



LAWWORKS AND UNIVERSITY OF BRISTOL
Pro Bono Week Seminar

The Ethics of Pro Bono:
Some reflections from the Independent Review of Legal Services Regulation

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Introduction

A second nation-wide lockdown is now less than 48 hours away. Many of our fellow citizens will as a consequence face unexpected and unwelcome legal issues, and I suspect many of their needs will be met through pro bono provision.

I am therefore honoured and delighted to offer some opening thoughts for this very important and timely seminar. I was invited to share with you my reflections on the two-year Independent Review of Legal Services Regulation that I concluded in June and the associated landscape of legal professional ethics.

What do we mean by 'ethics'?

As I was carrying out the Review, many people used the expression 'professional ethics' or some variant of it. But the more people used it, the more I was led to wonder: What do we really mean when we talk about ethics?

Even the title of this seminar can be read in at least two ways! Are we here to discuss the ethical consequences arising from *providing* legal advice and representation on a pro bono basis? Or are we here to talk about an ethical imperative to *offer* our professional expertise on a pro bono basis to those otherwise unable to access legal advice and representation? Perhaps it is, and should be, both.

The volume of references and the importance attached to ethics among those I spoke to or heard from during the Review was striking. Yet, in the almost 300 pages and more than 100,000 words of the final report¹, there are fewer than 25 direct references to ethics, which might then seem to be an under-representation. Let me assure you that this is not because I think that ethical behaviour in the provision of legal services is not important.

1. Available at: <https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>.

What became increasingly clear to me is that many people do not see a difference between regulation and ethics. Their view seems to be that professional ethics are wholly enshrined in, and expressed by, formal regulation and its associated rules. And on that, I beg to differ.

What also became clear was that people held genuinely different views about certain aspects of ethical practice. To take an example: all might agree that the cab-rank rule for barristers is a matter of professional ethics, but certainly not everyone agrees about its application, requirements or enforcement. Views about ethics might differ, but should views about regulation?

Are regulation and ethics the same thing?

It might be tempting to use words like 'regulation', 'rules' and 'ethics' interchangeably. That temptation is probably even reinforced by our formalised codes of professional conduct, which to my mind now typically contain elements of all three. But I invite you to think about whether we *should* regard them as synonymous.

As I explained in the final report, for me the 'proper' role of regulation is to set the minimum below which practitioners may not go. Regulation can then be supported by practice rules that identify more specific formal requirements.

Professional ethics might be said to lie at a different point to regulation on a spectrum of requirements or incentives that are intended to guide or influence behaviour. Professional ethics are, to me, manifestations of aspiration – if you prefer, they represent a 'soft' and more informal dimension to behavioural influences.

Rather than reflecting the 'hard', formal, minimum standards of competence and performance that should be determined by regulation, ethics express an expectation of even better competence and behaviour. Aspiring to be the best is very different to being required to avoid the worst.

The Legal Services Act 2007 says nothing explicitly about the cab-rank rule or continuing professional development, for instance, but both can be part of a profession's approved 'regulatory arrangements' under the Act. Are they – or, more importantly, *should* they be – part of the regulatory minimum expected of all practitioners? Or should they more accurately be seen as examples of professional expectation or aspiration that have for some reason been incorporated into the formal regulatory framework?

If they are a regulatory minimum, why is there no cab-rank rule for solicitor-advocates? Why are the CPD requirements for a reserved activity not the same for everyone who carries it on?

Do not get me wrong: I am not opposed to expecting the highest standards of competence and performance from those who hold themselves out as members of a profession. But I do question whether setting and enforcing those highest standards is the proper role of regulation. In fact, I would go further and say that it is not.

Ethics can vary over time and with circumstances. Arguably, there might even be degrees of ethicality. They are often the subject of contextual and interpretative ambiguity, contention and debate. I do not believe that this should ultimately be so for *regulation*.

In the end, you might say that it does not really matter whether high standards of competence, performance and behaviour are the result of formal regulation, specific rules, or professional ethics, as long as somehow those standards are achieved. But I believe that it does matter, for two principal reasons.

Why the difference matters

First, the cost of establishing and enforcing a regulatory minimum should be lower than establishing and enforcing a higher expectation. I recommended in the report that any regulatory intervention should be the *minimum necessary* to achieve a targeted and proportionate outcome that addresses a risk to the public good or to consumers.

Incorporating and defining in formal regulation every aspect of the hard *and* soft dimensions of behaviour must inevitably result in an ever-lengthening, supposedly comprehensive, rule-book or code of conduct. The focus shifts to 'doing things right' when everyone is looking at you, and on the cost and burden of regulatory compliance. Arguably, it then leaves less room for 'doing the right thing', focusing on behaving ethically and honourably even when no-one is looking.

Second, even now – and probably more so in the future – not all providers are or will be members of a profession. What scope should there be for the application of 'ethical considerations' over and above those minimum requirements that should apply to everyone? In other words, *should* regulation and professional ethics address different things?

The ethics of pro bono and the pro bono of ethics

Let me finish with a couple of other reflections about pro bono from the Review. The first was the universal view from pro bono providers that their clients should not be required to expect or accept a lower level of competence or performance simply because they were not paying for their legal advice and representation. This was both humbling and extremely heartening.

The second was the strongly held view that much of the current regulatory framework is helped – if not in some ways underpinned – by the voluntary contributions of practitioners. This is particularly the case in relation to serving on regulatory and professional bodies, and to supporting educational activities. These strike me as a reinforcement of the continuing development and realisation of professional ethics.

So while we might be here to talk about ethics in the provision of pro bono services, let us not forget the tremendous value of pro bono contribution to the continuing realisation of professional ethics.