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ETHICAL ISSUES IN PRACTICE

PIBA London 2018

Stephen Kenny QC, 7KBW

Charlotte Reynolds, 12 KBW

EVERYONE ALREADY KNOWS ABOUT ETHICS?

- "The Ethical Capacities of New Advocates" (2015, UCL Centre for Ethics)
- "The research does not make comfortable reading" (Inns of Court College of Advocacy)
- "While the research shows that many of the lawyers had a grasp of the relevant ethical principles at the highest level of generality, some 'struggled to understand and appreciate the core professional values', and only about one half could 'mostly or always correctly identify the issues of professional ethics contained in our problems (even though they were specifically on the lookout for such problems)...'"

THE KEY MATERIAL

- BSB Handbook (version 3.2, 1st February 2018)

https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/the-handbook-publication/

- BSB Code Guidance

https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/code-guidance/

BSB HANDBOOK

- Six parts
  - Introduction
  - Code of Conduct
  - Scope of Practice, Authorisation and Licensing
  - Qualification
  - Enforcement
  - Definitions

CODE OF CONDUCT

- A – Application
- B – Core Duties
- C – Conduct Rules
- D – Rules for specific groups

CODE OF CONDUCT

- 10 Core Duties (CD)
- Outcomes (O)
- Rules (R)
- Guidance (G)

CORE DUTIES

- CD1: You must observe your duty to the Court in the administration of justice
- CD2: You must act in the best interests of each client
- CD3: You must act with honesty and integrity
- CD4: You must maintain your independence
- CD5: You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession

CORE DUTIES

- CD6: You must keep the affairs of each client confidential
- CD7: You must provide a competent standard of work and service to each client
- CD8: You must not discriminate unlawfully against any person
- CD9: You must be open and co-operative with your regulators
- 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.

GUIDANCE TO CORE DUTIES

- gC1 – Core Duties not in order of precedence, but
  - CD1 (duty to the court in the administration of justice) overrules any other inconsistent duty
  - Specific provisions at rC3.5 and rC4 and rC5 on the relationship of CD1, CD2 (best interests of client) and CD6 (client confidentiality)
  - rC16: CD2 is subject to CD1 and to your obligations to act with honesty, and integrity (CD3) and to maintain your independence (CD4).

CONDUCT RULES

- You and the Court (C1)
- Behaving ethically (C2)
- You and your client (C3)
- You and your regulator (C4)
- You and your practice (C5)

DISCOUNTED FIXED FEES

- Scenario: CPR 45.38 – fast track fixed trial fee of £690
- Your chambers has an arrangement with these solicitors that you will receive (a) £500 in any event; (b) £500 if you lose, £690 if you win.
- Do you need to tell the court?
- In (a), if the court awards you £690, what happens to the £190? Is it a referral fee?
- Is (b) a CFA?

DISCOUNTED FIXED FEES

SEE HTTP://WWW.BARCOUNCILETHICS.CO.UK/WP-CONTENT/UPLOADS/2017/10/DISCOUNTED_FIXED_FEES.PDF

- On any costs issue, you need make the Court aware of what you are actually being paid, even if it is obliged to award the fixed fee e.g. under CPR r. 45.38(2). The Form N260 statement of costs may have to be amended: e.g. *"Counsel's fee: £500, but the fixed fee of £690 will be claimed"*.
- In (a), you need to be satisfied that any extra £190 awarded will benefit the lay client, or that the lay client has, on an informed basis, agreed that it should go to the solicitor. Otherwise this is very likely a disguised referral fee, and in agreeing to work on this basis you will be in breach of the Code (rC 10).
- (b) is a CFA. The agreement must be in writing, and you must comply with applicable law and regulation. Otherwise it will unenforceable; and improper to attempt to enforce it.

LACK OF MENTAL CAPACITY

- Scenario: You arrive at court and meet your client, X, for the first time. Your papers mention that X is eccentric but you are now concerned that X's behaviour is indicative of a lack of capacity.
- What do you do?
- What if you thought that X's behaviour was because of drink / drugs?

LACK OF MENTAL CAPACITY

HTTP://WWW.BARCOUNCILETHICS.CO.UK/WP-CONTENT/UPLOADS/2017/10/CLIENT_INCAPACITY.PDF

- Capacity is presumed; but also issue-specific: a client may have capacity to understand and make simple choices, but not more complex ones e.g. whether to give evidence.
- If you entertain a reasonable doubt about the client's capacity to give proper instructions on an issue which requires them, you must resolve the issue at once.
- Speak to your solicitor. If you still have concerns, speak to your client (tactfully).
- If you still have concerns, which the client does not accept, seek an adjournment; but disclose as little of your concerns as possible: e.g. *"I am in a position of professional embarrassment, the nature of which are I am not currently at liberty to reveal, but which I need time to resolve"*.
- If the client is temporarily incapable through drink/ drugs, seek an adjournment. You may have to make some disclosure of the client's intoxication.
- Keep good contemporaneous notes!

ADVERTISING AND WEBSITE PROFILES

- [X] behaved in a way likely to diminish the trust and confidence which the public placed in him or in the profession in that his website contained the statement that '*[X] was the UK's top criminal barrister*', and contained a testimonial from a lay client expressing his view that '*[X] could get Stevie Wonder a driving licence*'.
- [X] engaged in conduct which was likely to diminish public confidence in the legal profession or otherwise bring the legal profession into disrepute in that his website contained the assertion that '*[X] was the UK's top criminal barrister*' in circumstances where he was unable to substantiate the assertion.

ADVERTISING AND WEBSITE PROFILES

What about:

- *"Terms such as "best" and "top" and "leading" are used for search engine optimisation (SEO) purposes, and I make no express or implied representation that I am the "top" or the "best" or the "leading" barrister in any area of law."*?

