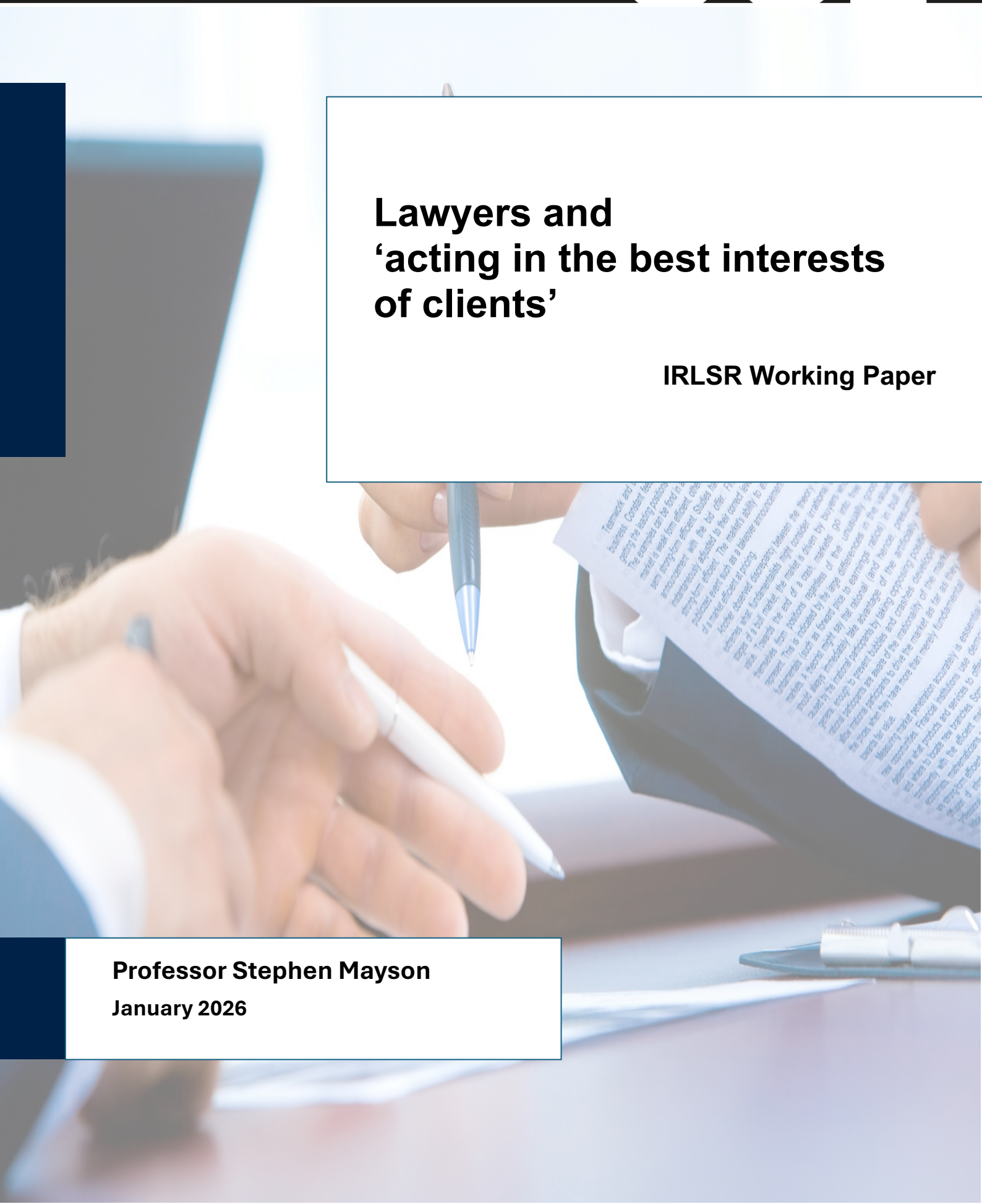
UCL Centre for Ethics & Law, Faculty of Laws

Lawyers and ‘acting in the best interests of clients’

IRLSR Working Paper



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January 2026

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Abstract

This paper explores the ethical obligations of lawyers, focusing on the duty to act in the best interests of their clients. It examines the tension between serving clients' best interests and the public interest, highlighting the complexities in identifying who the client is and what constitutes their best interests. It discusses the roles of lawyers as agents, fiduciaries, regulated professionals, and members of a public profession, and how these roles influence their ethical duties. The paper confirms that acting in the best interests of clients is a relative and qualified duty, not an absolute one, and that lawyers must balance this duty with broader ethical, social, and public interest considerations.

Note:

There is a danger when writing about ethics that it becomes equated to morals and morality. At one level, the two words are often used interchangeably, and that does not perturb me. However, several scholars have gone to great lengths to draw a distinction, and so for the purposes of this working paper it is probably incumbent on me to set out the basis on which it presents its analysis.

I observed in a recent lecture (Mayson, 2025) that there are both internal (or internalised) and external (or contextual) dimensions to ethical behaviour, and acknowledged that they can reciprocally influence each other. For some, then, morals reflect the internal dimension, derived from an individual's beliefs and views. Ethics, on the other hand, reflect an external, collective view of the rules of conduct that steer appropriate behaviour in social or organisational settings (cf. Khatibi & Khormaei, 2016). For others, the opposite is the case (cf. Walker & Lovat, 2017).

In this paper I adopt the morals-internal, ethics-external view for two reasons. First, the underlying explanation is well set out by Chaddha & Agrawal (2023: 1708):

> Ethics will assess and evaluate the rational justification of an individual's moral judgements of what is right or wrong and what is just or unjust. These act as both a code of conduct for the practice of moral behaviour by an individual or group and as a benchmark against which morally questionable decisions and actions may be judged....
>
> Ethics are formulated by a society based on reflections over moral views and standards. Being founded on the basis of systematic review of moral standards and values, they are grounded in logic and reasoning. They are instituted in a society as a formal system to guide an individual's behaviour and tend to be objective and universally applicable in contrast to individual morals.

The second reason is that, in legal services, the current regulatory view appears to be that professional ethics is to be equated with the externally defined and imposed requirements and codes of conduct (cf. Legal Services Board, 2025). This also accords with an approach of ethics being external and collective, and therefore of morality being individual and internalised (albeit being influenced by the external).

Acknowledgements

I am particularly grateful to Dr Anna Donovan and Dr Karen Nokes (both of the Centre for Ethics and Law at UCL) and Professor Richard Moorhead (of the University of Exeter) for comments on an earlier draft of this paper. Responsibility for the final version is, of course, mine alone. Comments on the paper are welcome at s.mayson@ucl.ac.uk.

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1. Introduction

In recent years, there have been several instances of lawyers who have sought to justify certain actions they have taken as matters of professional ethics.[1] In the eyes of some, these actions have been of dubious moral or ethical merit. For example, they have included lawyers asking individuals to sign non-disclosure agreements (as in the Harvey Weinstein cases) or threatening them with unmerited defamation claims. The intention is too often to prevent certain unpleasant facts being made public or to hide possibly criminal behaviour.

The examples have also included withholding helpful evidence from other parties in litigation (as in the Post Office Horizon cases). In the eyes of the lawyers involved, these actions are justified as being part of their professional obligation to 'act in the best interests' of their clients.[2]

In 2018, I began an independent review of legal services regulation, carried out from the Centre for Ethics & Law at UCL. By September 2024, I had published three reports, and the third focused on the obligation of lawyers to act 'in the public interest'. This immediately sets up a possible contrast or tension between serving the best interests of clients and acting in the public interest.

Most people accept that law is a profession, and they do expect members of the profession to serve them faithfully. But in those reports, I went further. For the purposes of this paper, I can summarise by saying that I claim that lawyers are part of a '*public* profession'. By this, I mean that the status and licence to practise as lawyers is given *on behalf of* the public.

Lawyers are then given a degree of monopoly over the provision of legal services as well as some control over how they provide their services. In return, I say that they owe a reciprocal obligation *to* the public. This means that, when acting for their clients, lawyers owe a duty to the public to act in the public interest and not *only* in their clients' interests, and certainly not in their own self-serving interests.

Clearly, then, my position that lawyers owe a higher duty to the public interest can lead to a conflict if a lawyer believes that they must act primarily in their clients' best interests. My purpose in this paper is therefore to explore the substance of the duty to 'act in a client's best interests' and how it might be reconciled with a higher duty to act in the public interest.

By way of context, I need to emphasise that I am focusing only on England & Wales: there are different laws and regulations in place relating to lawyers in Scotland and in Northern Ireland.

1. The concerns are not only recent: "After Enron, critics, reformers, and regulators have all called for large firm corporate transaction lawyers to be more professional, to re-focus their moral compass, and, in terms of core values, to exercise more independent professional judgment and to show greater respect for the rule of law" (Whelan, 2007: 1116).
2. For fuller identification and discussion of the problematic actions, see Moorhead et al. (2023), Mayson (2024: paragraph 9.4) and Legal Services Board (2025: pages 11-15).

2. Who is the client?

Perhaps the obvious starting point needs to be: where there is a duty to act in the client's best interests, do we first of all understand *who* that client is? The largest regulator of legal services, the Solicitors Regulation Authority (SRA), states in its Code of Conduct for Solicitors that 'client' means the person for whom the solicitor acts; perhaps no surprise there, but it can also include prospective clients and former clients.[3] Flowing from this, there is also then an understandable requirement on solicitors to *identify who* they are acting for (paragraph 8.1 of the Code).

It might be tempting to assume that the answer to the question 'Who is the client?' is obvious and straightforward, and in many cases it will be. I do not wish to make this question a major part of this paper. But consider for a moment the situation where someone exists physically but not capably, that is, when they lack full capacity to act or decide for themselves. This could be because of a physical or mental disability that prevents an individual from being able to express *any* of their intentions or interests, or to do so only in a limited way. In these circumstances, the identity of the individual might be clear, but they need someone else to decide and speak for them. There might be conflicting views as between a partner, parents or other relatives, on the one hand, and (say) a medical team responsible for an individual's care and treatment, on the other. Are the lawyers clear about who they are acting for in these circumstances and whose interests they must be concerned about?

Next consider those situations where the solicitor is dealing with someone who exists as a legal entity but not physically. This could apply, for example, to a company, a charity, a local authority or a trust. To give the entity some physical representation, certain individuals must be taken to speak and decide for the entity: but it is still the entity that is, technically, the lawyer's client and not the individuals who represent it. Indeed, there may be circumstances where the interests of the entity and those individuals are not aligned – for instance, where the governing body wishes to dismiss one of its own directors or trustees or the beneficiaries of a trust disagree with the decisions of their trustees.

The question can also become acute when we look at the position of in-house lawyers.[4] They are employed by an organisation and are expected to be loyal employees; but, as lawyers, they still have duties to act independently and to discharge obligations to the court and to their profession. And they must do this in relation to an organisation that pays their salaries and holds the key to their career progression. So, it is easy to say that the employer is the client and that the in-house lawyer must act independently in the best interests of the employer. There may, however, be personal or other organisational factors at play here that are difficult to ignore or to put at the back of one's mind.

Similarly, the organisation itself might have multiple subsidiaries or be engaged in joint venture arrangements, and the best interests of these might not always be aligned with each other or the parent company. Providing advice to competing or conflicting interests might turn out to be a breach of an in-house lawyer's professional duties. It will therefore be important for in-house lawyers to be clear (with everyone) which entities are their clients.

At a more personal level, the corporate client's interests in all these circumstances will need to be represented by an individual from within the organisation – usually a director or other senior executive – who might also be a close working colleague of an in-house lawyer. It is important that the lawyer remembers that the organisation, and not the individual, is the

3. For the avoidance of doubt, the fact that someone may be identified as a 'client' does not necessarily mean, in the case of prospective or former clients, that the solicitor owes them a duty to act in their best interests as discussed in this paper. In the case of former clients, the continuing duties will relate, for instance, to maintaining the confidentiality of client information and ensuring the proper storage and management of their files.
4. For a fuller treatment of this point, see Loughrey (2011: chapter 4).

client for the purposes of giving advice. It is also important that these individuals should have the express authority of the organisation to give legal instructions on its behalf.[5]

Even where the answer to the question 'Who is the client?' is crystal clear, the focus of the 'best interests' representation is not inevitably without problems or challenges. Take, for instance, a lawyer who is representing the wife and mother in a divorce. As Webley puts it (2008: 237): "Here the solicitor may feel she has the power to help not just the client who gives her instructions, but also the client's immediate family and former partner. To a greater or lesser extent their financial futures are tied inextricably together, as are future parenting decisions, pension provision and housing issues."

The first question of 'who is the client?' cannot be doubted: it is only the wife. But should that prevent the solicitor from discussing with the client the broader interests of other parties or members of the family in seeking to establish the *client's* best interests in resolving the issues created by the family breakdown? After all, the law itself – on which the solicitor is advising the client – is "designed to keep a balance between the interests of the couple, the children and other interested parties" (Webley, 2008: 238).

Similarly, a lawyer might be retained to advise someone who themselves stands in a fiduciary relationship to others (such as a trustee in relation to trust beneficiaries). While it might be clear that the trustee is the lawyer's client and the beneficiaries are not, it is still possible that the lawyer might nevertheless owe those beneficiaries a duty of care: see, for example, *White* v. *Jones* [1995] UKHL 5 and *Ashraf* v. *Lester Dominic* [2023] EWCA Civ 4. In the latter case, Nugee, LJ explained (at paragraphs 55-56):

> the solicitor has not agreed to act for other parties, and has not agreed to provide a service to them, and it follows that he owes them no obligation to perform his services with care and skill.
>
> But it is recognised that there are special cases which are exceptions to the general rule.... One group of cases is where the very purpose of the solicitor's retainer by his client A is to confer a benefit on a particular third party B, the classic example being where a testator engages a solicitor to make a will in favour of a beneficiary. Here the solicitor by agreeing to act for A is agreeing to provide a service for the benefit of B, and there seems to me little conceptual difficulty in the conclusion that the solicitor owes a duty not only to the client A who retains him to provide that service but also to the intended beneficiary B for whose benefit he has agreed to provide the service.

'Who is the client?' is therefore an important prior question: a lawyer cannot be confident about representing someone's best interests if they are not clear in the first place about who that someone is and to whom they owe any professional duties. There is much more that could be said about this issue, but it is not the main focus of this paper. Let me therefore just highlight these examples to show why it is not always as straightforward as many might think.

5. This is expressed in the SRA Code of Conduct (paragraph 3.1) as: "You only act for clients on instructions from the client, or from someone properly authorised to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your client's wishes, you do not act unless you have satisfied yourself that they do. However, in circumstances where you have legal authority to act notwithstanding that it is not possible to obtain or ascertain the instructions of your client, then you are subject to the overriding obligation to protect your client's best interests." The dangers for lawyers who act for corporate clients on the instructions of individuals who do not have the appropriate authority can be seen, for instance, in *Rushbrooke UK Ltd* v. *4 Designs Concept Ltd* [2022] EWHC 1687 (a wasted costs order).

3. Best interests as a relative duty

Let us *assume*, then, that we can be clear about who the client is, and turn to the consequential question of 'acting in their best interests'. The requirement to do this arises from the overarching Act of Parliament that applies to legal services regulation (section 1(3)(c) of the Legal Services Act 2007). This requires that those lawyers who require prior authorisation to offer their services to the public "should act in the best interests of their clients". This is carried through into the regulation of solicitors as the SRA's Principle 7 and of barristers by Bar Standards Board (BSB) Core Duty 2.

As I have already noted, there have been instances where lawyers have used this duty as a shield to justify professional actions that have subsequently attracted adverse comment. For example, in giving evidence to the Post Office Horizon Inquiry, one of the external lawyers advising the Post Office said: "in an adversarial system, it is my absolute duty ... to act in their best interest".[6] And this is not an isolated view. But however commonly held, it is wrong: there is no such *absolute* duty.

The emergence of such a misunderstanding might be characterised as a consequence of the idea of 'client-first lawyering' or the duty of zealous representation. Many lawyers and clients might regard such an approach as no bad thing; but there is undoubtedly a dark side (cf. Dare's 2004 distinction between 'mere zeal' and 'hyper-zeal', and paragraph 4.5.5 below).

The pursuit of a client's stated interests or objectives in a client-first or hyper-zealous way can crowd out any consideration of other perspectives and interests.[7] Indeed, the very idea of 'zealous representation' will usually *exclude* any other considerations.

But this absolutist approach to client representation has other consequences, too. It certainly respects a client as an autonomous independent, capable person who is free to determine their own interests and pursue them. It allows the lawyer to say, "I advise, but the client decides". It can also allow a degree of moral and ethical distancing by the lawyer, who might say: "I don't like the client or agree with their views, but they are entitled to independent legal advice. I've offered that advice, and they are entitled to come to their own conclusions about it. As their lawyer, I must then carry their instructions through, whether I personally agree with them or not."

This view expresses what is often referred to as the 'standard conception' of the legal profession. It incorporates the principles, first, that lawyers should be neutral (that is, not identified with their clients and not accountable for the client's actions) and, second, that they should be partisan (that is, faithfully and vigorously represent their clients' interests): Postema, 1980: 73; Kim, 2020: 1665.

In the first principle, neutrality means that lawyers must not allow their "own view of the moral merits of the client's objectives or character to affect the diligence or zealousness with which they pursue the client's lawful objectives". Consequently, this moral detachment (or non-accountability) means that "lawyers are not to be judged by the moral status of their client's projects, even though the lawyer's assistance was necessary to the pursuit of those projects" (Dare, 2004: 28). As Pepper has put it (1986: 614): "As long as what lawyer and client do is lawful, it is the client who is morally accountable, not the lawyer."

It is perhaps not surprising, though, that these ideas of ethical distancing and detachment also fuel negative public views about a 'morally neutered' profession (cf. Ross, 2024).

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6. From transcript available at: https://www.postofficehorizoninquiry.org.uk/hearings/phase-4-21-september-2023.
7. This is the point at which the lawyer has become 'too close' to (or too closely identified with) the client or to the cause. For example, business lawyers might be perceived as not operating as independent and objective professionals "in a sphere separated from their clients" where the "resulting client alignment is deeply problematic" (Moorhead et al, 2003: 10). On the other hand, the lack of any such alignment in lawyers who represent those who are vulnerable or poor might be seen as equally problematic.

