education and training at the vocational stage have a generally similar model of training, with variations depending on resources devoted to activities outside of the lecture theatre or classroom. Most vocational stage providers offer some form of clinical education, or practical training where legal services are delivered pro bono to members of the public by students undergoing their vocational training. For example, The College of Law has a well established programme of clinical legal education including the provision of free advice and representation in Legal Advice Centres.

The most traditional format is delivered through the classroom lecture. Classes are based on Manuals which give guidance and information to students. The typical Manual outlines the legal context of professional conduct rules, and the regulatory framework. Ethical issues are discussed in the Manual and the lecture format is used to identify where students must take particular care. Manuals may outline scenarios and pose questions for the student to answer. Some providers use simulation in the classroom in order to develop scenarios and to assist the students in their learning.

Workshop exercises are becoming more common than the traditional lecture in the curriculum of some providers. This gives each student the opportunity to participate in small group discussions and problem-solving exercises. The section in the Manual which is used for the teaching of the Codes of Conduct gives a series of questions to be answered by the students individually. However, the workshop format enables the teacher and students to

interact and allows the teacher to assess the understanding of the students. A technological innovation is the use of I-Tutorials, study to be done in preparation for the workshop session, which is completed on-line by each student individually. The student logs on to a tutorial that commences with a movie with a short lecture, which explains the law in context. The student is then directed to relevant reading, which they must complete before addressing questions for which they must submit answers before closing the session. This work is forwarded to the tutor before the workshop session, and every student must have completed the I-Tutorial before attending the workshop.

Specific and focussed workshops on ethics are used by some training providers where they provide clinical legal education. An international study of the teaching of ethics in Universities and Law Schools by Nigel Duncan, (City University) and Sara Chandler (The College of Law), is in its second year of survey, and already there are results which show the increasing interest in enabling students to understand the ethical issues they will face as lawyers, and to develop their own moral standards which will guide them throughout their careers as lawyers. There is increasing use of experiential workshops, with learning outcomes based on developing the individual student's professional values and commitment to the ethical practice of the law.

Some clinics run seminars on particular topics which highlight ethical dilemmas and conflicts which the students will encounter in practice. An extra curricular programme of practice related activities is integrated into some vocational programmes, with an option for assessment. The College of Law have a well established programme of speaker meetings known as the Law & Justice Forum. Typical topics are on human rights issues, and speakers range from the Lord Chief Justice to campaigners on anti-human trafficking for example.

Assessment of competence:

The vocational courses are assessed through Course Work and Examinations. Ethical issues and the core duties are embedded in the Legal Practice Course examination questions for the three core examinations. There is also a two hour examination on professional conduct which the student must pass in order to qualify as a solicitor. The BVC has a additional test known as the "red light" test. This test identifies students who have so little understanding of the core duties and the principles of the Code of Conduct that they are not allowed to pass the BVC.

What does society and the legal profession want from future lawyers?

The challenges of the 21st Century are felt acutely in the legal profession, because of its' key role in upholding the rule of law and respect for human rights. The Code of Conduct remains paramount and is central to identifying what is different about the legal profession from other professions. Differing structures of practice, as envisaged by the Legal Services Act 2007 and Alternative Business Structures will mean a changed environment for the future generation of

lawyers. Working alongside accountants, surveyors, and other professionals in the same practice will mean that lawyers will need to be very clear about their moral standards and Codes of Conduct.

The globalisation of legal services can mean that the legal profession may reach a harmonisation of standards and Codes of Conduct. The conduct rules in England and Wales apply to Registered European Lawyers, and Registered Foreign Lawyers. The conduct and practice rules arise out of the traditions of each particular Bar Association or Law Society. It is not desirable that they should be taken out of context. The particular rules in each jurisdiction are based on the same values held by lawyers and in most cases demonstrate a common foundation, based on independence; trust and personal integrity; confidentiality; respect for the rules of other Bars and Law Societies; and service in the best interests of the client. One in ten British lawyers work overseas in a total of 92 overseas jurisdictions, and that proportion is likely to increase steadily.

The major challenge facing lawyers in the current period is the downturn in the world economy and impending recession. Lawyers provide their services in the context of a business. Already the effect of the credit crunch has affected the provision of legal services, especially in the commercial and property sectors. When the economic context is difficult for the professions, the moral standards to which we adhere in our codes of conduct are what hold us together.

Above all lawyers in the 21st Century are the fundamental defenders of the rule of law and respect for human rights. The support of the FBE for lawyers in jurisdictions where lawyers are at risk has been an important part of the FBE's work in recent years. The example of support for the Law Society of Zimbabwe has been one example, as has been the support for human rights lawyers in Colombia. Lawyers have an obligation to act fearlessly, in the face of whatever threats they may receive, and our colleagues in Zimbabwe and Colombia have shown us extreme degrees of courage and dedication to the rule of law and the administration of justice. Without lawyers there is no justice, and without the core values and duties which cement our great profession together lawyers would not be able to stand fearlessly together to defend justice.

