# Put ethics back at the heart of legal practice

*Peter Scott*

**If the spirit of ethical practice is not deep-rooted in a firm's very being, the consequences can be far-reaching**

In my work with law firms I often come across what I would call 'bad behaviour' – in the sense of behaviour which does not meet basic standards of decency, fairness, integrity or honesty within the community of a partnership. Addressing such issues can be difficult.

Acting with integrity and in a decent, fair and honest manner should be very much at the heart of what we mean when we talk about acting ethically and for me the most meaningful definition of integrity I have come across is that of C S Lewis: 'Integrity is doing the right thing – even when no one is watching.'

The problem of people within law firms failing to *do the right thing* is something which equally confronts those who regulate lawyers and the Solicitors Regulation Authority (SRA) principles attempt to codify to some extent ethical principles which lawyers should observe. The reality is, however, that, both internally within law firms and for regulators, other pressures impact on their ability to ensure lawyers always do the right thing. Those pressures, however compelling, should not be allowed to take precedence over ethical behaviour.

## Bad behaviour within law firms

In a partnership context (whether a firm is organised as a partnership, limited liability partnership, or a company) many law firms often talk about their partnership ethos, usually referring to what they perceive to be the underlying character or spirit of their firm. Unfortunately, the perception is often very different from reality. In an ideal world, ethics in the sense of integrity and doing the right thing should be embedded at the heart of a partnership ethos. Partners would then consider it the right thing to do to abide by decisions properly made by the partnership; would support those who have been asked to manage the firm; and would mutually support each other. Failure to behave in such ways and the cascading and destructive effects of such failure on a firm and those in a firm can spell disaster. Not only is a firm likely to suffer financially, but there is also likely to be a cost to a firm in terms of instability and loss of morale, resulting in good partners and staff leaving. Destroying morale in this way can eat at the very spirit of a firm.

Internally, in law firms 'bad behaviour' can come in many shapes and sizes. Set out below are just a few examples I have recently come across of what I would describe as bad behaviour in a partnership context:

- the partner who leaves a firm and, notwithstanding having voluntarily earlier entered into restrictive covenants, poaches people and takes clients, safe in the knowledge that the firm does not want to risk a public fight;
- the partner who agrees a course of action at a partners' meeting, but then refuses to implement it because: 'It doesn't suit me and I'm not going to do it.'
- the partner who says: 'You can't manage me because I am a big biller!';
- the partner who says (often in the context of procedures relating to risk management and compliance): 'That's a great idea – for the rest of you!';
- the partner who, pursuing his or her own agenda, deliberately destroys relationships with other partners or staff and causes tension and strife within a firm;
- the partner who is bullying staff (also a serious risk issue); and
- discriminatory behaviour by those in management which is designed to 'cull' older partners.

The evidence that ethical ways of behaving are sometimes in short supply in law firms is the number of partnership disputes that occur. And they are just the tip of the iceberg because they do not include those partners and staff who, rather than fighting an uphill battle, leave their firms because they are no longer prepared to take the continued acceptance by their firms of the bad behaviour of others.

## Integrity is doing the right thing – even when no one is watching

On the other hand, there are many examples of firms which have faced up to bad behaviour and removed those elements who were not prepared to do the right thing and, as a result, are now better places to work in.

It is sometimes said that it is because law firms have become businesses that there has been a less ethical approach by some partners as to how they behave, both internally with their colleagues and externally in the manner they practise law. However, surely the practice of law and the running of a law firm as a business are not mutually exclusive and can sit together harmoniously? This will increasingly become an important issue as alternative business structures (ABSs), owned by non-lawyers who come from the wider world of commerce, continue to grow in number.

It has always been recognised that in a non-lawyer-owned ABS there must inevitably be a risk of potential conflict between the commercial interests of the non-lawyer owner and traditional legal ethical principles and there is a risk that these issues may to some extent be 'swept under the carpet' in a headlong rush to make the legal profession 'fit for purpose' in a post-Clementi world. The issue of how ABSs owned by non-lawyers deal with ethical issues is particularly topical at this moment because there is currently a great deal of discussion

about whether those who run highly successful businesses should not only be great entrepreneurs, but should also apply an element of business morality to the way they conduct business and run their organisations. The business which is often held up as a good example of how to do this is the John Lewis Partnership, which on any basis can be viewed as a successful and profitable business. It provides its customers with what they want, with high service levels and at prices they consider are value for money. And it does this through the structure of a form of co-operative venture which helps to engender a loyal and productive work force. It has always based its business model around the strong ethical principles given to it by its founders. The result is that customers trust John Lewis, which is arguably one of its best selling points. Law firms which gain the trust of their clients and their people also tend to be successful. The bedrock of creating that trust should be a commitment to behaving ethically – by always acting with integrity and honesty and doing the right thing.