For my present purposes, however, it is the second element of partisanship or zealous representation that most concerns me. If this is interpreted to mean that, as a lawyer I must, and can with impunity, 'do whatever the client wants or asks of me', then I believe that we are in trouble, both within the profession but, more importantly, also within society.

However, there is an alternative to this absolutist view. This would suggest that lawyers should of course definitely pursue those interests of clients that are given or protected by law, and certainly bring to bear all of their professional skills to secure the client's legal rights. But they are under *no* professional obligation to pursue anything else that happens to be in the client's interests where that goes beyond the law or the wider public interest (cf. Dare, 2004: 30, 32, and 35).

In other words, lawyers should be mindful of wider interests and should not zealously pursue *only* those interests that the client cherishes. This is covered in detail in Mayson (2024), and the foundation of this alternative view lies in the law being a 'public profession'. As one commentator has put it (Bassett, 2005: 750-751):

> the notion of a public profession contemplates more than merely serving clients, more than merely acting as officers of the court serving justice in the most general of senses, and more than merely doing what is proper under the law. A public profession requires acting affirmatively in a manner beyond what is necessary to earn a living. In particular, to claim law as a public profession requires a broader expectation of, and performance of, public service.

Similarly: "The very idea of a profession connotes the function of service, the notion that to some degree the professional is to subordinate his [*sic*] interests to the interests of those in need of his services" (Pepper, 1986: 615).

This alternative view places an emphasis on public service, and on the public interest that is echoed in the Legal Services Act. The Act does have a professional principle that requires lawyers to act in the best interests of their clients (section 1(3)(c)), and therefore not in their own self-interest. But it also refers to "protecting and promoting the public interest" (section 1(1)(a)).

In addition to the public interest, the Act also refers to other interests within the opening section on regulatory objectives, including "protecting and promoting the interests of consumers" (section 1(1)(d)), and (if lawyers are exercising rights of audience or conducting litigation) they must also comply with their duty to the court[8] to act with independence "in the interests of justice" (section 1(3)(d)). All of these are supplemented by a solicitor's and barrister's duties to maintain public trust and confidence in the profession (SRA Principle 2 and BSB Core Duty 5).

There are, therefore, a multiplicity of 'interests' that are relevant to the framework of legal services regulation and the ethical behaviour of lawyers: the public, consumers, clients, justice, the profession, and so on. Such a variety of interests could, of course, give rise to conflict among them.

In relation to advocates and litigators (that is, those who are authorised to exercise a right of audience before a court, or to conduct litigation in relation to any court proceedings), the Act is itself quite clear that these authorised persons have "a duty to the court in question to act with independence in the interests of justice" (section 188(2)), and that this duty will "override any obligations which the person may have (otherwise than under the criminal law) if they are inconsistent with them" (section 188(3)).

More generally, the Legal Services Board (LSB), as the oversight regulator, has been clear that the duty to protect and promote the public interest actively requires the Board to place it "higher than sectional interests of the particular consumers or professional interests".[9]

8. In addition, solicitors explicitly become 'officers of the court' by virtue of section 50 of the Solicitors Act 1974.
9. Legal Services Board (2010: 3).

In addition, the SRA is also clear that where any of its Principles relating to the fundamental ethical behaviour of solicitors come into conflict with each other, "those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over an individual client's interests".[10]

For barristers, the relativity is expressed slightly differently. Core Duty 1 requires barristers to observe their duty to the court in the administration of justice: consistently with section 188, this "overrides any other core duty" and the "duty to act in the best interests of each client is subject to your duty to the court" (BSB Handbook, Version 4.8: gC1 and rC4).

On the basis that the administration of justice is a key element of the public interest (cf. Mayson, 2024: paragraph 5.3), it is quite clear that the public interest takes precedence over clients' interests. It is certain therefore that the best interests duty to clients is, in the eyes of regulators, *subordinate* to the higher duties owed to the public and the rule of law.

We therefore have to conclude that in no sense can the duty to act in a client's best interests be 'absolute'. It is one of a number of duties identified as a regulatory objective and as obligations on lawyers, and it is not regarded as the highest of those duties. An absolutist view is also inconsistent with lawyers being members of a public profession who must *not* act in the exclusive interests of their clients.

Consistent with this general statement, the position in relation to barristers (as advocates) was powerfully expressed by Lord Denning MR in the Court of Appeal in *Rondel* v. *Worsley* [1966] 3 All ER 657 (at page 665):

> A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end. Provided only that he is paid a proper fee, or, in the case of a dock brief, a nominal fee. He must accept the brief and do all he honourably can on behalf of his client. I say 'all he honourably can', because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court.

In conclusion, then, because of wider and overriding (public interest) factors, the duty to act in the best interests of a client is a *relative* duty, not an absolute one. With that established, the next question is *how* the best interests duty sits within that wider context.

10. See https://www.sra.org.uk/solicitors/standards-regulations/principles/.

4. Best interests as a qualified duty

4.1 The idea of best interests

My starting point here is to emphasise that the lawyer's duty is not expressed as being to act 'in the interests of their clients', but 'in the *best* interests of their clients'. We have already seen that, as a *relative* duty, this must be assessed not only in the context of the client's wishes but also in the context of wider obligations to the court, to the rule of law, to the interests of justice, and to the public interest itself.

But it is also a *qualified* duty, and the word 'best' *is* the qualification. It is not an injunction to identify and pursue whatever might be – objectively or subjectively – in the client's interests, but only what is considered to be in their *best* interests, taking everything else into account.

Part of our challenge here is that the same constraint – or at least the same language – is used in different contexts and circumstances to require someone to act in a certain way, that is, in the best interests of the individual or entity concerned. Looking at the available insights, however, leads me to offer some distinctions for the purposes of the analysis that follows. In particular, I think it is necessary to distinguish:

(i) decisions *by* an individual;
(ii) decisions made *for* an individual or entity by another; and
(iii) a representative *acting on behalf of* an individual or entity.

My contention here will be that, although the *language* of 'best interests' is the same, the *interpretation* or *application* needs to be different.

4.2 Decisions by the client

The first category (decisions by the client) is a crucial starting point. The law's foundational assumption is that individuals are free to make their own decisions and are capable of doing so (section 1 of the Mental Capacity Act 2005). This view respects the *capacity* of a decision-maker to decide for themselves, and assumes that they are *competent* to do so, at least until it is proved otherwise. There is, consequently, personal autonomy – or, in other words, a right to self-determination and an ability to choose, combined with a freedom from interference.

This notion of autonomy is critical in the provision of legal services. Pepper explains (1986: 617):

> Our first premise is that law is intended to be a public good which increases autonomy. The second premise is that increasing individual autonomy is morally good. The third step is that in a highly legalized society such as ours, autonomy is often dependent upon access to the law.

Tuckett explains further (2006: 168):

> autonomy means self-determination of, and self-governance over, one's actions. A person is self-determining by choosing for themselves as well as by formulating and carrying out their life plan. The decision to implement a course of action that is in the best interests of the self highlights the autonomous agent's capacity for 'intentional action'.
>
> Furthermore, the autonomous person is said to be self-governing through the exercise of rational decision-making. Hence, rational deliberation is an essential feature of the autonomous individual. Meshed into the self-determining and self-governing components of autonomy is a further element – to act freely. A person can only be acting freely and autonomously when acting independently from controlling influences. Controlling influences can include incomplete information or impaired comprehension.

In this sense, self-determination requires (1) legal *capacity* to act independently and (2) the *competence* to do so based on full information and understanding (that is, first-person[11] decision-making agency and task-specific competence): Bielby (2005: 358 and 360).

It is worth remembering in this context that, for the purposes of legal advice and representation, it is perfectly lawful and acceptable (and, indeed, increasingly common) for clients to reach their own views on the applicable law and to represent themselves. For the purposes of this discussion, therefore, we might make the assumption that, if the client has both the capacity and competence to decide and act independently, they will determine for themselves what they consider to be in their interests, best or otherwise.

However, the consequence is that, where autonomous capacity and competence exist, freedom of decision-making also includes the freedom to make *unwise* decisions.[12] Others might say that such outcomes are not desirable for the individuals concerned and that therefore the decision could not be in their best interests. Even so, courts and other authorities are loath to interfere in these situations. Each autonomous individual effectively determines – independently and competently – what they see as being in their own interests.

In other words, the client's (subjective) view of what is in their interests can be at odds with or completely contrary to what others might (objectively) consider to be in that person's best interests. But unless there is some basis for the client's autonomy to be questioned or removed, they are free to make bad decisions for themselves.

An autonomous, competent individual will therefore be entitled and expected to exercise their freedom to make a decision for themselves. In a medical context, for example, this would include their ability to give, or not to give, 'informed consent' to any treatment or other medical intervention.

Interestingly, it can be suggested that in some circumstances medical professionals (or judges) substitute their "own view on the best choice *for* the patient – which is not necessarily the choice that is judged best *by* the patient" (Huxtable, 2014: 465, emphasis in original). The effect of this substitution is then to impose an objective (or ideal) conception of autonomy. As a result, it denies that the patient in fact has genuine autonomy (2014: 479). This seems at odds with other principles of assessing autonomy and capacity where the focal person remains free to make ill-considered choices. Presumably, therefore, it can only be justified where there is some basis for concluding that the individual in fact lacks capacity or rationality (then taking us to the circumstances discussed in paragraph 4.3 below).

4.3 Decisions for the client

There can be circumstances where *someone else* must make decisions or act for another. It is in these legal contexts that the notion of a 'best interests duty' is usually created. In these situations, there is what I shall call a 'focal person' whose interests must be considered. The key issue becomes one of whether that focal person is capable of making their own decisions unaided (as in paragraph 4.2 above), or is for some reason not capable of making any decisions (considered in this paragraph), or has the capacity to make decisions but needs help in doing so (as in paragraph 4.4 below).

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11. The use of 'first-person' here is to emphasise that someone has the capacity to act on their own behalf. It is intended to distinguish the circumstances that I shall consider in paragraph 4.3 below, where *someone else* must be appointed as a substitute to make decisions on another's behalf (which we might then describe as 'third-person decision-making agency'). The expression 'agency' in these contexts refers to the ability to take action or to choose what action to take: in this sense, someone with first-person agency would not then be described as acting *as an agent*. However, someone exercising third-person agency almost certainly would be acting as the agent of another – although, as we shall see, not all agents exercise third-parry agency in the sense intended here (see further paragraph 4.4.2 below).
12. These decisions might variously be described as 'mad, bad and dangerous' (cf. Pollard, 2018) and 'stupid, implausible and self-destructive' (cf. Woolley, 2015).

For instance, the best interests duty is applied when decisions fall to be made for those who lack mental capacity, as well as in cases where children's welfare is at stake. These are cases where a vulnerable individual simply cannot make decisions about their lives, their health or their assets, because they do not have the mental capacity or developmental maturity to do so.

Similarly, artificial legal entities such as companies and trusts cannot make decisions for themselves but must rely on appropriately authorised individuals or governing bodies to make decisions for them.

In this second category (decisions *for* the client), we need to recognise that decision-making competence can be compromised or removed by a lack of mental capacity. Such circumstances can arise, for example, during the normal development of children, where they will not be competent until a certain age to make decisions for themselves. In the meantime, someone else must make decisions for them.

This category therefore applies to all circumstances where a *substitute* decision-maker is required (a 'third-person' decision-making agency: cf. paragraph 4.2 and footnote 11 above). Although this is not the usual position for a lawyer who is required to act in the best interests of a client (considered in paragraph 4.4 below), 'best interests' are still a material consideration and there may be insights to be gained about the professional nature of the duty.

In some professional contexts then, such as medical treatment, the professional involved might well be making decisions about treatment that the patients themselves are unable to make. This can involve abnormal or unwelcome circumstances that impair capacity, such as illness or vulnerability (say, in those who are seriously unwell, injured, or developmentally impaired), as well as by the normal process of ageing[13] (as, say, in cases of cognitive decline or, more unfortunately, dementia). These circumstances require decisions to be made *for* those individuals.

We also need to acknowledge that the appointment of a substitute decision-maker could be made *before* any loss of competence (e.g. using a lasting power of attorney): Bielby (2005: 360-361).

This second category therefore addresses circumstances where the focal person *cannot* make their own decisions, either ever or for the time being, and a substitute decision-maker is required. This gives rise to two consequences. The first is that the substitute decision-maker stands in a particular legal *relationship* to the focal person (for example, as a trustee, director, guardian, agent, medical practitioner). The second consequence relates to the *substance* of the decisions they make for the focal person.

Where individuals lack the *capacity* to make their own decisions, there might then often be conflicts about the *substance* of a decision. For example, medical professionals might conclude that there is no remaining quality of life or prospect of recovery for someone who has suffered a catastrophic injury or has a terminal illness. They form a view about the withdrawal of treatment, for reasons that they believe, in their professional opinion, would be in the best interests of their patient. On the other hand, the partner, parents or relatives may equally strongly believe that withdrawal of treatment would not be in the patient's best interests.

There are two conflicts here: one about the right to make a decision for the patient (next of kin or medical specialists); and the other about which view of the patient's best interests

13. The mere fact of aging should not be taken as giving rise to a need for decisions to be made prematurely in someone's assumed best interests: "The ability and opportunity to exercise autonomy is important for physical health, psychological health for all persons and is generally a component of a good quality of life" (Tuckett, 2006: 167).

should prevail. The courts can be drawn into resolving these conflicts. And the answer to one conflict does not inevitably determine the answer to the other. In fact, because of the disagreement, the answer to the first question can become neither because, in effect, the court is called on to resolve it; and the court itself then goes on to make the decision about the patient's best interests.[14]

There is a great deal of case law concerning, for instance, the continuation of life-sustaining medical treatment, or the wishes of parents to try alternative therapies for their terminally ill children, both of which might not be supported by the views of the relevant medical team. In general terms, the court will not require doctors to act contrary to their professional judgement if they believe that treatment is not clinically justified. Further, medical practitioners will be considered to be acting in accordance with their judgement if their assessment of best interests accords with accepted professional practice – even if there is a body of opinion that might take a contrary view (the 'Bolam test').

However, it is also settled that conformity with clinical practice alone is not sufficient to meet a best interests threshold. This is because best interests decisions must also "incorporate broader ethical, social, moral welfare considerations" (see *Aintree University Hospitals NHS Foundation Trust* v *James* [2013] UKSC 67, per Lady Hale at paragraphs 39 and 40, and Shah, 2010). Such considerations are also consistent with the thrust of my position that wider factors than technical expertise must be taken into account.

It therefore seems clear from medical intervention cases that a best interests decision is not made only by reference to a patient's clinical needs, and nor is it an objective evaluation of what a 'reasonable' patient's preferences would be (cf. Taylor, 2016: 181). Instead, there appear to be two elements. The first is a professional decision about clinical interests (what might be described as best *medical* interests). As the expression of expert professional expertise, it is unlikely that a court would gainsay this decision.

However, this clinical decision is followed by a second element. This is a separate, subjective evaluation of the patient's wider social and welfare preferences, that is, of their best interests *overall* and it goes beyond merely medical considerations. As Bartholome points out (1988: 40): "the obvious fact that outcomes are determined more by factors having little to do with medical care – parent-child relationships, family resources, educational and rehabilitation programs, social attitudes, etc – should have a profound influence on considerations to withhold or withdraw medical interventions". This is an issue on which a judge might reach a different conclusion to both medical professionals and relatives. Such wider evaluation might also be expressed as a "guiding principle which serves to promote the well-being or benefit of the individual[15]" (Taylor, 2016: 182).

Bridgeman offers this helpful summary (2019: 137, 138-139, 140; emphasis supplied):

> neither the court nor parents can require clinicians to treat contrary to their professional judgement....
>
> A professional judgement is one made in a professional context in which 'the uncertainty derives from the professional context and the evidence or relevant considerations are acquired by means of professional knowledge and skills'. Professional judgement must be exercised in accordance with a competent body of professional opinion that is 'capable of withstanding logical analysis' given the risks and benefits, and *accord with the values of the profession*....
>
> [A] view that the point has been reached that continued treatment is contrary to conscience may not have been predicted but *reasons for that position must be given*. Further, it is an individual decision, with which others may disagree, and as such is not 'correct' but a matter of judgement. In the context of withdrawing or withholding life-sustaining treatment from a child, I

14. It appears that the threshold for judicial intervention is a low one, and that once crossed the court's powers are extensive: *Yates* v. *Great Ormond Street Hospital for Children NHS FT* [2017] EWCA 410 (the Charlie Gard case).
15. This conclusion is consistent with the thrust of the second report of the Independent Review of Legal Services Regulation, which proposed a concept of 'legal well-being': see Mayson (2022: Chapter 5 and paragraph 8.4).

> argue, an individual professional judgement must be supported by the view of others, but that does not preclude disagreement. Practitioners ... should be encouraged to listen to their consciences although they must also *be prepared for them to be subjected to challenge*....

As Hedley, J. explained at first instance in *Re Wyatt* [2005] EWHC 2293, a clinician "does not take orders from the family any more than he gives them. He acts in what he sees as the best interests of the child: no more and no less. In so doing, however, parental wishes should be accommodated as far as professional judgement and conscience will permit, but no further". Bridgeman continues (2019: 151-152; emphasis supplied):

> This is not out of deference to the medical profession or that the clinicians are better placed than parents to decide what is in the best interests of the child 'in the widest possible sense', but because continued provision of treatment has *gone beyond the limits of what is professionally conscionable*.... It is important to appreciate that this conclusion results from the demonstration by clinicians that they have *reached the limits of the professionally possible and permissible* in their professional judgement of care for the child, not a competing view of what is best.

In addition to medical cases, the courts are also sometimes required to decide what would be in children's best interests[16] in relation to their living arrangements when families split up or when there has been parental neglect. Again, the best interests of the children (as the focal persons) must usually be paramount in the courts' decisions. In *ZH (Tanzania) (FC)* v*. Secretary of State for the Home Department*, [2011] UKSC 4, Lady Hale confirmed that the 'best interests of the child' "broadly means the well-being of the child" (paragraph 29), which again takes the professional consideration of best interests to a broad assessment.