6 October 2008

Sara Chandler

**Associate Professor and Director of Pro Bono at the College of Law, London, UK
Past President of City of Westminster and Holborn Law Society.**

APPENDIX 1

GUIDANCE to Rule One of the Solicitors Code of Conduct 2007:

1. A modern just society needs a legal profession which adopts high standards of integrity and professionalism. As a solicitor, registered foreign lawyer (RFL) or registered European lawyer (REL) or recognised body you serve both clients and society. In serving society, you uphold the rule of law and the proper administration of justice. In serving clients, you work in partnership with the client making the client's business your first concern. The core duties contained in Rule One set the standards which will meet the needs of both clients and society.

2. The core duties perform a number of functions;

(a) They define the values which should shape your professional character and be displayed in your professional behaviour.

(b) They form an overarching framework within which the more detailed and context-specific rules in the rest of the Code can be understood, thus illuminating the nature of those obligations and helping you to comply.

(c) The core duties can help you to navigate your way through those situations not covered in the detailed rules, as no code can foresee or address every ethical dilemma which may arise in legal practice.

(d) The core duties are fundamental rules. A breach may result in the imposition of sanctions.

3. Where two or more core duties come into conflict, the factor determining precedence must be the public interest, and especially the public interest in the administration of justice.

Compliance with the core duties, as with all the rules, is subject to any overriding legal obligations.

4. It will be a breach of Rule One if you permit another person to do anything on your behalf which would compromise or impair your ability to comply with any of the core duties.

Justice and the rule of law – 1.01

You have obligations not only to clients but also to the court and to third parties with whom you have dealings on your clients' behalf (see Rule 10 Relations with Third Parties and Rule 11 Litigation and Advocacy)

Integrity – 1.02

Personal integrity is central to your role as the client's trusted adviser and must characterise all your professional dealings –with clients, the court, other lawyers and the public.

Independence – 1.03

See also Rule 3 (Conflicts of interests) and Rule 9 (Referrals of business)

Best interests of clients – 1.04

You must always act in good faith and do your best for each of your clients. Most importantly, you must observe:

(a) Your duty of confidentiality to the client - see Rule 4 (Confidentiality and disclosure)

(b) Your obligations with regard to conflicts of interests - see Rule 3 (Conflicts of interests)

(c) Your obligations not to use your position to take unfair advantage of the client – see Rule 10.01 (Not taking unfair advantage)

Standards of service – 1.05

You must provide a good standard of client care and of work, including the exercise of competence, skill and diligence. Disciplinary action will not always follow where breaches of this duty are minor and isolated.

Public confidence – 1.06

Members of the public must be able to place their trust in you. Any behaviour within or outside your professional practice which undermines this trust damages not only you but the ability of the profession as a whole to serve society.

APPENDIX 2

Bar Code of Conduct 2004 Fundamental Principles

Applicable to all barristers

301. A barrister must have regard to paragraph 104 and must not:

(a) engage in conduct whether in pursuit of his profession or otherwise which is:

(i) dishonest or otherwise discreditable to a barrister;

(ii) prejudicial to the administration of justice; or

(iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;

(b) engage directly or indirectly in any occupation if his association with that occupation may adversely affect the reputation of the Bar or in the case of a practising barrister prejudice his ability to attend properly to his practice.

Applicable to practising barristers

302. A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.

303. A barrister:

(a) must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any professional client or other intermediary or another barrister);

(b) owes his primary duty as between the lay client and any professional client or other intermediary to the lay client and must not permit the intermediary to limit his discretion as to how the interests of the lay client can best be served;

(c) when supplying legal services funded by the Legal Services Commission as part of the Community Legal Service or the Criminal Defence Service owes his primary duty to the lay client subject only to compliance with paragraph 304.

304. A barrister who supplies legal services funded by the Legal Services Commission as part of the Community Legal Service or the Criminal Defence Service must in connection with the supply of such services comply with any duty imposed on him by or under the Access to Justice Act 1999 or any regulations or code in effect under that Act...

305.1. A barrister must not in relation to any other person (including a client or another barrister or a pupil or an employee or a student member of an Inn of Court) discriminate directly or indirectly because of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability, age, religion or belief.

305.2. A barrister must not in relation to any other person, victimise that person for carrying out a protected act as defined in the relevant legislation.

306. A barrister is individually and personally responsible for his own conduct and for his professional work: he must exercise his own personal judgement in all his professional activities.

307. A barrister must not:

(a) permit his absolute independence integrity and freedom from external pressures to be compromised;

(b) do anything (for example accept a present) in such circumstances as may lead to any inference that his independence may be compromised;

(c) compromise his professional standards in order to please his client the Court or a third party, including any mediator;

(d) give a commission or present or lend any money for any professional purpose to or (save as a remuneration in accordance with the provisions of this Code) accept any money by way of loan or otherwise from any client or any person entitled to instruct him as an intermediary;

(e) make any payment (other than a payment for advertising or publicity permitted by this Code or in the case of a self-employed barrister remuneration paid to any clerk or other employee or staff of his chambers) to any person for the purpose of procuring professional instructions;

provided that nothing in paragraph 307(d) or (e) shall prevent a barrister from paying a reasonable fee or fees required by an alternative dispute resolution body that appoints or recommends persons to provide mediation, arbitration or adjudication services, or from entering into such a reasonable fee-sharing arrangement required by such a body, if the payment or arrangement is of a kind similar to that made by other persons who provide such services through the body;

(f) receive or handle client money securities or other assets other than by receiving payment of remuneration or (in the case of an employed barrister) where the money or other asset belongs to his employer.