This is not likely to prevent disciplinary action!

UNDISCLOSED EVIDENCE

- Scenario: On the day of trial, you meet your client X, who gives you some undisclosed documents. Some of them undermine X's claim for past and future loss of earnings. X refuses to disclose them.
- Do you give disclosure to your opponent / the court?
- Do you carry on with the case?

UNDISCLOSED EVIDENCE

- You must advise your client of **his** duty to disclose the documents at once; and try to persuade him to comply with it.
- You should not disclose the documents yourself: that would be a breach of confidence. This was the view of Stuart Smith LJ in Vernon v Bosley (No.2) [1999] QB 18; but cf. the contrary view of Thorpe LJ in the same case. The former view is now reflected in Code gC13.
- If, despite having been made aware of the consequences, the client still refuses to disclose the documents, you should immediately withdraw from the case (Code rC 25.3), citing "professional embarrassment".
- In those circumstances, the Court will probably not grant any adjournment.

ILLEGALLY OBTAINED DOCUMENTS

- Scenario: you are acting for the claimant in a workplace injury claim. You have drafted the Particulars of Claim on instructions and now meet the client in conference. He hands you a brown envelope containing what he says are confidential documents from the HSE. He tells you that he had to bribe an employee of the HSE to obtain them. He says they are dynamite.
- What do you do? Do you read them? What advice do you give your client?

ILLEGALLY OBTAINED DOCUMENTS (2)

- Do not read the documents. If you read them, and they are confidential to the HSE – and they are likely to be – then you may have to return the case: rC26 ("confidential … information … of another person") and gC86.
- The documents have been obtained illegally, through bribery. Therefore they are not privileged (Dubai Aluminium v Al Alawi [1999] 1 WLR 1964). Your client's possession of them will have to be disclosed in due course.
- Your client should not retain the documents, because they are not his: they (and any copies made) should be returned to the HSE, and you should so advise: Imerman v Tchenguiz [2010] EWCA Civ 908 at [147].

ILLEGALLY OBTAINED DOCUMENTS (3)

- Before returning the documents, you should have them listed by your solicitor for later disclosure purposes. (If the client later refuses to permit disclosure of his one-time possession of the documents, you must withdraw from the case.)
- If you have, unfortunately, read the documents, you will have to consider whether you can continue to act: it may now be impossible for you to continue to act with integrity., knowing what you now know.
- There is nothing to prevent your client from applying to obtain copies through some legal process (e.g. a Third Party Disclosure Order under CPR 31.17), although your client would have to disclose his previous (improper) possession. And if you had yourself read the documents, you could probably not make that application.
- See generally https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/evidence_obtained_illegally_in_civil_and_family_proceedings.doc.pdf

EXPERT CHANGING HIS VIEWS

- Scenario: your side obtains a medical report from Dr X, which is favourable and which is disclosed. Two years later, Dr X prepares a further report. It is not favourable.
- Do you have to disclose it?
- Can you attempt to settle the case without disclosing the new report?

EXPERT CHANGING HIS VIEWS

- If the new report is in final form, you must disclose it without delay, unless you are prepared to abandon reliance on the expert altogether (and communicate that fact without delay). See Civil Justice Council's Guidance paras 14, 66 (appended to CPR PD 35). You cannot persist in what has become a deception of the other side and the Court.
- If the new report is in final form, you cannot attempt to settle the case without disclosing the new report, unless you are prepared to abandon reliance on the expert altogether (and communicate that fact without delay).
- If the new report is in draft, and there are genuine reasons for thinking the final report may be less unfavourable, then it should be finalised promptly and disclosed. But it would probably be improper to attempt to settle without having disclosed it.
- But, whether the new report is final or in draft, you can probably accept an existing offer made by the other side before you were aware of the new report.

A HELPFUL WITNESS

- Scenario: before proceedings are launched, your solicitors approach X as a potential witness. X replies by sending them a copy of the signed statement already provided to the other side.
- You are sent a copy of X's statement. What do you do?

A HELPFUL WITNESS

- DO NOT READ THE WITNESS STATEMENT. It will have been prepared and signed in circumstances of confidence. You will have received it in breach of confidence. (You have not however received it through mistaken or inadvertent disclosure by the other side. CPR Rule 31.20 does not apply.)
- You should make the other side aware of your possession of its witness statement, and that you intend to make appropriate use of it, unless restrained. It will then be for the other side to apply for injunctive orders. Whether the Court will restrain its use will depend on various discretionary factors, including whether it is possible to *"put the genie back in the bottle"*.
- If further use is restrained, AND YOU HAVE ALREADY READ THE WITNESS STATEMENT, you may be ordered to cease acting. Even if you are not, it may now be impossible for you to continue to act for your client with integrity. You may have to withdraw: Code rC26.6. and gC86. But see Code gC83: in those circumstances you must ensure that the client is not adversely affected.

A HELPFUL WITNESS (2)

- If further use is not restrained, or the other side do not make prompt application for injunctive orders, then you can and should read the witness statement and make proper use of it.
- There is no reason why your solicitors should not prepare their own statement for the witness, asking the witness himself to check for consistency with his previous statement (if they cannot do so), and to explain why his evidence has changed (if it has).
- See for general guidance http://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/documents_disclosed_to_counsel_by_mistake.pdf. But note, this is not a case of mistake: different considerations may apply.

HELP WITH ETHICS

- The Bar Council provides a confidential Ethical Enquiries Service for the benefit and assistance of barristers and staff to assist them to identify, interpret and comply with their professional obligations under the BSB Handbook.
- 020 7611 1307 / ethics@barcouncil.org.uk
- Bar Council Ethics and Practice Hub: http://www.barcouncilethics.co.uk/