In the case of a company director, the exercise of the duty to act (substitute) for the company must be discharged in good faith in what the director believes to be the best interests of the company (Companies Act 2006, section 172, and cf. *Smith* v. *Fawcett* [1942] Ch. 304). In these circumstances, the 'best interests' decision is expressed in section 172 to be the one that is "most likely to promote the success of the company for the benefit of its members as a whole". But this judgement must also be made in the context of some wider factors that directors must consider, such as the interests of employees, customers, suppliers, the community and the environment, as well as maintaining the company's own reputation for high standards of business conduct.

This assessment of the company's best interests requires the exercise of commercial judgement, and the courts have long been reluctant to substitute their own judgements on such commercial matters. In relation to directors' decisions for a company, therefore, the courts are far less likely to intervene unless it is clear that the directors have not acted in good faith. In other words, intervention is based on a failure in the requirements of the relationship, such as not even considering the company's interests or where there is no basis for a reasonable belief that a transaction was for the benefit of the company (cf. *Charterbridge Corporation Ltd* v. *Lloyds Bank Ltd* [1970] Ch 62), and this assessment may be informed by or derived from the substance of the decision made.

Langford summarises (2016: 507):

> The best interests rule regulates the exercise of discretion by directors, with courts stating that directors "must exercise their discretion bona fide in what they consider – not what a court may consider – to be the best interests of the company".... It is not merely a duty to act in good faith. It is also not an absolute duty to act in the interests of the company. It comprises both elements, requiring directors to act in good faith in what they believe to be the best interests of the company.

16. As a general cautionary comment, Skivenes observes (2010: 339 and 340): "The principle of the 'best interests of the child' is ambiguous.... Determining a child's best interests is about predicting results and consequences that are difficult to estimate.... It involves making normative decisions regarding what is good and right for a child and his/her parents. What is considered to be the child's best interests varies across cultures, religions and states."

Examples of circumstances where the best interests duty will be breached would include: most usually, a conflict between the company's interests and those of the director (such as using their privileged position to receive an unauthorised benefit); an abuse of power (such as misusing the company's proprietary trade secrets or other confidential information); or misusing the company's assets (diversion for a personal or otherwise inappropriate purpose).

The essence of decision-making in this second category arises because the focal person does not have either the capacity or the competence to make *decisions* for themselves. Therefore, in some professional contexts, such as medical treatment, the professional concerned might well be making decisions about treatment that the patients themselves are unable to make. They are truly making decisions *for* their patients or those under their care. In all cases, though, it is clear that the considerations that must be taken into account are much broader than those derived from narrow, technical, professional expertise.

In summary, in making those decisions for others, the key points are that:

(1) practitioners cannot be required to act contrary to their professional judgement;

(2) their judgement is to be evaluated by reference to accepted professional practice (even if some practitioners might hold contrary views);

(3) if challenged, courts are very unlikely to disagree with this technical judgement;

(4) however, broader considerations of ethical, social and moral welfare and well-being must also be taken into account in assessing overall best interests; and

(5) any conclusion must be reached in good faith.

This offers a basis for considering the way in which best interests decisions might be made by lawyers seeking to fulfil their duty to act in a client's best interests. We could surmise that an assessment of the client's best *legal* interests would need to be followed by an assessment of broader ethical, social, and moral welfare considerations that affect the client's overall well-being; and these assessments must be consistent with accepted practice of what is professionally possible and permissible as well as made in good faith.

While such a simple translation might represent a good start, as the further analysis in the next paragraph shows, it would not take us to where we need to be.

4.4 Acting on behalf of the client

4.4.1 The client as autonomous decision-maker

The critical starting point in relation to lawyers – in their capacity as advisory professionals – is that they do not usually make decisions *for* their clients. We therefore need to draw a distinction between those professionals who do make decisions for their clients or patients as *substitutes* (such as medical professionals) and those (like lawyers) who are not substitutes but who do, nevertheless, act *on their clients' behalf*. This is the third category.

A lawyer not having decision-making authority thus becomes an important distinction for the purposes of my analysis here. It can be explained in this way (Woolley, 2015: 288):

> The normative structure of the lawyer-client relationship requires lawyers to facilitate or enable client exercises of discretion, not to exercise discretion on their clients' behalf.... The central moral feature of the lawyer's role is that a lawyer enables and protects a client's participation in the legal system and, in particular, facilitates a client's ability to make decisions about what to do in relation to what the law permits, proscribes, or enables.

The lawyer-client relationship requires the lawyer to consult, advise, inform and support the client in the exercise of *the client's discretion*, but not to exercise that discretion *for* the client.

The distinction is important because in this third category of 'acting on behalf of' a client we must relate most closely to the first category, that is, of clients making decisions for

themselves (as first-person decision-making agency: cf. footnote 11 above) rather than to the second of a substitute making decisions for them (as third-person decision-making agency). Again, therefore, we must begin with an assumption that the client's decision-making competence is not compromised by some lack of capacity, whether physical, mental or developmental.

We therefore start from a position of the client's capacity and autonomy to take decisions for themselves. But we also, of course, have a position where a lawyer has been asked to advise that client. Reverting to Bielby's distinction between capacity and competence (see paragraph 4.2 above), rather than lacking *capacity* or autonomy to act or decide for themselves, the client here lacks a degree of *task-specific competence*, that is, there is a lack of expertise and full understanding of the legal aspects of their situation.[17]

This is where regulating in some way the role of professional experts becomes particularly important. The client is potentially vulnerable to these experts, who must be trusted to apply their knowledge and expertise for the benefit of those they serve.

For my purposes here in this third category, then, we are in most cases presuming a client who has full mental capacity: they do not need a professional to make decisions *for* them. But they do need someone who has specialist expertise to help them make a decision and then implement it, that is, to *act on their behalf*.

Woolley elaborates a number of practical consequences that arise from the lawyer's position (2015: 295, emphasis in original):

> Lawyers do not routinely exercise practical authority over their clients' decisions. Large corporations or sophisticated individuals clearly retain decision-making power in relation to their identification and pursuit of their legal interests. Further, even in relationships where the lawyer has power over a client – the client is incarcerated, poor, or otherwise vulnerable – the lawyer's central obligation is to identify and act on that client's instructions, not to undermine them.... [T]he lawyer's role in facilitating a vulnerable client's ability to communicate her own perspective and position within the legal system, no matter how stupid and implausible and self-destructive that perspective and position may be, is an essential aspect of how lawyers protect the dignity of those they represent.... This is not to say that a client directs everything done by the lawyer – the lawyer's drafting or conversations or interpretation of the client's instructions will involve the lawyer's judgment. Nor is it to deny that lawyers and clients may make decisions in iterative and complex ways in which separating the client's choice from the lawyer's advice is difficult. But it *is* to say that the central function of the lawyer in advising a client is to discern the client's wishes, not to substitute her own.... [T]he lawyer-client relationship cannot be accurately or usefully categorized or explained through a lawyer's exercise of *de facto* or *de jure* discretionary power; that power is neither a defining nor necessary feature of a lawyer-client relationship.

A similar point is made by DeMott (1998: 303): "Many lawyers, especially in litigation settings, make decisions with significant consequences for the client without the client's knowledge or assent". It is not therefore the case that an autonomous client makes *every* decision relevant to the lawyer-client relationship (this is picked up further in paragraph 4.4.2 below). The importance lies in Woolley's notion of the lawyer's 'central function' which, in the analysis presented in this paper, is not that of third-party decision-making agency (cf. footnote 11 above).

It is therefore more a question of a lawyer making consequential or ancillary decisions that flow from the agreed best interests in order to give effect to those interests. The lawyer must be careful not to overstep the boundaries of the best interests decision, or to usurp or

17. It is possible, of course, that a client's lack of expertise could also be combined with lack of mental or physical capacity. This could be the case where medical practitioners need to apply their expertise both to make a decision for their patients *and* then to see it through on their behalf. This reflects the fundamental difference between the second and third categories.

change the substance of those interests, through their actions in 'acting on behalf of' the client to give effect to those interests.

The analysis here can benefit, I believe, from looking at four important aspects of the lawyer's role in the lawyer-client relationship: (i) the lawyer as agent; (ii) the lawyer as fiduciary; (iii) the lawyer as a regulated person; and (iv) the lawyer as a member of a public profession. Only by considering all of them can we offer a comprehensive view of what it means for lawyers to act in the best interests of their clients.

4.4.2 The lawyer as agent

It is often said – and accepted – that solicitors act as agents for their clients. Any agency relationship is created by contract, under which the agent (in our case, the solicitor) agrees to represent the principal (the client) in accordance with the agreed terms of that relationship. The resulting contract is often referred to as the lawyer-client 'retainer'.[18] The conclusion in the context of this paper, though, is that agency offers an important but only partial view of a lawyer's duties to clients.

A key component of agency relationships is that the agent represents the principal or, in other words, the principal (client) exercises control over the agent (lawyer). This means "prescribing on an ongoing basis what the agent shall or shall not do" (DeMott, 1998: 303). The agency contract will therefore set out the limits of what the agent can rightfully do on behalf of the principal. Within the scope of these limits, the agent's acts bind the principal.

It is important to stress here that lawyers, as agents, must be *acting on instructions*, that is, in accordance with the terms of their retainer. This means, therefore, that someone – the client – must instruct them. Unlike the second category (making decisions *for* others, exercising third-party decision-making agency), the lawyer does not substitute for the client. One important consequence here, then, is that the terms of the agency might include an explicit statement of the client's best interests (perhaps expressed as desired outcomes).

However, where, by definition, the principal consults the agent because of the latter's specialist knowledge and expertise, it is right to question the extent to which the client as principal can realistically 'control' what the lawyer as agent should or should not do on their behalf. In these circumstances, it is probably more accurate to say that (as DeMott puts it: 1998: 304), "the principal's expertise is inferior to that of the agent and the principal exercises control by selecting a particular agent, defining the scope and objectives of the agent's retention, and determining how to compensate the agent".

This still does not, technically, amount to the lawyer making decisions for the client, as in the second category (DeMott, 1998: 305), because

> control is exercised as an initial matter when the client retains the lawyer and defines the scope of representation. Thereafter, the lawyer has a duty, grounded in both the law of agency and professional norms, to keep the client informed about the status of the matter and to consult with the client to best determine the course of action that serves the client's interests. And some decisions ... are the client's to make unless the client has authorized the lawyer to make the particular decision, regardless of any prior or general grant of authority from the client to the lawyer.

There is, therefore, a difference between making a decision for a client as a substitute (the second category) and as an agent (this category). For instance, as a substitute there is no duty to consult the client or keep them informed (because, by definition, the client lacks capacity to decide or consent). As an agent, the lawyer is making decisions within the scope

18. Solicitors are required by regulation to set out the terms of their engagement with a client, which they will usually do in a 'client care letter' (though this might be a suite of associated documents rather than just one letter): https://www.sra.org.uk/solicitors/guidance/client-care-letters/. However, it is also implicit in the retainer that the solicitor will also proffer advice which is 'reasonably incidental' to the work that they have agreed to carry out: see *Spire Property Development Ltd & Anor* v. *Withers LLP* [2022] EWCA Civ 970.

of their authority in progressing actions that are consequential or ancillary to the client's substantive mandate and must consult with and inform the client accordingly.

As an agent, like any other agent, a lawyer is expected to display loyalty, good faith and integrity in their dealings with their client, as well as to bring independence, care and skill[19] to the discharge of their duties.[20] The relationship will also include respecting any confidential information shared by the client, and not seeking to benefit a third party at the client's expense.

A 'normal' agency relationship might also include the agent not exercising 'undue influence' over the principal's decisions. However, as we have just seen, where the principal is necessarily relying on the agent's expertise and experience, a strong degree of influence might be expected. It must follow that, provided that the influence is exercised for a proper professional purpose, it is not to be regarded as 'undue'.

In other ways, too, the lawyer-client agency relationship sets up a strong (and different) obligation of loyalty. DeMott explains (1998: 316):

> Within the general law of agency, much of the agent's duty of loyalty to the principal is subject to contrary agreement between the agent and the principal. With the principal's consent, for example, the agent may self-deal, act on behalf of parties with interests adverse to the principal, profit from transactions conducted on behalf of the principal, use the principal's confidential information, and compete with the principal....
>
> In contrast, the relationship between the lawyer and the client is less susceptible to an agreement that varies the lawyer's duty of loyalty to the client. The lawyer's professional duties cast the lawyer in many respects as the guardian of the relationship, requiring the lawyer to use reasonable judgment to identify the client's interests and to educate the client as a prelude to the client's consent to otherwise problematic conduct.

Indeed, because lawyers are fiduciaries as well as agents (as we shall consider in paragraph 4.4.3 below), there are limits on lawyers being able to put themselves in situations of conflict and personal profit. It is thus possible for lawyers to act consistently with (or at least not contrary to) agency obligations, but nevertheless to breach their obligations as a fiduciary.

A contention of this paper is that, although lawyers are both agents and fiduciaries in their relationships with clients, it is nevertheless important not to conflate the two. For the reasons given by Worthington (2021, and explored in paragraph 4.4.3 below), I adopt her view that fiduciary duties are narrower than agency obligations such that it is possible to be in breach of fiduciary duties but not agency obligations; and that not all breaches of agency obligations are necessarily fiduciary breaches.

There is no doubt that solicitors act as agents for their clients. As a result, the law of agency will apply to that relationship. However, it is also clear that lawyers perform functions that are *different* to most other agents and that they are *more than* just agents. As DeMott explains (1998: 301):

> Lawyers are officers of the court, thus subjecting themselves to the court's supervision and to duties geared to protect the vigor, fairness, and integrity of processes of litigation. Furthermore, as members of a profession, lawyers are subject to duties not neatly captured by the consequences of agency.

Because of this, "the client's right of control does not trump the consequences of the lawyer's position as an officer of the court and a professional subject to profession-defined norms and discipline" (DeMott, 1998: 305).[21] This means that "in the litigation context the relationship between a lawyer and the court is direct and immediate. Concurrently with the lawyer's representation of the client, the lawyer owes duties directly to the court.... This

19. On a solicitor's duty of competence, see https://www.sra.org.uk/solicitors/resources/continuing-competence/competence-statement/.
20. This might also be expressed as a generalised duty of 'fair dealing', as required by consumer protection laws and recommended in Mayson (2022: paragraphs 8.5 and 8.6.2).
21. It is also usually the case that these professional duties are not necessarily enforceable *by the client*.

dimension of the lawyer's position is beyond the explanatory framework that agency supplies" (1998: 305-306; and cf. Lord Denning, MR at paragraph 3 above).[22]

As discussed in Mayson (2024: paragraph 8.3) in relation to *Amersi* v. *Leslie & Others* [2023] EWCA Civ 1468, a lawyer as agent is not expected simply to carry out the client's instructions, come what may. Doing so might be seen by the court as pursuing an 'impermissible collateral purpose' that is not consistent with the lawyer's duty to the court and to the administration of justice.

A consequence is then that best-interests decisions made in accordance with agency obligations will not necessarily satisfy *other* duties and obligations that lawyers have when making such decisions. In other words, agency does not provide a complete explanation or encapsulation of a lawyer's duties.

Equally, there are limits to implied retainers,[23] and there may be elements of the client's conception of the relationship that are not included within the express terms of the client care letter (especially if the terms of engagement are 'standard form' and include few specific details of the client transaction).

As we shall see in paragraphs 4.4.4 and 4.4.5 below, there may also be some regulatory duties and professional norms that are not included within the agency contract that nevertheless govern the lawyer-client relationship (such as the professional principle in section 1(3) of the Legal Services Act 2007 to maintain proper standards of work).

All in all, the retainer agreement and associated expectations can constrain the scope of representation. As Webley puts it (2008: 246-247):

> if the best interests are to be defined according to the client's instructions[, then the] subjective assessment is made by the client, although the solicitor may counsel against the course of action dictated by the client. However, unless the solicitor is being asked to break legal or other ethical obligations, she is bound by those instructions unless she chooses to terminate the retainer.

In summary, "the general law of agency is often just a starting point for analyzing the legal consequences of lawyer-client relationships. Lawyers owe duties to a cast of characters wider than that defined by general agency principles, while the content of duties that lawyers owe their clients is distinctive" (DeMott, 1998: 326). Because of this, there may be circumstances where the lawyer is not an agent, or does not have the full duties of a 'normal' agent, and might even have extra duties not usually held by an agent at all.

As a result, the terms of the agency contract and relationship might only partially define the nature or extent of what it means for the lawyer to act in the best interests of a client. Nevertheless, I would say that one conclusion must be that, if a lawyers' actions are not consistent with their agency obligations of skill, honesty and fidelity, they *cannot* be said to be acting in the best interests of their clients.

4.4.3 The lawyer as fiduciary

It is also often stated that lawyers stand in a fiduciary relationship to their clients. In the same way that trustees and company directors are said to stand in such a relationship, it is taken as self-evident and unarguable. However, much of the literature (and, indeed, the

22. Although an agent can have more than one principal, that is not the case here because the lawyer is not the court's agent.
23. See, for example, *Robinson* v. *EMW Law LLP* [2018] EWHC 1575, *NDH Properties Ltd* v. *Lupton Fawcett LLP* [2020] EWHC 3056, *McDonnell* v. *Dass Legal Solutions (MK) Law Limited t/a DLS Law* [2022] EWHC 991, *Miller* v. *Irwin Mitchell LLP* [2022] EWHC 2252, and *Cooke & Ors* v. *Woodchurch House Ltd* [2023] EWHC 3318.

case law) tends to describe, rather than define, fiduciaries.[24] As a result, there is little guidance on the circumstances in which fiduciary duties arise. Thus, we can say, for instance, that trustees, directors, solicitors and agents owe fiduciary duties to others, and the consequences of those duties then follow, but the *reasons why* might be somewhat obscure or confused.

Although, as we have seen, lawyers are agents for their clients (see paragraph 4.4.2 above), and agents are also fiduciaries, there is not a direct overlap. Lawyers are not fiduciaries *because* they are agents. Their characterisation as fiduciaries arises because of the *obligations* they owe as professionals to their clients. This is a reflection of the observation that individuals are not subject to fiduciary obligations because they are fiduciaries; rather, it is because those obligations exist that they become fiduciaries[25] (cf. Finn, 1977: 2).