## How can the pursuit of ethical behaviour be made a virtue in law firms?

Much has been written about the 'bonus culture' contributing to unethical behaviour by some within the banking sector when doing the right thing by customers gave way to behaviour based on greed. Law firms need to ensure that their own bonus arrangements to partners and staff do not also lead to unethical behaviour.

Law firms have numerous different types of reward mechanisms, including many which unfortunately reward individual billings and recorded billable hours to the exclusion of all other behaviour and performance. Basing reward solely on the amount of personal billings delivered and billable hours can (and, in practice, often does) lead to a culture of greed developing within a law firm. An 'eat what you kill' reward structure is unlikely to build a strong ethical foundation for a law firm.

On the other hand, a reward structure based on 'fairly matching reward to contribution' can help to build an ethical culture within a firm, where each person's contribution across a range of agreed 'good behaviours' and performance can be seen to be fairly and honestly valued and rewarded. Various kinds of good behaviour leading to a more ethical approach to practising law can be included in criteria to be met for the purposes of reward and advancement. At the same time, processes such as 360-degree or all-round feedback involving peer review can be put in place and, if managed well, can be highly effective in supporting and encouraging desired behaviours.

## Compliance with regulation

Just at the point when I was beginning to consider how I should approach this article, the SRA announced its consultation 'Looking to the future – flexibility and public protection' in relation to a review of the SRA Handbook and its regulatory approach. I was interested to see if, in the consultation document reviewing regulation, the SRA had sought to focus more on the ethical foundations of regulation and, by using regulation, to try actively to *encourage* lawyers to 'do the right thing – even when no one is looking'.

Currently, the emphasis is on the requirement of solicitors to demonstrate compliance under SRA outcomes-focused regulation (OFR), with the threat of regulatory action being taken if compliance cannot be demonstrated. It is the threat of disciplinary action for non-compliance which I suspect more often than not is what drives behaviour, rather than being compliant with regulation in order to do the right thing – even when no one is looking.

This article is not in any way intended to be a detailed commentary on or a response to the current SRA consultation, which I am sure others are already preparing, but instead, in the broader context of this article, I will set out just a few of my initial personal thoughts from my reading of the consultation document.

Encouraging ethical behaviour by those whom the SRA regulates is, I have always assumed, one of the primary objectives of the SRA, given the content of the current SRA principles and Handbook. While a written code of legal ethics is not essential, professional associations of lawyers in many jurisdictions have sought to commit the principles of ethical conduct to written form. However, no code can foresee every ethical problem that may arise in the practice of law. The current SRA principles, which are the basis of OFR, embed a number of fundamental legal ethical principles, but at the same time go beyond ethical considerations by attempting in various ways to micro-manage how law firms run their businesses – principle 8 requiring solicitors to run their business or carry out their role in the business effectively and in accordance with proper governance and sound financial and risk management principles. It is therefore a welcome move that the SRA no longer includes principle 8 in its draft list of SRA Principles [2017].

However, one of the difficulties with current SRA regulation is that, notwithstanding those legal ethical principles set out in the current SRA principles, the rest of the Handbook has appeared to focus more on other considerations rather than primarily on ethical behaviour (for example, see chapter 7 of the current Code of Conduct) and it does not seem from my reading of the consultation document that there will be any wholesale change to this approach in the future. For example, in para.12 of the consultation document, the SRA states that:

*'We want to do more to allow greater flexibility for solicitors and freedom for firms to innovate, compete and grow. This will help improve access to quality services at affordable prices.'*

There may be a laudable intent in those words on the part of the SRA to encourage the provision by lawyers of more value-for-money services for consumers, but, far from encouraging more ethical behaviour, the notion of 'affordable prices' is likely to encourage more cutting of corners as firms attempt to compete in a downward spiral of discounting prices to uneconomic levels. That is likely to lead to even more firms closing their doors, as has been the unfortunate experience for many criminal legal aid firms as prices have been driven down. Innovation is not going to help firms to provide quality services at affordable prices when those prices are already in some areas of work at rock bottom and when there are no further efficiencies to be found, even applying the best 'innovation'.