In most, if not all, situations where decisions are being made on behalf of others, the decision-maker will stand in a fiduciary relationship with the individual or entity that is the focus of the decision. All fiduciaries must act in the best interests of those for whom they make decisions; but not all instances of a duty to act in the best interests of someone else create fiduciary relationships (cf. Ribstein, 2011).

In her 40-year retrospective of Professor Len Sealy's pioneering work on analysing fiduciaries, Professor Sarah Worthington seeks to clarify this difference. She identifies two sets of 'legally significant facts' that give rise to two core fiduciary categories to which "certain special legal consequences follow" (2021: 163). These categories are: (i) that an individual has control of another's property (such as a trustee or company director), or (ii) that an individual has undertaken to act on another's behalf and for that other's benefit and not the individual's own benefit (such as an agent or solicitor). Those individuals within category (i) are also likely to fall within category (ii), but not vice versa (2021: 160).

The consequences that Worthington then identifies as attaching to a fiduciary relationship are prohibitions on taking personal benefits. These include prohibitions on using the property under the fiduciary's control for the fiduciary's own benefit, on self-dealing, on taking opportunities for themselves something that might have arisen for the beneficiary, and on taking bribes or secret profits (2021: 163 and 164). This has been summarised judicially as follows (*Lehtimäki* v. *Cooper* [2020] UKSC 33), by Lady Arden:[26]

> If a person is a fiduciary then, as part of his core responsibility, he must not put himself into a position where his interests and that of the beneficiary conflict ('the no-conflict principle') and he must not make a profit out of his trust ('the no-profit principle').

It is sometimes suggested that characteristics of fiduciary relationships include that the relationship is one of trust and confidence, that fiduciaries owe a duty of loyalty to act in the interests of others, and that they may make discretionary decisions on behalf of their beneficiaries. Worthington's analysis does not necessarily support these characterisations of the relationship and tends to a narrower view. She persuasively advances a view that is emphatically *proscriptive* and not prescriptive.

On this view, therefore, there is not a *prescriptive* duty to act loyally[27] in the interests of another: "the necessary equitable intervention in the fiduciary context was not an intervention concerned to enforce the fiduciary's undertaking to act 'in the interests of the principal', and see to it that this undertaking *was* performed; but it *was* concerned to see

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24. This view is also acknowledged in the Supreme Court's recent judgement in *Hopcraft & Anor* v. *Close Brothers Ltd* [2025] UKSC 33.
25. Woolley expresses a similar, associated point when she writes (2015: 294, emphases in original): "The power and vulnerability traditionally associated with fiduciary relationships are a *product* of the fiduciary's undertaking and discretionary power, not a *source*".
26. The principles of no conflict and no profit have been further affirmed recently by the Supreme Court: *Rukhadze* v. *Recovery Partners GP Ltd* [2025] UKSC 10, *Stevens* v. *Hotel Portfolio II UK Ltd* [2025] UKSC 28, and *Hopcraft & Anor* v. *Close Brothers Ltd* [2025] UKSC 33.
27. As Woolley acknowledges (2015: 322), "the extension of fiduciary duties beyond conflicts of interest and duty, to a generalized duty of loyalty, is controversial".

that, if the fiduciary acted at all, he acted in accordance with the undertaking he had given *not to act in his own interests*" (Worthington, 2021: 170-171, emphases in original).

Further, while the existence of discretionary decision-making powers might be a feature of category (i) (control over another's property), this cannot be true for category (ii) (those who have a job to do for others), and certainly not for solicitors "who simply had specific duties to perform, not discretions to exercise, yet were undoubtedly fiduciaries" (2021: 169).[28]

More fully, Woolley explains that the principle underlying the lawyer's fiduciary status focuses (2015: 291-292, emphases in original)

> not on the *lawyer's* exercise of discretion ... but rather on the lawyer's provision of the advice and advocacy necessary for the *client's* exercise of discretion. A client cannot access the legal rights and entitlements in a system of laws without advice and advocacy.[29] He cannot enjoy the dignity and respect with which the law aspires to treat him. The discretionary power of the lawyer that grounds the lawyer's fiduciary obligations is indirect; it is not the lawyer's own discretion but rather the lawyer's ability to enable – or destroy – the discretionary decisions of her client about how to participate in the rights, entitlements, and processes of law that grounds the lawyer's fiduciary duty. The lawyer's loyal representation actualizes the client's discretionary decisions; fiduciary liability ensures that loyalty.

The key component, then, is that the lawyer has undertaken to act on the client's behalf and for that client's benefit (the no-conflict principle) and not for the lawyer's own benefit (the no-profit principle[30]). However, the essence of a fiduciary relationship is often taken to mean that fiduciaries must act in good faith, owe a duty of loyalty, must not exercise undue influence, must not misuse confidential information, and similar (cf. paragraph 4.4.2 above in relation to agents). These descriptions go beyond the no-conflict and no-profit principles – even though they might be stretched to relate to them – and should therefore arguably apply only to persons who stand in a relationship to someone else *as agent*, not as a fiduciary.[31]

Fiduciary duties should therefore properly be characterised as narrow obligations. Although they might be seen as encompassing a duty of loyalty, the no-conflict and no-profit principles are consistent with such a duty rather than an expression of it. As such, these fiduciary duties do not impose a generalised duty of loyalty and could not be used to support a 'client-first' or hyper-zealous approach to client representation (cf. paragraph 3 above).

Where, as in our case, the fiduciary is a professional person, Jorgenson et al, for example, write (1997: 50-51):

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28. It seems to be for this reason that Ribstein adopts an even narrower view than Worthington, and would confine fiduciary obligations to category (i): "The fiduciary duty is a useful tool for controlling agency costs. It makes sense to utilize it in the context of a particular type of agency relationship involving broad delegation of power to manage another's property. In this situation, a default duty of unselfish conduct is appropriate because lesser constraints on the agent often are ineffective.... The fiduciary duty of unselfishness should be distinguished from duties that can exist outside the fiduciary setting, including the duties of care, good faith and fair dealing, and to refrain from misappropriation.... Fiduciaries should be distinguished from those who exercise lesser power over the property of others, including co-investors, advisers and professionals, and those in confidential relationships.' (2011: 919-920). Compelling though Ribstein's logic is, it is not consistent with the clear view of the courts that lawyers owe fiduciary duties to their clients, and therefore Worthington's slightly wider formulation is preferred.
29. This sentence might be an overstatement (in terms of 'cannot access') given that individuals can choose to represent themselves in legal proceedings – and increasingly do so (or must do so, in the absence of available funding): cf. paragraph 4.1 above.
30. Although taking a bribe or secret profit would undoubtedly be a breach of the no-profit principle, it is not a precondition for such a breach of fiduciary duty that any profit or personal benefit should have been received as a consequence of dishonesty or secrecy: cf. *Stevens* v. *Hotel Portfolio II UK Ltd* [2025] UKSC 28 and *Hopcraft & Anor* v. *Close Brothers Ltd* [2025] UKSC 33.
31. Ribstein is also quite clear that any duty that directors have to society as a whole is not a fiduciary duty (2011: 909-910): "Social responsibility generally relates to whether corporate managers have breached their duty of care or acted outside the business judgment rule by seeking to benefit society rather than the corporation. Since courts have limited ability to second-guess business decisions, they must give non-self-dealing managers wide leeway in making these decisions by refusing to impose liability except for decisions that egregiously waste corporate assets".

> In this situation, the importance of maintaining boundaries flows from the nature of the relationship in that the professional possesses the special expertise or knowledge that the client seeks. The element of proprietary knowledge creates, at a minimum, an imbalance of information between professional and client and may, when combined with the client's vulnerability[32], constitute an imbalance of power....
>
> The professional, by virtue of his or her status as a fiduciary, has both the power and the opportunity to exert undue influence over the client.... It is because of this potential for undue influence that the professional is charged with acting only in the best interest of the client.

These are undoubtedly factors that relate to the context of a 'best interests' decision. In other words, if the fiduciary, when making a decision, is swayed, for instance, by the illegitimate or irrelevant interests[33] of someone other than the focal person (this would be a conflict), or by the possibility of personal enrichment (this would be a profit), the fiduciary duty is broken.

However, it is not the *existence* of an imbalance of power or knowledge, or the *potential* or the *opportunity* presented by it for undue influence, as referred to by Jorgenson et al, that is the problem. It is only an *actual* conflict or profit arising from the exercise of undue influence that would create the breach of a fiduciary duty.

Worthington is similarly clear in her view that although obligations that relate to not exercising undue influence, not breaching confidentiality (or failing to disclose relevant information to the client), or dealing unfairly, are all relevant and can apply to the lawyer-client relationship, they are nevertheless not *fiduciary* obligations. Other individuals who, say, exercise undue influence or breach confidences do not thereby become fiduciaries (2021: 162 and 165). Therefore, says Woolley (2015: 166), "not every breach of duty by a fiduciary is a breach of fiduciary duty".

This would seem to me to answer Woolley's uncertainty about "whether a lawyer may also be liable for significant non-disclosures, breaches of confidence, or other serious acts of disloyalty, even in the absence of a conflict" (2015: 306). Applying Worthington's analysis, the obligation of a lawyer as a fiduciary arises from circumstances of a conflict of interests or taking a personal profit. These might also be breaches of regulatory obligations, for which the lawyer as fiduciary would also be liable.

Other circumstances, however, such as breach of confidence or non-disclosure might well be a breach of agency or regulatory obligations, and they might be breaches of a duty committed by someone who in fact stands in a fiduciary relationship to another, but they are not breaches of a *fiduciary* duty. This understanding would be important in deciding what remedies might be properly be available for any breach of duty.

As with agency duties, therefore, fiduciary obligations only partly explain the basis on which lawyers are expected to act when representing another. However, when fiduciary duties lie in the no-conflict and no-profit principles, any breach of either of these must mean that the lawyer could *not* be said to be acting in the best interests of the client.

4.4.4 The lawyer as a regulated person

As we have already seen (cf. paragraph 3 above), a lawyer is subject to a set of explicit regulatory obligations and requirements. In some cases, these replicate obligations that already exist as a result of duties arising as an agent (cf. paragraph 4.4.2 above) or as a

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32. The Supreme Court in *Hopcraft & Anor* v. *Close Brothers Ltd* [2025] UKSC 33 was clear that the associated relationship of trust and confidence is a *consequence* and not a *cause* of a fiduciary duty as, too, is the vulnerability which is a typical characteristic of a person to whom a fiduciary duty is owed (at paragraph 108).
33. I have deliberately used the expression 'illegitimate or irrelevant interests' of someone else to reflect the point made earlier about the best interests duty being a relative one (see paragraph 2 above). In other words, it is acceptable – necessary, even – for a decision-maker to take account of wider public or social factors in deciding what might be in a focal person's *best* interests: see also paragraph 4.3 above.

fiduciary (cf. paragraph 4.4.3 above), whether explicitly or implicitly. Hence, obligations of confidentiality, integrity, and independence, are included as professional principles in section 1(3) of the 2007 Act.

Sometimes, though, there are regulatory duties that are not directly replicated within the obligations of an agent or fiduciary. This would be the case, for instance, in relation to maintaining proper standards of work in accordance with the professional principle in section 1(3)(b), to the requirements of anti-money-laundering compliance, or to the more specific requirements within the SRA Accounts Rules relating to accounting for client money.

Again, we can conclude that a breach of any of these regulation-only requirements could *not* be said to be acting in the best interests of the client, *in addition to* those circumstances where agency and fiduciary obligations prohibit other actions.

Although the repetition of certain activities in both regulation and in other sources of obligation might seem unnecessary, it is not without consequence. Where regulatory breaches have taken place (even those that are also a breach of the agency contract or of a fiduciary duty), the client may make a complaint to the lawyer, to the Legal Ombudsman, or to the lawyer's regulator. In these circumstances, regulatory action will be taken against the regulated lawyer, which could result in a sanction (including the ultimate penalty of losing the ability to practise at all). However, the regulators' ability to provide redress or compensation directly to the client might be limited.[34]

Where there has been a breach of the agency contract, the court can order compensation or other remedies to the client – and other than (usually) a financial consequence, there might be no other action taken against the misbehaving lawyer. Similarly, if a lawyer has taken a personal benefit, contrary to their fiduciary duty to the client, the court can order that the benefit be returned[35] but, again, there might be no disciplinary action in that forum against the self-dealing lawyer.

4.4.5 The lawyer as member of a public profession

With the formal separation of regulation from representation under the Legal Services Act 2007, we have the possibility that a profession could seek to encourage amongst its membership standards of behaviour and interaction with clients and others that exceed those required by law or formal regulation (whether as agency and fiduciary duties under the general law or as regulatory obligations under statute or regulators' codes of conduct).

However, where these arrangements do not have the force of law, one might question their legitimacy and efficacy in actually shaping and monitoring the behaviour of professionals. Wendel has written that (2001: 1958) "an aspirational code of conduct, pitched in terms of virtue and the 'highest ideals' of the legal profession, indeed seems to be a flimsy reed upon which to hang an argument for doing something against one's self-interest".

But perhaps we should not be so sceptical. After all, there is widespread and powerful evidence of the effects of community and organisational norms on the behaviour of lawyers within their work settings. Public reputation and social standing, as well as a 'sense of belonging' within a professional community, can be both powerful motivators and constraints. As Chaddha & Agarwal put it (2023: 1711): "An organisation known to be driven by ethical and moral values garners respect and credibility among the general population." (Of course, the opposite is also true.)

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34. This is one of the main conclusions in the IRLSR first supplementary report (see Mayson, 2022: paragraph 4.4).
35. Indeed, the remedies for breach of fiduciary duty are "peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory" (per Millett, LJ in *Bristol and West Building Society* v. *Mothew* [1998] Ch 1 (at page 18) and cf. *Hopcraft & Anor* v. *Close Brothers Ltd* [2025] UKSC 33 (at paragraph 82).

My question here, therefore, is whether there is anything beyond the general law and formal regulation that can give us any better insight or understanding of the factors that might sway lawyers towards – or away from – acting in a client's best interests.

As we have seen in the preceding paragraphs, the general law of agency and fiduciary obligations, and the regulatory duties imposed on lawyers, do not each present a complete description of a lawyer's responsibility to their clients. Although, when combined, they offer a richer description of what it might mean to act in someone's best interests, again in my view it is not comprehensive. There are still factors that are not included – something that we might describe as 'professionalism' or a 'professional ethos'.

Given the multitude of different clients and circumstances in respect of which lawyers might be called on to advise, we can probably safely assume that no set of laws or regulations can ever cover all possible ethical permutations. There will always be a gap or room for doubt. The question is whether anything can fill the gap or resolve the doubt.

Chaddha & Agarwal seem to think so (2023: 1711):

> The versatile nature of moral principles between individuals, groups, societies and time periods often raises many questions of moral ambiguity where different moral principles may dictate different courses of action. Often, in such circumstances, making a moral decision is complicated, not as a choice between right and wrong, but as a choice between better of two right decisions. Such conflicts in moral decision making occur at individual, personal, professional and group/organisation levels. A framework of ethics will provide clear guidelines to enable the individual, group or organisation to take decisions, which would benefit all involved and help them avoid taking decisions or actions that might be considered unethical in retrospect, although based on good moral intentions.

As an expression of the aspirations or expectations of a professional community, can a broader view of professional ethics offer any clear guidance when the formal rules are incomplete or ambiguous? Can it provide a moral compass when deciding what should be done (by prescription), or should not be done (by proscription)? Would it not be preferable, in the interests of maintaining public trust and confidence in the profession, for a lawyer to act in accordance with *ethical values* rather than to use any doubt about the formal rules as 'wriggle room' for questionable behaviour?

My instinctive and preferred answer to these questions is yes. I would rather see ethical backbone than a flimsy reed. I have to say, though, that the evidence is positive and encouraging as well as negative and dispiriting!

While the duty to act in a client's best interests is commendable, the modern view of 'law as a business' leads to an inherent tension between serving the interests of clients and meeting the commercial imperative of maintaining the law firm's profitability.[36] This is starkly illustrated by this quotation from Whelan & Ziv (2012: 2605):

> The pressures to deviate from ethical conduct in the name of making profits and bringing in business included, according to a 'big firm' partner ... "inflating time sheets, undertaking such unnecessary research, exaggerating the need to review everything during discovery, undertaking overzealous due diligence processes, and other practices." He went on: "[W]e cheat and lie to make ends meet. We act dishonestly as a matter of course. We do it because we have no choice."

It is unlikely that these practices are isolated instances in the world of large corporate clients and the large commercial law firms that serve them. There is both an organisational and professional culture that sustains and, in some senses, validates these practices.

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36. For another treatment of conflicts of duties arising from law firms' business models, see Stagg-Taylor (2011). See also Visscher, who concludes (2014; emphasis in original) that "there are various reasons to believe that the principle that lawyers should only serve the interest of their client and not their own interests is naive. There are Law and Economics and empirical reasons to think that lawyers *will* also serve their own interests and there are behavioral economic and psychological reasons to doubt that lawyers who *want* to serve their client's interests are always *able* to do this properly."

Nevertheless, it is perhaps also worth noting (with hope) Bridgeman's observation that (2019: 151) "a change in circumstances can mean that what was once an acceptable option has become an affront to professional conscience".

Professional and organisational hierarchy, and requirements for more junior staff to act under the direction and supervision of others, all create a more widespread, but corrosive, ethos of practice.[37] This deference to peers or internal hierarchy can mean that the need for the approval of superiors and colleagues "results in a disposition towards dependence rather than autonomy" (Gill, 2009: 102), and that ethical questions "are not so much ignored as displaced" (2009: 132).

This displacement of professional independence in turn leads to a wider challenge for professional ethics as identified by Gill (2009: 114): "How can [these professionals] suddenly learn to think independently according to complex ethical principles if they have been socialized not to think in such terms throughout most of their professional lives?" Nor is the situation always straightforward.

Suppose that there are different possible courses of action, all of which will achieve the client's interests. There is no one choice that is more ethically justified than another (this is sometimes labelled 'ethical indeterminacy'). If no choice will disadvantage the client, is there any reason why a lawyer should not then choose one of those that also happens to be beneficial to the lawyer or their firm?[36]

As Tata explains (2007: 496):

> The concept of ethical indeterminacy suggests that the relationship between financial arrangements and lawyer behaviour is less straightforward than that either portrayed in public by professional law bodies (namely, that lawyers only act in the clients' interests regardless of financial self-interest), or, that portrayed by behaviourist economics (namely, that lawyers, like everyone else, are determined more or less directly by financial incentives). Rather, lawyers rely on a range of forms of capital (social, cultural, as well as economic), and we should expect the relationship between financial payment structures and the handling of cases to be complicated by and mesh with cultural practices....

It is not a given, then, that the lawyer would follow self-interest alongside a beneficial outcome for the client. There might yet be other effects on, say, reputational capital that could lead a lawyer or a firm to decide otherwise.

Nevertheless, it is clear from this that the organisational or cultural pressure to meet economic objectives may often be sufficient to outweigh any professional obligation to put clients' interests ahead of those of the firm. It would therefore seem reasonable to conclude that some law firm practices *cannot* be said to be in the client's best interests. This would include, for instance, those that 'pad' or inflate the time spent or work done for clients because that is in the lawyer's organisational or personal financial interests.[38]

However, any switch to fixed-fee work, as an alternative and counter-incentive to these practices can also result in less time and attention being paid to clients' concerns and interests (because of the financial disincentive to spend any more time than is absolutely necessary to dispose of the legal issues). This approach is often adopted in matters that lawyers characterise as high-volume or low-value, such as residential conveyancing or personal injury claims – but which nevertheless remain personally significant and stressful for the clients.

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37. It can, in fact, lead to a default, unthinking culture that creates lawyers who are "performing one-dimensional roles for one-dimensional reasons, and so can demand their adherence without commanding their respect and therefore their ethical commitment" (Gill, 2009: 130).
38. See the recent case before the Solicitors Disciplinary Tribunal in which a solicitor recorded, over a period of 266 working days, a daily average of more than 28 hours. She was ordered to be struck off: *Solicitors Regulation Authority* v. *Ahmed* (2025) Case No. 12760-2025.

Tata suggests that it is equally difficult here, too, to establish that clients' best interests have been met (2007: 518-519, emphases in original):

> Clients' expressed wishes (their desired outcomes) do not make up a neat, inert entity which is just there waiting to be responded to. These wishes are, among other things, inescapably wrapped up with the work of the lawyer. Although both the 'supplier-induced demand' thesis and the 'demand-induced supply' thesis argue that there is a relationship between supply and demand, they nonetheless regard 'supply' and 'demand' as fairly settled and discrete entities – there is 'real' demand which can be seen as distinct from supply. My suggestion is that supply and demand are inescapably and mutually constitutive....
>
> Nor does it seem possible to determine empirically whether or not a reduction in client contact and preparation (brought about by fixed payments) can be shown definitively to be contrary to client interests. I do not mean to suggest that it is impossible *in the abstract* to arrive at the 'best interest' of clients but, rather, that because lawyers are the daily custodians of legal knowledge, practical experience, and the keepers and masons of individual case 'facts', the search to define and fix a pure conception of best interests (and thus 'need') which is free and 'uncontaminated' by other influences (not least the lawyer) may be *empirically* unrealizable. There is no unmediated essence of a case to which we can fix universal definitive characteristics of 'need'.

Tata's conclusion has an echo of Finn's (1989) view that the quest to find and articulate a client's best interests is in fact an 'impossible inquiry' (on this point, see also paragraphs 4.5.2 and 4.5.6 below).

This would require a common understanding of actions and behaviours that, within the professional community, are to be regarded as either acceptable or unacceptable in their outcomes or performance. As we have seen, some of these are defined by general law and regulation. The question here is whether there are other actions and behaviours that should also be regarded as professionally acceptable or unacceptable.

These further actions and behaviours will reflect, as well as be the result of, custom and practice. As Mather observes (2003: 2085): "professionalism in practice does not reside in each lone individual lawyer, but in the social community in which each lawyer practices". However, as we have seen, this can lead to – and validate – actions and behaviour that are negative in their client effects as well as desirable.

The challenge is that professionals can "develop their sense of group membership as much by flouting [professional norms] as by adhering to [them]. However ... such flouting [is] itself done largely according to *an unarticulated shared ethic which defined appropriate action differently*" (Gill, 2009: 142, emphasis supplied). Where questionable behaviour seems to be part of widespread or common practice (as, for instance, in 'padding' time, as noted above), we need to understand and address "the ways in which normality has become dysfunctional, and particularly on the ethos that has become normalized" (Gill, 2009: 142).

As Donovan puts it (2021: 49), within any community, norms "are, in effect, the rules that we actually live by rather than those that we are asked to live by"; they are constructed through social interaction, and their meaning "becomes authority for that community, embodying a collective reality". There are descriptive norms (what is) and injunctive norms (what ought to be). Consequently (2021: 55-56), "to change the conduct of someone within a community, it is not enough to simply encourage the introduction of new injunctive norms.[39] Rather, we must also address existing and conflicting descriptive (or observable) norms as well."

Although the professional ethos, norms, culture, and practice that we are looking at here originate within and are legitimated by the professional community from which they develop, the implications are more far-reaching. As Gill explains (2009: 145, emphasis supplied):

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39. Regulation can be seen as a form of injunctive norm and, explains Donovan (2021: 58): "Crucially, when a norm is enshrined in regulation it adopts a particular status of authority, namely that it is the product of a democratic institution that speaks for society and has coercive force."

> The fate of the professional ethos does not only matter to professionals themselves. Others also have reason to be concerned about the ethical relation between individual [professionals] and the commercial and regulatory contexts in which they work. Professionalism is relied upon to guarantee the quality of [professionals'] work not only by clients, *but by other stakeholders and the general public as well*.... professionals are relied on to make such judgements, and the ethos of professionalism justifies that reliance.

We must therefore be careful that the resort to 'professionalism' to justify certain actions and behaviours does not allow practitioners to insulate themselves from the evaluation of outsiders (cf. Gill, 2009: 102). We must also be careful that the frame of reference does not become the narrow interests of the employing firm (where questionable behaviour can create issues for the reputation of the profession as a whole).[40]

As Gill explains, a broader conception of professional responsibility can act as a supportive buffer between an individual and their situation (2009: 108-109):

> professionalism enables [professionals] to resist the idea that they are merely functionaries of, respectively, a technical system, a profit-maximizing employer, or a client. Professionalism does not enable them to avoid playing the roles of technocrat, employee, and service worker. However it does enable them to modify those roles to some extent, and to do so in ways that make them less dependent on validation by those employers or clients before whom the roles are played....
>
> [A] professionalism that articulates an ethical relation between self and work does entail a degree of independence from employers' and third parties' interests. This kind of independence is not always achieved, but it matters not only to [professionals] but to their clients and to the general public as well. Professionals must be trusted by clients to perform on their behalf in spheres where those clients are not competent to operate themselves, and they must be trusted by the public to do so with due regard to the overall consequences of their actions.

As highlighted in paragraph 3 above, the call for a more ethical approach was advocated in Mayson (2024). This approach incorporates the assertion that, as members of a public profession, lawyers' actions, behaviours and practices must also reflect an acceptance of a broader obligation to the public interest. This requires (Mayson, 2024: paragraph 5.3) attention to (1) the fabric of society (including the rule of law and the administration of justice) and (2) the legitimate participation of all citizens in society (including exercising their personal autonomy, support for their legal rights and duties, and access to justice). Unfortunately, too often we see a failure to recognise and act as members of a public profession and a preference instead to adopt a determined but unprofessional pursuit of clients' interests and self-interest.

To my mind, this reflects a shattered conception of professional ethics that leaves lawyers without the vocabulary they need to discuss, evaluate and reinforce the ethical aspects of their practices and community. Without that vocabulary, though, they lose the prospect of legitimacy and scaffolding that grants them the assurance of the public trust and confidence that in turn underpins their public status as professionals and their licence to practise.

4.5 Deciding on 'best interests'

4.5.1 Whose view prevails?

We should by now be clear about who the client is, who has the capacity and authority to give instructions on which their lawyer must act, and how an appreciation of the role that a lawyer is fulfilling can help us understand the basis on which they are acting on behalf of the client. Our attention must now turn to the content and substance of the best interests that are explicit or implicit in those instructions, and look at some of the challenges that a lawyer might face in carrying them out.

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40. See, for example, issues with lawyers being perceived as 'professional enablers' of suspicious transactions: Heathershaw et al, 2024; Institute of Business Ethics (2025).

The first fundamental consideration in relation to the substance of best interests decisions has already been touched on, but is nevertheless an important one: whose view, ultimately, prevails on what is in a client's best interests? This question gives rise to potentially important distinctions. Is it the lawyer's assessment that matters, namely, what *they believe* to be the substance of the best interests of their clients? Or is the lawyer's task to enable and understand what the *clients* believe to be in their best interests? Or is it even what, in the end, retrospectively (and perhaps at a different point in time and with different information available to them), the courts might conclude was, or should have been, in the clients' best interests?

In keeping with the law's foundational assumption of an individual's capacity and autonomy, and the lawyer's role in acting on behalf of a client (cf. paragraphs 4.2 and 4.4 above), we have already seen that it should not be the lawyer's role to usurp the client's autonomy to make their own decisions. Consequently, the lawyer's role would not be to advise in *what the lawyer believes* to be the best interests of the client. As Woolley writes (2015: 323, emphasis in original):

> With client-centred representation the focus is not on what the lawyer believes to be the best interests of the client (although that is not irrelevant to the representation) but is rather on the lawyer assisting the client to identify and pursue what *the client believes* to be in his best interests, given his varied needs, obligations, interests, and concerns.

We know that this position would notably contrast with the best interests duty of company directors where the directors, as substitutes and fiduciaries, must make their decisions *for* the company about what they believe to be its best interests (cf. Langford, 2016: 507, paragraph 4.3 above). However, this is simply a reflection of the differences between those who make decisions *for* a focal person and those who *act on behalf* of that person.

The conclusion about whose view of best interests prevails is therefore, in principle, clear, based on the discussion in paragraphs 4.2-4.4 above. However, where lawyers reach a professional judgement that their clients' best interests should lie somewhere that is not aligned with the clients' views, and they then seek to persuade them otherwise, there is often a fear or concern that the lawyers' actions could become paternalistic. If true, this would be an 'I know better' attempt to deny the clients' decision-making autonomy, and therefore inconsistent with the lawyers' professional duties.

Woolley makes the point that (2015: 329-330): "lawyers act improperly when they engage in paternalistic legal objectification of their clients. Such paternalism prevents their clients from enjoying the respect for their dignity and autonomy that the law provides. The point of the lawyer-client relationship is the actualization of the client's decision making, not the lawyer's substitution of her own decisions for those of the client."

However, the *proper* deployment of professional judgement and advice should not run this risk. As Dewhurst explains (2013: 981): "Lawyers who begin with a broader focus on their clients – their needs, their interests, their choices, their happiness, etc. – and then look at what is possible within the law to address those interests to the full extent possible, avoid the paternalism critique".

As part of this initial discussion about whose view prevails, we need to return to the idea of clients expressing their own expectations about the lawyer-client relationship. In some cases, these requirements or expectations should also be regarded as explicit statements of what clients regard as being in their best interests. For example, companies and other clients might expressly support early settlement or mediation rather than expecting the zealous or 'scorched earth' pursuit of their interests in aggressive litigation.

Such statements can also be powerful 'regulators of behaviour'. For instance, a public statement that the client organisation seeks to be ethical in its dealings with others can become a standard against which its suppliers are judged, too. As Whelan & Ziv (2012) point out, regulators can struggle to identify and sanction breaches of professional codes of conduct because they do not have sufficient proximity to a regulated law firm and its lawyers

to monitor and supervise it effectively, at least until something goes seriously (and usually publicly) wrong.

In practice, corporate clients can have frequent dealings with law firms, and they can observe and experience ethical or unethical actions at first hand. The threat of losing a valuable or prestigious client can exert a far more powerful influence on lawyer behaviour than the remote possibility of regulator attention. Also, as Whelan & Ziv rightly observe (2012: 2607): "large corporate clients do not have to justify their decision to impose the ultimate sanction: termination of the relationship".

However, these explicit corporate statements are increasingly going further as large corporate or institutional clients impose their own 'moral' requirements on suppliers, including lawyers. These can relate to employment and working practices, such as equality and diversity targets and achievements, flexible working hours, carbon footprint and so on. These requirements can extend well beyond what is required of lawyers by their regulators and might be regarded by some as 'client capture' (cf. Leicht & Fennell, 2001; Dinovitzer et al, 2015) and by others as 'quasi-regulation' (cf. Whelan & Ziv, 2012).

It is questionable whether such 'moral behavioural' impositions represent an expression of a client's best interests in the *legal* matter in issue and, indeed, whether they therefore technically form part of the lawyer's 'instructions' for the purposes of the retainer on which they are obliged to act. Of course, from a commercial point of view, in maintaining good relationships with clients, the law firm might not be best advised simply to ignore their clients' wider stated wishes and preferences. But, as a matter of regulation and professional ethics, these behavioural impositions are not perhaps so clearly instructions that *must* be followed.

In many ways, this 'privatisation' of lawyers' ethics is unsettling (cf. Whelan & Ziv, 2012: 2608). If corporate clients determine lawyers' ethical responsibilities and imperatives, who oversees compliance – especially if those imperatives are broader than, or different to, their professional regulatory obligations? It clearly cannot be the formal regulator in the 'beyond' or 'different' areas. Would this matter if these areas are consistent with wider public interest or societal good? But if they are not ...?

4.5.2 What the client says they are

The ideal starting point in relation to the substance of a client's best interests would be a client who is already clear about what they wish their lawyer to do for them (as a conscious expression of their best interests). But, as Mather observes (2003: 1065): "some clients do not know what they want and rely instead on their lawyers to tell them what they should do".

Even when clients know what they want, they might not be fully sharing their objectives, reasons or motivation with their lawyers: they "have certain power over their lawyers as they engage with them in the process of giving instructions" (Moorhead et al, 2003: 8). Clients might not therefore have shared everything with their lawyer that would allow the latter to form the most comprehensive view of the clients' best interests in any given situation or circumstances.[41]

In some cases (such as breakdown of marital or family relationships), the client's view may be clear but nevertheless distorted or partial. Indeed, if one party fears that their lawyer is trying too hard to accommodate the views and preferences of an adversary, they might be reluctant to engage fully with that lawyer (cf. Webley, 2008: 233-234 and 235).

Equally, what the client wants might be unrealistic, idealistic or misguided: "Far from being 'in control' lawyers perceive a need to move clients, through strategic invocation of law, from a fight for justice towards realism, reason and above all settlement" (Moorhead et al, 2003:

41. Although as a matter of agency law, the lawyer as agent has a duty to share all relevant information known to the agent with the client, the reverse is not the case.

8). Through the enabling process of independent, objective professional advice (cf. paragraph 4.2 above), the lawyer needs to bring the client to a settled view of their best interests.

It therefore seems clear that a client's view of their interests might be considered by others to be partial, misguided or short-sighted. A lawyer must therefore take into account considerations that go beyond the self-interest of the client, and should advise the client accordingly. These considerations will include the client's wider personal, family, community, social, cultural and spiritual circumstances and values. In doing this, the lawyer should be thought of as acting in the client's (wider) *actual* best interests rather than in their (narrower) *legal* best interests.[42] This would also affirm the lawyer's own wider role in advancing the public interest and, in particular in contentious matters, the interests of justice rather than merely being the client's agent (cf. paragraph 4.4.2 above).

As Melville et al observe (2014: 173-174):

> clients do not necessarily know what they want, they need to make decisions under financial and emotional stress, do not understand the limits of the law, and their goals may change. In response, lawyers may see that it is in their clients' best interests to maintain social distance and to actively manage their clients....
>
> [L]awyers and client may have quite different conceptions of what is in the client's best interests.... Rather than seeing the client's best interests as being objective, stable and self-evident, a client-aligned approach acknowledges that a client's best interests are shaped by social processes and social practices.

The obligation to 'steer' a client towards a broader realisation of their wider, rational, actual, best interests would appear to put lawyers in a 'controlling' or 'decision-making' role. On the face of it, this would be inconsistent with their professional responsibility to counsel a client to their own realisation of their best interests (cf. paragraph 4.4.3 above). What the lawyer should be doing, though, is taking into account considerations that go beyond the client's narrow self-interest and advising the client accordingly.

If clients are to make decisions for themselves, they must be in possession of all the information and advice that is necessary for them to make a proper assessment of the facts and factors that touch their best interests. Only then can they reach an informed and balanced conclusion about what those interests are. Addressing the potential 'ignorance gap' requires lawyers to focus on disclosure and understanding, namely, that the lawyer has given sufficient information and explained the consequences (the *facts*) that will allow the client to understand and reach an informed decision (on their *interests*) for themselves.

Coggon & Miola put it this way in relation to medical treatment (2011: 544, emphasis in original):

> The patient is treated as most intimately engaged with her own values, beliefs, preferences, and priorities.... A presumption that doctor knows best is exchanged for one that the patient does: or more accurately that the patient *will* if properly informed. To know best, the patient needs to be sufficiently informed of relevant matters that fall within the health professional's competence. Although she cannot demand a treatment that her doctor thinks inappropriate, she can decide what is best from what is offered, including no intervention whatsoever. In principle, if not perfectly in practice, the doctor deals in facts and the patient in values.

It may be that the courts have concentrated too much on disclosure (that is, on who makes a decision and the sufficiency of the information provided to them) and too little on the importance of the understanding of the recipient of that information (cf. Coggon & Miola, 2011: 538-540 and 547, emphasis in original):

> the courts have appeared to suggest that providing information itself will be enough to render a patient's decision autonomous, without anything further. They therefore require only that

42. This is also consistent with medical best interests cases (see paragraph 4.3 above), where considerations that go beyond *clinical* best interests must be taken into account in reaching a decision about a patient's actual best interests.