And there is a sting in the tail of this new freedom and flexibility which is proposed. In para.27 of the consultation, the SRA says:

*'We trust solicitors and firms to use this flexibility to deliver an increasingly wide range of services that meet consumer demand and meet the regulatory standards we set for them.'*

Is it now to be a primary regulatory objective of the SRA that solicitors are to cater for the increasing market demands of

consumers equally with the enforcement of ethical standards? Will a requirement to act in the commercial interests of consumers become the new mantra by which solicitors must practise law? And where does this leave the commercial law firms who do not act for 'consumers'?

There also seems to be a tendency in the consultation to differentiate between 'ethics' on the one hand and 'standards and behaviours' on the other. For example, in para.39 of the consultation, the SRA says it is consulting on a revised set of SRA Principles [2017], saying that 'these set out *high level* ethical principles that comprise the fundamental tenets we expect of all those we regulate to uphold'. What are 'high-level' ethical principles? Can there be 'low-level' ethical principles and, if so, what are they?

**Surely the practice of law and the running of a law firm as a business are not mutually exclusive**

A possible answer is probably to be found in para.39 of the consultation which says that the Draft SRA Code of Conduct for Solicitors, RELs and RFLs [2017] 'aims to set out clearly professional standards and behaviour expected of solicitors in practice'. Why is there no mention here of ethical standards and behaviour? Almost all the provisions of the proposed new code for solicitors will require solicitors to act in ways which are ethical and will require them to do the right thing. The SRA explains this by stating, in para.46, that 'the Codes refer more specifically to expected practice standards, which is context specific, rather than to overarching values and behaviours [i.e. in the Principles]'. By treating the requirements of the proposed new Codes of Conduct in this way, the SRA risks reducing, in the minds of the regulated community, their ethical importance to just another set of rules, instead of them being seen as an ethical framework for doing the right thing.

An example of the SRA's approach is demonstrated in paras.62–65 of the consultation where client conflict of interest is discussed and where two options are suggested. Both options discuss the situation in which there is a significant risk of such a conflict and involve exceptions where solicitors can act. If doing the right thing is what should govern behaviour, then there should be no 'if and buts' about acting if there is a significant risk of a client conflict. 'If in doubt, don't' has always been my guiding mantra in relation to potential conflicts and if the SRA wishes to provide an ethical framework for practice (as it states in para.50 of the consultation) then the new Code should clearly state that: 'You do not act if there is a client conflict or a serious risk of such a client conflict' (as is already the case for solicitors with own-interest conflict where they can never act in those circumstances).

If the SRA really wants to encourage those it regulates to do the right thing in terms of ethical behaviour, then it should carry out a 'hearts-and-minds' job on the profession. Every solicitor knows that the SRA is a regulator with enforcement powers and this should not need emphasising in a consultation of this nature, the purpose of which is expressly stated to provide 'freedom and flexibility' for solicitors, and by which consultation the SRA is presumably endeavouring to 'take with it' the profession. It should therefore not be necessary to state in Annex 1 of the consultation (page 45), in the introduction to the Draft Code of Conduct for Solicitors, RELs and RFLs [2017] that: 'The Principles and Codes are underpinned by our Enforcement Strategy…'. Instead the SRA should be taking more active steps to 'sell' compliance with SRA regulation as something positive and beneficial and in the interests not only of clients and society but also of those who are regulated. Indeed, both law firms and the SRA should try harder to educate lawyers into understanding that compliance with regulation and managing risks can have very positive and beneficial consequences if embedded at the heart of a law firm's culture and operations.

The director of risk of a top 10 law firm gave a very persuasive answer when asked why the firm manages compliance and risks in the manner it does: 'the pursuit of excellence, with the aim of doing things better for the clients'.

And C Lenoire, head of FM Global's business risk consulting division, was quoted in an article in *The Times* (21 January 2013) as follows:

*'It has got to make financial sense, but you have to see risk management as one of your strategic objectives. Business resilience is actually a competitive advantage.'*

On the other hand, perhaps the threat of enforcement is the only way to persuade some solicitors to toe the line. If that is the case, then regulation should be far more focused on ridding the profession of the 'bad apples'.

Law firms need in particular to reappraise how they select and recruit people and put more emphasis on a candidate's personal qualities than just on the ability to do the work and bring in business. Ultimately, it will be the partners of a law firm who make decisions about the ethical culture of a firm which will dictate how those in the firm should behave. Now that a revised regulatory framework is under discussion, not only is this a good moment for the SRA to take another look at ethics within the profession, but also for law firms to look at the behaviour of all of their people to ensure that they *will* do the right thing – even when no one is looking.

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