> information is imparted to the patient, rather than communicated to her.... But does this expose the law's approach to autonomy as not only flawed but, more seriously, counter-productive for precisely the vulnerable patients who need it most?... Disclosure means nothing unless the patient *understands* the information [and so] *understanding* must be a precondition, as it *is* in the law relating to capacity.[43]

There is certainly a lesson here for lawyers in relation not merely to *informing* a client by passing on any relevant information or in giving advice but making sure that the client has understood the meaning and significance of it so as to be able to make a rational assessment and decision based on it.[44]

The tension between narrow and wider interests in assessing what, in totality, is in the client's *best* interests is expressed by Coggon & Miola in such a way that even the otherwise mentally competent may lose their freedom or liberty to choose what best serves their interests "when it is probable that [a focal person] is making a bad decision without possessing the requisite rationality to do so reasonably. Juvenility, mental impairment, and *factual ignorance* all may bar a person from having privileged liberty at law" (2011: 543, emphasis supplied). I think this formulation goes too far.

In circumstances of juvenility and mental impairment, the focal person is within the second category of lacking autonomous capacity (see paragraph 4.3 above). A substitute decision-maker is *required* (third-party decision-making agency), and that is not the role of a lawyer. Observable lack of rationality in decision-making by the client might also be indicative of questionable capacity, which would potentially also put the client into the second category (see further paragraph 4.5.3 below).

But to deprive someone of the freedom to make their own decisions based only on factual ignorance strikes me as an unwarranted substitution of judgement. What statutory or common law power exists to allow a court to do this? For a lawyer to presume to do so would be a denial of the client's autonomy (which, for the purposes of professional representation, they must assume) and would not be the exercise of their proper role (see paragraph 4.4.3 above).

Indeed, if there is any factual ignorance on the client's part, that might rather suggest that the lawyer had failed in their representation by not ensuring that the client *was* fully and appropriately informed and had understood. Accordingly, moving beyond a shallow or tick-box notion of informed consent – telling (one-way communication) without ensuring understanding (two-way communication) – is an important piece of considering whether the client has been fully able to assess where their best interests lie.

4.5.3 When the client's capacity is in doubt

I considered earlier (see paragraph 4.2 above) circumstances where a client lacks the mental capacity to make decisions for themselves. Someone else needs to be appointed as a substitute to make decisions for the client, and the lawyer is not that person. However, a client might suffer from some mental ill-health but not lack capacity, and this may add some additional challenges for the lawyer seeking to identify and act in the client's best interests.

Barnett et al explain the challenges of acting for clients who are suffering from mental health issues (2007: paragraph I):

> Such clients may act irrationally some of the time or all of the time, or they may suffer from mood swings, disorganised thinking, hallucination or paranoia. The intensity of their symptoms

43. The Mental Capacity Act 2005 states that a person is unable to make a decision for himself if he is unable to understand the information relevant to the decision, or to use or weigh that information as part of the process of making the decision (section 3(1)).
44. The potential inadequacy (or misguidedness) of the general tendency for regulation and professional rules to focus – and over-rely – on information and disclosure in the context of lawyers' duties to 'consumers' of legal services was also picked up in Mayson, 2022: paragraphs 2.3.1, 3.4 and 6.2.3.

> may fluctuate and its effect on their functioning may also vary. There may be issues as to their capacity to give instructions or they may frequently change their instructions or give conflicting instructions. It also may be difficult for a lawyer to assess their legal capacity because the symptoms of their illness may manifest in deficits in their ability to communicate and in social, literacy and numeracy skills.
>
> Mentally ill clients may reject a lawyer's professional advice or misconstrue such advice because of irrational thoughts and feelings....
>
> It is also important to point out that mentally ill clients may not exhibit many, or even any, of these behaviours or symptoms during the course of their being represented by a lawyer, while non mentally ill clients could well present difficult challenges for lawyers because of their personality traits, attitudes, behaviour and addictions.

Representing a client's best interests in these circumstances is undoubtedly challenging and far from straightforward – especially where those interests are not clear or appear to conflict with the lawyer's instructions. As Barnett et al explain (2007: paragraph III.B; emphasis supplied):

> It may be extremely difficult for a lawyer to remain free of influence by their personal view of the client or the client's activities, particularly if these activities are a direct result of mental illness. The lawyer may well believe that the instructions given by the client are contrary to the client's best interests and indeed the lawyer may have strong grounds for such a belief. Friends and family or medical practitioners might also be putting a contrary view to that of the client's instructions. However, the guiding principle for lawyers should be that they must act according to the instructions of their client unless the client lacks capacity to give instructions or those instructions breach obligations owed by lawyers to the administration of justice. Thus, lawyers as a matter of legal principle and ethics are as much obliged to follow a mentally ill client's instructions as they are those of a non-mentally ill client *subject to the requirements of their duties to the administration of justice*.

Consequently, the fact that a client suffers from issues with their mental health does not inevitably negate their capacity to give valid instructions. The test was set out by Chadwick, LJ in *Masterman-Lister* v. *Brutton & Co* [2002] EWCA Civ 1889 as follows (paragraph 75):

> the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of ... a litigation friend.

Clients who suffer from mental health issues should therefore be treated as one type of vulnerable client.[45] Note, too, that where there is a question about the client's capacity but no litigation, and so the possibility that someone has not been appointed to make decisions for them, SRA guidance says that "you may still need to take steps to meet the requirements of the SRA Principles to act in the client's best interests. It is important to note that these requirements are distinct from the Mental Capacity Act 2005's definition of 'best interests'".

4.5.4 Unlawful or ill-advised actions or intentions

A critical challenge can arise in relation to acting in best interests if the client's planned actions or intentions are unlawful. The lawyer must advise accordingly because no lawyer should ever counsel their clients towards or in support of illegality. If the client is still determined to proceed, the lawyer must withdraw from the retainer.[46] This might be more problematic in litigation when coming off the record (especially at short notice) could

45. See the SRA guidance at https://www.sra.org.uk/solicitors/guidance/accepting-instructions-vulnerable-clients/.
46. The position at common law is that withdrawal from the retainer must be 'for good reason' and 'on reasonable notice': cf. *Underwood, Son & Piper* v. *Lewis* [1894] 2 QB 306. While previous codes of conduct have reflected this wording, the current Code does not. Nevertheless, it would be sensible to bear this formulation in mind.

seriously prejudice the client's case. However, good reasons for doing so could include a conflict of interest, or being asked to act unprofessionally or illegally, or being unable to obtain instructions.

A second critical challenge would be circumstances where the autonomous, competent decisions or intentions of a client have adverse consequences for others and would inflict collateral damage on opponents, other third parties, or the public interest – where it might be seen, in other words, as unduly selfish or damaging to the public interest.

As Coggon & Miola put it (2011: 530 and 531, emphasis in original): "people should be free to act autonomously *provided* they do not breach well grounded external laws that legitimately limit their actions.... That a person has the mental capacity to evaluate a situation and come to some decision of what is right does not automatically entail that she should be at liberty (have the legal capacity) then to act on her decision."

In this context, I would assert that 'external laws' refers to more than the law of the land and extends more widely to the public interest and the legitimate interests of third parties. In short, none of us is ever free to do exactly as we might wish and in what we believe to be our own best interests (the criminal law alone is testament to that proposition). As Huxtable notes (2014: 477, emphases in original), "appeal to the public interest sometimes *promotes* a particular course (for some beneficial purpose), while at other times it *prohibits* a particular course (in order to avoid some harm)".

Accordingly, as suggested in Mayson (2024), lawyers should regard themselves as bound to raise wider, public interest considerations as part of their duty to the client and the advice they offer. The rationale is that confining attention to self-interest or narrow legal interests may provide only a partial understanding of what could be at stake for the client. Dewhurst elaborates (2013: 988-989):

> Knowing only what is possible within the law may not provide sufficient information for the client's deliberations. It may not provide the client with all that is necessary for rational decision-making, or with the level of counseling expertise necessary to challenge irrational decision-making. If a client's decision-making process is irrational or counterproductive, then counsel's unquestioningly following the client's instructions by pursuing the narrow legal case simply perpetuates that irrationality. This says nothing of cases where a client claims to want one thing, but acts at odds with the expressed goal.

This seems to be consistent with a wider role for solicitors which, at least in the context of divorce (though there does not seem to be any good reason why it should not apply more widely), Webley summarised as follows (2008: 249):

> It appears they should be partisan, but not too partisan, litigate when appropriate to protect the interests of the client, but consider the interests of the children, support continuing family relationships, ask their clients to be frank and open, manage clients' expectations towards a 'reasonable' settlement, depart from legal norms where it is appropriate to do so, and apply them when not. They are required to consider the emotional effects of their actions, to remind their clients of their duties towards their children and the long-term family interests. They are asked to narrow down the issues to be debated and not to use the children as a way of gaining leverage on ancillary relief and property issues. In fact, their role is to encourage, cajole and if necessary intervene to get clients to behave as responsibly as possible towards their families. But who defines responsible behaviour? This takes the solicitor away from the model of 'hired gun' for the client, towards the model of a conciliator with knowledge of the law, of many previous divorces and of how to navigate the client through a difficult time. This is an interesting development in the role of the solicitor, much influenced, it could be suggested, by the emergence of family mediation and the ethics of mediation.

Dewhurst's conclusion (2013: 1015, emphasis in original) is then expressed as follows:

> the client's 'actual best interests,' and the focus on the *legal case*, are not necessarily compatible. Often they may interact to create ethical dilemmas.... The lawyer is not ultimately hired to act as the client's judge or to force a resolution upon the client that is not in keeping with the client's' values. Rather, ... the lawyer needs to do much more to provide full and proper advice about what legal resources are compatible with the client's values....

> [I]f lawyers wish to promote the client's actual best interests, then in many cases zealous and partisan advocacy should be seen only as one possible resort not as the default method of proceeding....
>
> In conclusion, it may be seen that while the client's legal best interests are still relevant to decision making, the client's legal best interests are at most a subset of the client's actual best interests."

The rationale is also, in part, because the lawyer – as a member of a public profession (cf. paragraph 4.4.5 above) – owes duties to those wider considerations. As Woolley explains (2015: 321):

> the client's ability to determine and pursue his own ends is a matter of personality, welfare, or right recognized in law, with respect to which the lawyer has power. It is the moral quality of the client's ability to determine and pursue his own ends and the lawyer's power in relation to that determination and pursuit that create and constitute ... the lawyer-client relationship.

Indeed, a material consideration is not merely to look *at* the client interests to be pursued but also at the effects of *the way in which* they are pursued. These effects will be felt by the client: "how a lawyer conducts a particular case can have significant impacts upon the client's emotional and psychological well-being; this ought to matter to the lawyer" (Dewhurst, 2013: 973).

But these effects will also be felt by other parties (see Webley above) and by third parties. A scorched-earth, aggressive, or even abusive or rude approach to a dispute or a transaction will have effects, not just on the emotional and psychological well-being of those on the receiving end (who might themselves be vulnerable or not represented by a lawyer[47]) but also potentially on the reputation of the lawyer and the client. It could, therefore, be counter-productive and, in fact, operate *against* the client's best interests.[48]

And I should say at this point that to me there is a big difference between the robust pursuit or defence of a client's interests, and steps taken to *deny or obstruct* someone else's legitimate pursuit of *their* legal rights through deliberate outspending, using delaying tactics, intimidating or misleading them, and similar.

The following extracts from the very recent judgement of Collins Rice, J. in *Hurst* v. *Solicitors Regulation Authority* [2026] EWHC 85 (Admin) help to throw some light on these matters and are worth setting out in full (at paragraphs 57 to 61, emphases in original):

> Abuse of position is a charge going, in this context, to the relationship between [a regulated solicitor acting on instructions] and ... a layperson for these purposes[49].... It focuses on the nature and extent of any imbalance of power in that relationship, and requires an assessment of whether [the solicitor] took *unfair advantage* of it. The test of fairness is plainly central, context-specific and evaluative.
>
> Misleading, or attempting to mislead, is a charge involving the identification of some form of misrepresentation, misstatement or inaccuracy, whether of fact or law, and a finding of some degree of culpable mindset in relation to producing a faulty result in the understanding of the other person.
>
> Whether assertions, statements, representations or submissions are *properly arguable* depends on their nature. To the extent that they are factual, to be *properly arguable* imports at least some evidential grounding or prospect of evidential grounding. To the extent that they are propositions of law, to be properly arguable is a familiar standard for legal professionals and for

47. The expectations on lawyers in these circumstances were considered in Mayson, 2024 (paragraph 8.2).
48. Rude and aggressive correspondence or interactions with third parties can be seriously detrimental to their dignity and autonomy (suggesting that such an outcome is not consistent with the lawyer's role within a public profession – or even in representing their own client's actual best interests). In the effects that they then have on the ongoing or future relationship between the client and those third parties, they can also be seriously detrimental to the emotional and psychological well-being of the client (cf. Webley, 2008: 235 and 236) and, accordingly, not consistent with acting in their best interests.
49. In fact, in this case and for these purposes, the 'layperson' was Dan Neidle, described by the judge as "a legal expert in his field and an experienced journalist so perhaps not paradigmatically '*vulnerable or uninformed*'" (at paragraph 57, emphasis in original).

> courts for assessing that they are something more than barely statable, but without importing any particular assessment of prospects for success. A *properly arguable* legal proposition is one that it would not be improper for a regulated professional to advance,[50] not necessarily one that is bound to or even likely to succeed. Our legal system is adversarial. Lawyers may and do *properly* advance weak cases if that is the best they can do for their clients, particularly at the stage of pre-action correspondence when they may hope to achieve results for their clients *without* litigation. They can even advance claims which courts later strike out as disclosing '*no reasonable grounds for bringing*' them, or give summary judgment on because they have '*no real prospect of succeeding*', without inevitably breaching professional standards. But they cannot advance legally unrecognisable propositions.
>
> Acting so as to uphold public trust and confidence is a standard familiar in many if not most regulated professional contexts. It imports the internalisation by a professional of their profession's ethos, and a proper acknowledgement that all professions are grounded in a fundamental imbalance of power, that the entitlement to the predicated dependence of the public on their power must be earned, and that it is the task of regulators to ensure that it is.[51]
>
> A failure to act with *integrity* is an imputation of unethical conduct. As such, it is more than a portmanteau reference to a corpus of professional standards. It connotes an element of *personal* substandard ethical behaviour or untrustworthiness – a degree of what lawyers sometimes refer to as moral turpitude.

Without saying so explicitly, these extracts seem to me to support the conclusion advanced in this paper, namely, that there is a difference (though admittedly with often a very fine line) between robustly advancing whatever case a client might have and engineering a counter position that, for whatever reason, is primarily intended to deny or obstruct the opportunity for the other party fully or cost-effectively to assert their own legal rights.

This might be summarised as three propositions:

(1) it is acceptable to advance a client's cause robustly – even a weak or tenuous case where, as Collins Rice J. put it, 'that is the best they can do' for their client;

(2) it is not acceptable to conduct litigation in such a way that the *main* objective is to deny another's full participation in any claim (abusive litigation or strategic litigation against public participation (SLAPP) in the proper sense of those terms); and

(3) it is not acceptable to conduct litigation – especially perhaps of the weak type within (1) above – in such a way that denial of full participation is a *collateral* purpose (illegitimate collateral objective).

Proposition (1) is consistent with the pursuit of a client's best interests; propositions (2) and (3) are not.

The principal rationale underpinning these propositions is that it is in the public interest for parties to be able to pursue or vindicate their legal rights in a public process of justice. It is not in the public interest for meaningful participation in that process to be intentionally denied to one party by another (or their representative) taking unfair advantage of an imbalance in the relationship: this is not a path to the proper determination of the respective rights and liabilities of the parties but rather 'game-playing the system'. The use of scarce public resources for such game-playing is not consistent with the public interest or the ethos of a public profession truly seeking to uphold public trust and confidence in it.

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50. There is a potential, and unhelpful, circularity here if 'properly arguable' simply means 'not improper'. Perhaps, though, what it signals is a steer also to focus on what might be considered improper. In this context, the considerations of factors such as those that arose in the *Amersi* case (cf. paragraphs 4.4.2 above and 4.6 below) could lead to a conclusion that pursuing an illegitimate collateral objective would render an assertion not properly arguable. This would be consistent with Collins Rice J.'s requirement of a 'culpable mindset'.
51. Without using the expression, this paragraph to my mind encapsulates the notion of a 'public profession' as advanced in Mayson (2024) and in this paper.

Huxtable therefore proposes asking three chronological questions in order to analyse the journey towards a best interests decision, which he applies in a medical context (2014: 460, emphasis supplied):

> The *autonomy question* asks: is the proposed course desired by the patient? This will involve probing whether the patient is autonomous, in the sense that she can direct herself. The *best interests question* asks: if the patient is not autonomous, then (what) is the proposed course in the patient's best interests? And the *public interest question* asks: whether or not the patient is autonomous, is the proposed course in the public interest? This third question may be phrased differently, according to whether or not the patient is considered autonomous. If she is autonomous, then we may ask: is it in the public interest that she should be at liberty to direct herself in the manner she proposes? If, however, she is not autonomous, then we may ask: is it in the public interest to take the course proposed in the patient's best interests?

Based on Mayson (2024), mentioned earlier, my assertion here is that the process of determining and pursuing the client's legal best interests should not be taken in isolation from considerations of the wider social and public interest (cf. paragraph 4.5.2 above). It is the role of the lawyer to encourage and facilitate this. Woolley explains why (2015: 326-327 and 328-329, emphasis in original):

> Organising a society through a system of laws accomplishes two essential ends: it allows social coordination, a system for the settlement of differences about the right way to live so that people can co-exist without violence, and it allows respect for the dignity and autonomy of the person....
>
> The *practice* of the 'concept and rule of law' requires lawyers to provide their clients with the necessary legal knowledge and information to allow those clients to make the sorts of decisions that the legal system expects them to make and to access the systems of dispute resolution that ensure that the law's application respects the client's dignity and autonomy.

To deny the existence, importance or relevance of these societal factors in clients' decision-making is to claim that selfish (or at least personal and self-centred) interests should take precedence over an organised, coordinated, dignified and mutually respectful society. For lawyers to make or support such claims, when they have explicit duties to the public interest, the rule of law and the administration of justice, would be curious, to say the least.

It also "threatens to undermine professionalism by denying any public obligation other than to serve the client" (Whelan, 2007: 1068). Indeed, Woolley argues (2015: 330): "Without lawyers enabling clients to access law's social settlement and the morally motivated structure law employs, the law would not be able to accomplish its ends."

Woolley's conclusion is therefore that (2015: 333, emphasis supplied): "The moral foundations of the lawyer-client relationship lie in the lawyer's role in ensuring that the law can fulfil its purpose as a form of social settlement and that it in fact respects the dignity and autonomy *of the persons it affects*."[52]

Thus, lawyers as agents – acting in the best interests of their clients, and acting on the terms of their instructions that form the basis of the agency contract – must nevertheless regard themselves as members of a public profession and therefore also bound to raise wider, public interest considerations as part of their duty to the client and the advice they offer. Consequently, as Woolley points out (2015: 290), the "lawyer-client relationship operates at the intersection of private obligation and public duty, and the scope and force of the lawyer's ... duties reflect that intersection".[53]

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52. The italicised words at the end of this quotation are chosen to emphasise the wider import of the lawyer's actions. Those actions are not simply about the effects on the lawyer's client but on those third persons who are also affected by the nature and tenor of those actions (see also footnote 48 above).
53. In her analysis, Woolley frequently refers to the lawyer's 'fiduciary duty'. In line with my analysis earlier (see paragraph 4.4.3), it seems to me that she is not always referring to the strict (or narrower) set of fiduciary obligations identified there, but the force of her analysis nevertheless applies equally to the lawyer's position as an agent or member of a public profession.

Part of the challenge here, though, is this (Woolley, 2015: 296): "When articulated in light of the requirements of the administration of justice, the lawyer's duties of loyalty to the system of laws would be as material as her duties to the client. Yet the private law concept of fiduciary obligation relates only to duties of loyalty to the client, not to the legal system." I take this to mean that the wider duty *to the public interest* arises from being a member of a public profession and is therefore part of the *context* for the discharge of fiduciary obligations *to the client* rather than being (part of) the *foundation* of those obligations.

This distinction between 'interests' (as narrowly – and only – concentrated on the focal person) and 'best interests' (as a broader set of considerations that affect the focal person and others) gives scope for even greater uncertainty about the concept and nature of best interests. As Batholome wrote some time ago (1988: 39 and 40, emphases in original):

> it has value as a 'conceptual lens' – as a device that assists us in seeing what is at stake in the problem and that directs and focuses the decisionmaking process....
>
> Thus, the primary role this concept plays in decisionmaking is to narrow and sharpen the focus of concern. It reminds decisionmakers that they are to give primacy in their deliberations to this party's interests.... The concept is very limited (at least in the context of decisionmaking about the never or not-yet competent patient)... [and] best interests cannot be defined or interpreted to provide objective, substantive, normative guidance.... It does not seem to provide a tool by which the *ethical* content of a decision can be judged right or wrong.
>
> Nevertheless, the concept of best interests does provide an essential ingredient in decisionmaking, what might be called 'normative direction.' It sets the broad limits within which arguments can be put forth regarding specific decisions or proposals and provides a framework for ethical dialogue. As a matter of loyalties, it forces us to address the basic normative question of which person involved in this particular situation *ought* to be the primary focus of concern.

The traditional view of the lawyer's role is predominantly derived from adversarial practice, with its concomitant expectation of zealous advocacy and representation (Dewhurst, 2013: 965). However, this increasingly needs to be revisited in light of the judicial and political pressures to mediate and adopt non-adversarial approaches to resolving disputes (cf. 2013: 978, and cf. Sowter, 2018[54]).

What is needed in all these situations is "an expanded understanding of the client's best interests (the client's *actual* best interests) that goes beyond the narrower understanding of a client's best interests as understood in the codes of conduct (the client's *legal* best interests) [such that] the client's legal best interests are at most a subset of the client's actual best interests" (Dewhurst, 2013: 965, emphasis supplied). The reason for this is that "the legal result may be in keeping with the client's legal best interests, but significantly less than optimal for the client's actual best interests" (2013: 990).

In summary, and in line with wider thinking, "what must be focused upon first of all is the overall respect for client autonomy" (Dewhurst, 2013: 967; cf. paragraphs 4.1 and 4.5.1). Clients themselves may therefore take (or be encouraged or persuaded to take) a broader view of their best interests, consistent with the exercise of their decision-making autonomy and founded on their values, preferences and (possibly ever-changing) objectives. As Dewhurst points out (2013: 968):

> Clients do not seek legal counsel as an end in itself; they seek legal counsel as a means to achieving other ends. Nor do they necessarily wish to stray from their legal best interests so that they may obtain an illegal result; instead, they are prepared to sacrifice particular legal best interests because they reject those interests as being too narrow or perhaps inappropriately targeted.

54. The language and tone of representation changes: "lawyers are representing clients who are trying to reach settlements that recognize their interests, instead of just pursuing their legal rights.... They are considering the emotional and financial consequences of relationship breakdown [and view] their clients as whole people with interests that are not just legal" (Sowter, 2018: 402).

4.5.5 Lawful but immoral actions or intentions

Finally, we need to suppose that the quest to establish clients' best interests ends with something that is not illegal but is, to the lawyer's mind (and possibly more widely) ill-advised because it is – or might be seen to be – morally unacceptable, either in itself or in its consequences: examples might be extracting fossil fuels and tax avoidance.

The 'ethical background' to this dilemma (with echoes of the two elements of the public interest as stated at the end of paragraph 4.4.5 above) is well articulated by Chaddha & Agarwal (2023: 1711):

> The organisation and advancement of a society has inextricable ties to its ethical framework. Often ethics and laws go hand in hand towards maintaining the security of a society, group or organisation. Ethics may even succeed law in safeguarding the society especially in cases where issues of morally questionable actions arise, which may not necessarily be overtly illegal....
>
> A society in which individuals follow ethical norms in their person, professional and social lives and participate as responsible and productive members contributes to establishing an environment conducive to the personal growth of each member and overall progress of the society as a whole....
>
> It is an assurance on behalf of the practitioners of the profession to act in a manner that protects the well-being of the public.

Where a lawyer sees a client's intended actions as morally questionable, there is likely to be a clear disagreement between the lawyer and client on the latter's intentions or proposed actions, and therefore strong discomfort or antipathy on the part of the lawyer in carrying out those intentions or actions. It is likely that, even where the lawyer subscribes to the notion of 'zeal' (cf. paragraph 3 above), the enthusiasm for robust representation is diminished.

It might be important to remember Luban's statement (2020: 281): "Arguably, tempering zeal and thereby failing to maximize client outcomes violates the lawyer's fiduciary obligation to the client. And so, the picture of lawyers as fiduciaries and agents of clients seems to rule out moral activism." Accordingly (2020: 287): "What should a lawyer do if she confronts a decision in which zealous representation inflicts collateral damage on adversaries, other third parties, or the public interest, that she thinks is morally wrong?" This is a difficult question on which there are differing views.

First, there might be a difference where the client has taken the decision without any reference to the lawyer: here, the lawyer might reasonably – and entirely consistently with professional obligations – seek to enlighten and persuade the client that their *actual* best interests lie in a different direction. This is an approach that Pepper describes as 'moral dialogue' (1986: 630):

> Instead of defining the client's goals in narrow material terms and approaching the law solely as means to or constraint on such goals, this view opens the relationship to moral input....
>
> [T]he lawyer's full understanding of the situation, including the lawyer's moral understanding, can be communicated to the client. The professional role remains amoral in that the lawyer is still required to provide full access to the law for the client, but ... is ameliorated by moral input from the lawyer which supplements access to the law. The autonomy of the client remains in that she is given full access to all that the law allows, but the client's decisions are informed by the lawyer's moral judgment.[55]

Indeed, Luban's view here is that "the lawyer *must* explain the moral objection that the client seems to have overlooked. That is because moral considerations are reasonably necessary

55. Pepper is not blind to the practical implications or limitations of this approach (1986: 631 and 632): "With traditional forms of legal services perceived as too expensive for [many in society], and a consequent shift occurring towards less expensive, more efficient structures for providing legal services, the dialogue model may be difficult (perhaps impossible) to incorporate as an integral part of the lawyers' professional ethic.... Lawyers in some contexts may be simply unable to engage in dialogue with their clients; the larger the cultural and economic gap between lawyer and client, the less likely is meaningful moral dialogue."

to permit the client to make informed decisions" (2020: 288, emphasis in original). This situation is the same as that considered in paragraph 4.5.4 above: the lawyer is trying to coach or persuade the client to a different view of their wider best interests.

Note, though, that consistent with Woolley's view above, this does not mean that the lawyer's view must prevail: it is about enlightenment and possible persuasion rather than the lawyer forcing a different decision on the client or substituting his or her conclusions (and morals) for those of the client. In fact, to the contrary, it is "failure to bring them up that amounts to substituting the lawyer's judgment for the client's" (Luban, 2020: 289).

This point about substitution is important because lawyers must not become the moral gatekeepers to justice in a way that might completely deny a particular client access. As Pepper, picking up an earlier point of his (cf. paragraph 4.2 above), explains (1986: 618 and 626): "If law is a public good, access to which increases autonomy, then equality of access is important. For access to the law to be filtered unequally through the disparate moral views of each individual's lawyer does not appear to be justifiable.... The client's autonomy should be limited by the law, not by the lawyer's morality."

Second, where the client insists on proceeding with their immoral intention despite the lawyer's utmost efforts to persuade to the contrary, lawyers face perhaps their most challenging situation: the client wishes them to act on instructions to achieve an outcome that they believe is 'lawful but awful'. Luban is also clear on this (2020: 289): "If the client insists on proceeding, the lawyer must obey or quit." However, professional regulation "barely considers cases where the principal-agent divergence is based on the agent's sense of moral decency rather than the agent's greedy self-interest" (Luban, 2020: 298).

Moorhead et al also refer to this ethical dilemma (2003: 11):

> If ethics and client alignment are in tension then deciding whether promotion of the client's aims is socially acceptable depends on the circumstances of each case. If a lawyer's advice leads to or encourages illegal or unethical behaviour, closeness to the client is clearly a bad thing. Save in more extreme cases, deciding when this has happened is likely to be highly contentious [and in] transactional work ... much less obvious or likely to be exposed.

This arguably leads to a more nuanced view of what being 'client-centred' should mean, expressed by Moorhead et al as (2003: 12):

> paying attention to the practical and emotional needs of the client, not necessarily agreeing with the client's motives, policy or philosophy and not necessarily doing what the client says they want. The client centred lawyer will listen to the client in order to advise on all options, as well as showing what they think is best for the client.

However, as they acknowledge (2003: 12, emphasis in original), "the notion of client centredness does not answer the question: *how far* should client aligned/centric behaviour be taken by competent lawyers?" Nevertheless, this more nuanced view does offer some tempering of the 'full-on, all-out' conception of lawyerly hyper-zeal (cf. Dare, 2004). For example, it does not support any notion of simply doing what the client wants or asks for – even assuming that the client knows what that is. There can be a personal moral backstop.

Again, adopting Worthington's analysis (cf. paragraph 4.4.3 above), within the usual agency relationship between lawyer and client (and in circumstances that do not reflect a no-conflict or no-profit issue), it is arguable that there is no breach of *fiduciary* obligations between lawyer and client if the lawyer does not implement the client's strict instructions. This could mean that "the fiduciary can indeed disadvantage the client for moral reasons" (Luban, 2020: 298). However, on the widest interpretation of the duty to act in the client's best interests, there might still be a breach of *regulatory* duties.

In conclusion,[56] if a solicitor is aware before accepting the client or the retainer, they can refuse to act: the lawyer-client relationship does not even begin. Echoing his earlier point (above), Pepper cautions that (1986: 634)

> the lawyer has the choice of whether or not to accept a person as a client. This choice also involves the exercise of moral autonomy. [This] exercise of the choice of client aspect of the moral autonomy of the lawyer is troubling if it leads to foreclosure of a person's access to the law. In that situation, the lawyer's autonomy results in second-class citizenship status for the denied individual.

However, if the lawyer has accepted the client or matter and agreed to act, and then failed to persuade the client to act differently, the lawyer must either follow the client's instructions or withdraw from the retainer (if that is possible: cf. paragraph 4.5.4 above).

4.5.6 Summary

The first issue, then, is:

(1) if the client is autonomous, capable and competent (as discussed in paragraph 4.2 above); and

(2) the client's instructions are a clear statement of what the client wants and expects (that is, can be taken as an expression of their best interests) and require no further elaboration, discussion or persuasion; and

(3) those instructions are acceptable to the lawyer; then

(4) the lawyer has the basis for acting on the client's instructions and in their best interests.

If the client's instructions are not clear (that is, (2) is not satisfied), then further discussion will be necessary in order to clarify the client's intentions and interests. When there is clarity about the client's position, but the lawyer is not comfortable with that for some reason (that is, (3) is not satisfied), then the reason for the discomfort will probably determine the next steps.

Acting on a sound basis for a client who is clear (or who has become clear) about their best interests provides the most appropriate foundation for discharging all of a lawyer's obligations to a client. Dewhurst explains (2013: 1014): "for so long as one respects the autonomy and independence of the client's decision making, and avoids the temptation for a lawyer to decide what is in the client's actual best interests, then the profession is on a path to providing a more comprehensively-just response to the client's legal concerns".

However, taking full account of the necessary social distancing, professional independence and objectivity in assessing best interests may be a high (possibly even unrealistic) expectation. As Barnett et al explain (2007: paragraph I):

> The relationship between a lawyer and client is often complex and multifaceted, involving fiduciary, financial and psychological elements. Obtaining instructions from clients and acting on those instructions may raise a variety of ethical and psychological issues for lawyers. For example, in family law, lawyers may be faced with acting on an apparently disturbed client's instructions that appear contrary to the best interests of the children of the relationship. In criminal law, some lawyers may face psychological and ethical difficulties in appearing for clients who may have committed serious crimes. Across the spectrum of professional practice, clients may be aggressive or unpleasant or, at the other extreme, very pleasant, attractive, vulnerable or sometimes seductive. Lawyers involved in a professional relationship may have strong personal feelings about their clients, either positive or negative, which consciously or unconsciously, may influence their professional responsibilities.

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56. These matters of client acceptance (and the associated decisions and processes) are considered in detail in Institute of Business Ethics (2025).

Thus, it would seem that the apparently prescriptive injunction to act in the best interests of clients should, in the context of a fiduciary obligation, more correctly be interpreted as a proscriptive one. Indeed, it is difficult to disagree with Finn's observation that if a fiduciary's liability "was to be determined by reference to whether or not the beneficiary's interests had in fact been served", this would be "an often impossible inquiry" (1989: 28).

This also points to the possibility of a different enquiry (Tata, 2007: 495, emphasis in original):

> To evaluate the conduct of ... lawyers requires some answer to the question of what else the lawyer could have done *and ought to have done in order to meet the client's best interests*. The parallel concepts of 'quality' and 'best interests of the client' are highly contestable and the subject of competing perspectives. Each of these perspectives is invoked by and constitutes the routine discourses of lawyers in guiding, justifying, and re-presenting different course of action and advice to clients, to other professionals, and to themselves.

As we have seen, whether or not a decision or action is assessed to have been taken in someone's best interests can be assessed negatively as well as positively. It is acceptable, as Bartholome writes (1988: 40) "to examine proposed courses of action on the basis of whether or not they are clearly contrary to the best interest of the [focal person], that is, could not arguably be said to be in his or her best interests".

Courts are reluctant to second-guess or substitute their own judgements on best interests, unless those who are charged with the responsibility of making decisions *for* someone cannot agree amongst themselves or have not acted in good faith. It seems to me that the same reluctance will apply where they evaluate the decisions and actions of those who are not acting for another but are acting on behalf of them.

Luban posits (2020: 298-300, emphases in original):

> The claim that client-lawyer relations are subsumed under principal-agent or fiduciary relations needs to be the *conclusion* of an argument, not the premise. And the claim that fiduciary obligations and client loyalty outweigh countervailing moral obligations also must be the conclusion rather than the premise of an argument....
>
> Being trusted by someone to further their interests does not by itself make it right to further those interests come what may.... Likewise, furthering another's autonomy matters only to the extent that one person's autonomy matters more than the harms inflicted on others to secure it – and that is a dubious proposition at best. Entering a principal-agent relationship does not abdicate the agent's own powers of moral choice, nor does it remove the need to make moral judgments about where to draw the lines.
>
> In effect, all these arguments claim that fiduciary obligations provide exclusionary reasons to subordinate that power of choice and judgment to the client's interest. But the appeal to exclusionary reasons always requires one to show *why* reasons are exclusionary, even in cases with strong first-order moral reasons to the contrary.

Even where decision-making or advisory duties are relevant to a fiduciary relationship, the associated obligations mean that (Worthington, 2021: 171-172):

> all discretionary powers must also be exercised in good faith (a subjective test) and for proper purposes (an objective test). The good faith and proper purposes constraints on the exercise of all powers (whether by fiduciaries or by others) are proscriptive, not prescriptive: the court's task is 'an essentially negative enquiry'; it is not to say which acts *are* for proper purposes, merely which acts are *not* ... and the no-conflict/no-profit rules identify certain ends (i.e. self-serving ends) which, if sought by the fiduciary, would indicate improper purposes.

In the end, then, it would appear that the assessment of whether or not a lawyer has acted in the best interests of a client relates less to 'What is in the client's best interests?' and more to 'How should we assess how a lawyer has sought to act in the client's best interests?'. Given that a number of outcomes might, with the benefit of hindsight, have delivered benefits to the client, any after-the-event assessment of which outcome could be described as a reflection of the 'best' interests, could put lawyers in an impossible position. It is often necessary to act 'in the moment' and under conditions of uncertainty and evolution.

It is likely that the issue of needing to assess lawyers' best interests decisions and actions will only be made after the event and where those decisions or actions are challenged. We must therefore be wary of imposing a near-impossible burden on practitioners some time afterwards when the benefit of hindsight is available to everyone in a way in which foresight was not available to the lawyers at the relevant time.

From the analysis in this paper, it would appear that the safest quest does not lie in trying to identify what, in the event, was or would have been in the client's best interests with a view to comparing that position with the actual outcome secured or transpiring for the client. Rather, the question should be: Is there any sense in which it could be said that the lawyer's decisions or actions were not in the client's best interests?

There appear to me to be two important questions and considerations in making this assessment:

(1) *What factors did the lawyer take into account in advising or acting for the client?* These should include the client's views and circumstances; the client's knowledge and capacity to understand the implications of the legal situation faced, given their views and circumstances; and what options for decision or action were developed and considered?

(2) *What evidence is there of the respective interests taken into account in deciding what action(s) to take on behalf of the client?* This will include an explicit attempt to elicit the client's views of their own best interests (bearing in mind any issues that affect the well-being, social and moral welfare of the client), as well as considerations relating to the interests of other parties (including the state of their knowledge and understanding, vulnerability, resources and access to professional advice and representation), any duty to the court and the wider interests of justice, and any other public, social, professional, ethical, and moral concerns. This element should also include an evaluation of whether the lawyer appears to have placed their own or their firm's interests ahead of those of the client, or to have acted otherwise than in good faith.

An assessment along these lines would not attempt to discern a definitive 'right answer' to the question of whether the client's best interests were in fact realised. Instead, it is a quest to determine whether the lawyer acted in 'the right way' (or, more pointedly, whether there is evidence that they acted in the 'wrong way'). It is, to adopt a colloquial expression, a matter of 'show us your workings'.

Finally, therefore, for this reason and as a matter of good practice, it might be sensible for a lawyer to articulate and record a best interests decision in order to show what client needs, motives and other considerations have led to the professional judgement about their best interests, and the decisions and actions taken as a consequence. Moorhead et al suggest (2003: 9) that "a lawyer who has not taken account of the client's needs in responding to the client's problem is not competent". Part of the demonstration of that competence is sufficient evidence in file notes and other records of the decision-making process.

In fact, Tuckett is quite forceful in his description of professionals who make assumptions or avoid enquiry or conversation (2006: 169): "Other persons, who act according to a belief that they know another's best interests, are fantasising.... Rather than serving another's best interests and welfare, they inflict harm by acting upon such fantasy and self-projection."

Skivenes then helpfully points to one way in which decision-making could be approached (2010: 341-342), namely as a "deliberative process, that rests on good information regarding the contents of the case and the parties' situations, that possible choices of action and their consequences must be explored, and that possible results should be ranked in relation to overall goals". If there is a good and clear record of this process, it will be very difficult to say that a lawyer has *not* acted in the best interests of a client – even if other outcomes, with the benefit of hindsight, might have served those interests better.

4.6 Breach of the duty to 'act' through inaction

There is one final matter that should perhaps be addressed before concluding this analysis. The professional duty examined in this paper is that lawyers should 'act' in the best interests of their clients. It is expressed as a verb, and connotes 'doing' or 'behaving'. This begs a question: can the duty only be met by action, such that omissions and inaction cannot be said to be a breach of it?

In other words, can 'not acting' be considered as not 'acting'? Instinctively at least, I suspect that many would respond by saying that a failure to act in certain situations could indeed be said to be not 'acting in the client's best interests'. While understandable as an instinctive reaction, is it nevertheless analytically sound?

The first point must be that, necessarily, any breach of the duty must be a negative: the lawyer is judged *not* to have acted in the client's best interests. This process of judgement results from circumstances (action/inaction) that lead to outcomes (best interests/not best interests). There are then different permutations:

(1) The lawyer *does* something (action) that can be said to be in the client's best interests. The duty is discharged and there is no breach. For example, the lawyer has followed the client's express instructions.

(2) The lawyer *does* something (action) that is not in the client's best interests. The duty is not discharged and there is a breach. For example, the lawyer mistakenly discloses the client's confidential information to a third party.

(3) The lawyer does not do something (inaction), and in the circumstances that inaction is ultimately judged not to have been in the client's best interests. Although there has been no 'acting', we should no doubt conclude that there has been a breach. For example, the lawyer does not issue proceedings before the expiry of the limitation period.

(4) The lawyer does not do something (inaction), and in the circumstances that inaction is ultimately judged to be in the client's best interests. Presumably, although there has been no 'acting', we should conclude that there has been no breach. For example, in *Amersi* v. *Leslie & Others* [2023] EWCA Civ 1468, the judges characterised aspects of the claimant's tactical conduct of litigation (including issuing a claim that was later withdrawn) as pursuing an 'illegitimate collateral objective'. The claimant's lawyer could have (should have?) refused to take such actions (cf. paragraph 4.4.2 above); this would have avoided judicial displeasure and would have been in the claimant's better interests.

However, there could be a very fine line here: if the lawyer has express instructions and has no basis for thinking that taking action would be an abuse of process (in the way the court thought it was in *Amersi*) or vexatious, it is difficult to see on what basis it might be argued that there is a breach of professional obligations. There is certainly no positive obligation to investigate even dubious claims by the client (cf. *Haddad* v. *Rostamani & Others* [2024] EWHC 448), but this does not mean that the lawyer can knowingly or recklessly 'turn a blind eye' (see Mayson, 2024: 71-72)

The inaction with which we are most concerned in this paper would result from a deliberate choice by the lawyer not to do something. In this sense, choosing not to act must, in itself, be an 'act'.[57] Even so, being the result of choice, the inaction in these cases could be both knowing and intentional as well as inadvertent or negligent.[58] We would therefore appear to

57. This can be described as a 'witting omission' and, in our case, arises where there is role responsibility; there may also be culpable 'unwitting omissions' arising from such responsibility, too, on the basis that "the agent could and should have known better": Bonicalzi & De Caro (2024).

58. Where there is a duty of care owed by the lawyer to the client, the scope of that duty is clear, that duty has been breached by act or omission, and a proximate, recoverable loss has arisen to the client in consequence: cf. *Khan* v. *Meadows* [2021] UKSC 21, at paragraph 28.

have no difficulty in concluding that 'acting' in the client's best interests extends to choices 'not to act'.[59]

It is perhaps worth pointing out that some failures to act by lawyers might be failures in service standards but would not necessarily be thought of as breaches of professional ethics. For example, delays in responding to letters, e-mails or telephone calls are common causes of complaint made by clients. These delays certainly result from inaction, and may eventually lead to adjudication by the Legal Ombudsman, but I suspect that few would describe them as 'unethical'. Whether those delays are properly regarded as being in the client's best interests or not would probably depend on other relevant or aggravating factors.

In the context of this paper, there is one final matter to address. The argument in this paper is that a client's interests do not prevail if there is an overriding public interest (cf. paragraph 3 above): this is because acting in the client's best interests is a *relative* duty and not an absolute one.

Such a conclusion must mean that there are circumstances where it is acceptable – and therefore consistent with professional ethics – *not to act* in the client's interests. Although a client might consider that a certain course of action would advance their interests (such as failing to disclose damaging evidence), the public interest nevertheless requires that it is not taken. This is a variation on permutation (4) above, and could be analysed in one of two ways.

First, we could say that the lawyer's duty to act in the best interests of the client is superseded or overridden by a meta-principle (to act in the public interest in supporting the rule of law and the interests of justice). Given the way in which the regulators have applied a hierarchy to the regulatory objectives (cf. paragraph 3 above), there would be much force in this view.

Second, though, we could also say that, because the duty to act in the best interests of the client is also a qualified duty (cf. paragraph 4.1 above), it is simply not in the client's *best* interests to act in a way that is inconsistent with the public interest. This would be because no client's best interests could ultimately be served without a functioning, effective, reliable, consistent and predictable framework for the expression and enforcement of legal rights and duties.

For the purposes of this paragraph, both approaches lead to the same outcome – the lawyer *not acting* to advance the client's view of their best interests. And both approaches would result in the same *ethical* judgement – that this failure to act is acceptable as a matter of professional ethics. However, to be consistent with the analysis in this paper, I think we must discount the second approach.

If the lawyer's proper role is to discern and not impose a position or course of action that is in the client's true best interests (by using persuasion where possible), it is still conceivable that the client might not accept that their *best* interests lie in a place where the public interest prevails. In that case (cf. paragraph 4.5.5 above), the lawyer cannot simply substitute their own view of what is 'best'. The second approach assumes such a substitution and therefore does not adequately recognise the potential for this lawyer-client deadlock.

For these reasons, although both views can be used to explain the outcome of not acting as the client might instruct or wish, it is preferable as a matter of professional ethics – as well as analytically more consistent – for the lawyer to be able justify their action or inaction as the consequence of an overriding regulatory and professional requirement. The relative duty prevails over the qualified one.

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59. To be clear, the expression 'not to act' here does not refer to the situation of a lawyer refusing to take on a client or matter in the first place (cf. paragraph 4.5.5 above) but instead to the choice not to do something in the furtherance of the client's cause or interests having agreed to the client retainer.

5. Conclusion

Even though there is relatively little to draw on when it comes to directly guiding or reviewing whether lawyers are, or have been, acting in the best interests of their clients, I think it is possible to learn and extrapolate from the broad range of other professional situations that have been considered in this paper.

First, it is important to remember that 'acting in the best interests of clients' is not an absolute duty. Second, in line with it being a relative duty, there is also a need, as they assess the legal advice that they have been called on to give, for lawyers to think broadly about a client's actual, long-term, enlightened, and non-legal interests.

Third, the qualified duty to act in the best interests of a client can variously arise from a lawyer's status as agent, fiduciary, regulated practitioner, and member of a public profession. There is often considerable overlap in the duties and obligations of these roles, but it is only in the status of a member of a public profession that *all* of them apply.

As analysed here, it may be that not every action by a lawyer is as an agent; not every action as an agent gives rise to a fiduciary duty; not every regulatory obligation is imposed because the regulated professional is an agent or fiduciary; and not every aspect of acting in a client's best interests is caught by the general law of agency or fiduciary obligation and by professional regulation.

However, a member of a public profession cannot choose not to be bound by the general law, by regulation or by their own professional norms and ethics. This means that lawyers are never just a 'hired gun' who must give unchallenged effect to the client's every wish, however illegal, immoral, inconsiderate or unwise. There is also an ethical backstop.

Fourth, and perhaps more controversially, I would suggest that the professional duty to act in a client's best interests is almost impossible to discharge as a *prescriptive* duty where the clients themselves have not identified clearly what those interests are. Even where they have, it is still not a question of simply doing what they say they want. Lawyers must not 'turn a blind eye' to anything untoward, and they must exercise purposeful curiosity about it. The duty is *not* therefore discharged solely by some *positive* mission to identify what those best interests are.

It is also about understanding what outcomes, actions and behaviours are such that, *negatively*, they could not be described as being in the client's best interests. In other words, it is as much about lawyers understanding what those best interests *are not* as it is about what they are – especially if there is a breach of their duties as an agent, fiduciary, regulated professional or member of a public profession.

Finally, lawyers often claim that the concept of 'the public interest' is too broad and ill-defined to offer sufficient practical guidance. It seems to me to be rather blinkered to resist the relevance and application of the public interest to their advice and work when their preferred notion of 'best interests of the client', as this paper seeks to show, is itself a subordinate consideration and not straightforward.

6. Implications for regulation

Finally, it might be useful to add some thoughts about the regulatory implications of this investigation of the meaning of best interests. Lawyers sometimes appear to have a particular view of ethics: it is often restricted to those professional rules that *must* be followed, such as anti-money-laundering, avoiding conflicts of interest, respecting clients' confidentiality, handling client money and solicitors' accounts rules. It tends to focus on what are perceived to be numerous, complex, and burdensome rules, and rarely encompasses any broader view of professional responsibility.

Practitioners are often schizophrenic about professional regulation. They hate too many specific rules and yet, when regulators offer principles to be followed or outcomes to be achieved using the practitioners' judgement and discretion in how, those practitioners complain that these principles or outcomes are too vague and they need specific guidance on exactly what the regulator expects of them.

Indeed, the challenge of professional ethics (cf. Gill, 2009: 110) is that if regulators' guidance is expressed in terms of general principles, professionals profess to find it difficult to relate those principles to the intricacies of modern professional practice. But if the guidance is more specific (e.g. money-laundering), professionals can perceive it as presenting a series of hoops to be jumped through or as an opportunity to 'game' compliance by looking for loopholes to exploit (cf. Donovan, 2021 on creative compliance).

However, as we have seen, to take a full account of all the elements and considerations that should properly influence an assessment of a client's best interests requires broad, open-minded attention to a range of varied and non-prescriptive factors. Consequently, writes Dewhurst (2013: 970): "If lawyers are going to adequately address the widely divergent range of values clients bring with them, codes of conduct should be as neutral as possible when instructing lawyers how to identify and address the different personal, familial, communal, spiritual, and socio-cultural values of individual clients."

Put another way – and consistent with the idea that the positive identification of a client's best interests may be an 'impossible inquiry' (cf. paragraphs 4.4.5 and 4.5.6 above) – professional regulations should not seek to define or guide too closely what best interests are or how they should be found. If the true notion of a client's best interests is not to be found in narrow legal considerations, then the inquiry needs to be wide-ranging and open-minded because (Dewhurst, 2013: 972):

> What is emerging is the understanding that effective client counseling, and the determination of a client's actual best interests, requires not only client-centered counseling but also counseling with a view to the relational context in which the client lives his or her life.

Mather also suggests that (2003: 1084) "rules of conduct should acknowledge the differentiated and stratified nature of the profession, and [regulators] should stop writing vague 'one-size-fits-all' rules that fit no one". The rules, she says, must recognise (2003: 1084-1085) "the practice setting of the lawyer, the nature of the legal problem, and the power differential between lawyer and client".

Gill also offers some pointers for the future (2009: 147, 148 and 152):

> In practice, [professionals] can only deal with so much prescriptive complexity, and the more of it there is the more pragmatically they must approach the rules in order to get anything done. It is important therefore to prioritize, and to decide when a rule needs to be a rule, and when [professionals] could be trusted to deduce it from some more general rule, principle, or perspective. Such a decision, moreover, should not be made simply according to whether trust would be well placed as things stand, but whether the placing of trust would encourage [professionals] to become worthy of that trust over time. Regulation is important, but should be approached as a necessary evil, the necessity of which can be reduced by discouraging dependence upon it....
>
> A shift towards principles ...is necessary, but not sufficient, to overcome a rules-bound mentality. In particular, practitioners often request guidance as to how principles are to be applied, and insofar as that guidance then takes on the status of rules, the distinction between rules and principles is lost. If a principles-based approach is to work, then pressure for guidance and interpretation needs to be resisted by standard-setters and regulators where possible....
>
> A change in ethos can be catalysed from outside the ... profession, but not straightforwardly imposed, even from within. This makes resistance to change, amongst those who exploit ethical ambiguity for commercial gain, harder to overcome.... In grey areas, the ... profession can be worthy of public trust only insofar as its members go beyond compliance with the rules, and behave according to a shared ethos that is worthy of such trust. The challenge facing the profession, therefore, is to articulate, institutionalize, and reinforce such an ethos.

The emphasis on ethos is instructive because formal professional discipline offers "notoriously ineffective measures when compared with the power of social forces, organisational culture, and economic self-interest" (Mather, 2003: 1085).

But in case anyone might be thinking that ethos rather than formality is an easy way out, Gill is also quite clear (2009: 152-153):

> A shift in emphasis from rules to professional trustworthiness is far from being a soft option.... It requires [professionals] to take greater personal responsibility for the implications of their decisions, and to more readily hold each other accountable not only when rules are broken, but also when power is abused or responsibilities are poorly discharged. Qualitative rigour is possible even in areas where quantification and regulation are not, and so what seem like grey areas from a legalistic perspective can often be more clearly defined from an ethical perspective.

As Gill observes (2009: 134):

> Those who hope [for] a regulatory quick fix to the problems faced by the [profession] will be disappointed.... it does not matter how sophisticated the rules are if [professionals] approach them as an irrelevant nuisance to be worked around. The ethical and interpretative approach [professionals] take towards rules is important, and a regulatory response ... is of value only insofar as it helps to change that approach. To believe that we have or ever could have the regulatory resources, predictive capacity, swiftness of response, and analytical precision necessary to fully control a social practice as complex as [a profession] from the top down, without the ethical involvement of individual [professionals], is fundamentally misguided.

Bernstein makes the further observation (2003: 1054-1055, emphasis supplied): "recourse to market-focused solutions to the client-relations problems that lawyers can expect to face ... include disclosure, client consent, reduction of words to writing, and warnings to clients that they can seek other advice [and] rests on a belief that market failure is exceptional, rather than a fixture of practice.... *We begin by writing the rules ourselves, with little input from the public, so that instances of client discontent must fit into an apparatus that nonclients built*."

The obligation and responsibility of a profession for its ethos cannot therefore just be to itself. This is perhaps why self-regulation eventually becomes unacceptable and unsustainable. These obligations need to be discharged not just by a profession's members to each other, but also to its sponsors (the public) and its patrons (clients and consumers).

In sum, the notion of a 'profession' implies:

(a) expertise: validated through training and licensing;
(b) character: manifested by integrity and selflessness; and
(c) responsibility: to the trust and confidence of the public, and through a regulator.

These elements play out in contexts of *environment* (society, public, media), *institutions* (profession, justice system, and professional body), and *organisations* (firm, employers, colleagues).

However, the most important motivation or driver for what we characterise as 'professional behaviour' must be that of the individual. The line of thinking here suggests that, to secure this, individual professionals then correspondingly need:

(i) 'scaffolding' from belonging to a 'public profession' and its associated regulation, values and ethics (*environmental framing*);
(ii) relevant direction and guidance (*institutional support* from their regulator, professional body and peers); and
(iii) practical support from their firms, superiors and colleagues (*organisational and psychological safety* to raise and discuss ethical issues and concerns).

There are, therefore, many points of obligation and responsibility that will mutually support truly – and consistently – ethical practitioners. They have to be crafted and sustained.

Is this possible, and is it worth the effort? In a recent lecture, I finished by referring to a 'golden thread' that ties together ethical behaviour, the rule of law and professional commitment (Mayson, 2025: 11):

> The golden thread starts with the commitment that a member of a public profession must have to the public interest; it passes to the resolve that must flow from it to act ethically in accordance with that membership and in ways that are upright and just; and it is a thread that should touch all persons, at all times, and in all circumstances.
>
> It presents both a privilege and an onerous, but necessary, duty of ethical integrity. Without it, there is no guarantee of consistently ethical professional behaviour. And without that, there is no real prospect of living meaningfully and securely under the rule of law.

I believe that, yes, it is possible; and that, yes, it must surely be worth the effort.

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