

# The Ethical Capacities of New Advocates



Richard Moorhead, Catrina Denvir, Mark Sefton and Nigel Balmer

Commissioned by the ATC and funded by the LEF



5<sup>th</sup> December 2015

## Acknowledgments

We are grateful to the Advocacy Training Council (ATC) who commissioned this research and the Legal Education Foundation who funded it. From the ATC, we especially thank Derek Wood CBE QC and Linda Hunting for their energy in assembling the project working group and their continued help throughout the project. From the LEF, we thank Matthew Smeardon and Natalie Byrom for comments on the report.

The project working group consisted of Derek Wood CBE QC (Chair, Research and Development Committee of the ATC); James Dawson (Barrister, 2 Hare Court); John Carrier (London School of Economics); Kelly Matthews (Specialist Prosecutor, Crown Prosecution Service); William Richmond-Coggan (Current Vice Chair, Solicitors Association of Higher Court Advocates); Karen Shuman (Barrister, 1 Chancery Lane); Brie Stevens-Hoare QC (Barrister, Hardwicke); Christiane Valansot (Bar Association for Commerce, Finance and Industry Committee Member); Ian Watson (former CEO, CILEx Regulation); Zoe Saunders (Barrister, St John's Chambers); Paul Mendelle QC (Barrister, 25 Bedford Row); Lesley Bates (Barrister, 23 Essex Street); Sonia Hayes (Head of Legal Services at Imperial College Healthcare NHS Trust).

We would like to thank also all four Inns and CILEx for their assistance with various elements of the research, including distributing the survey.

Experts assessors committed significant time throughout the project; helping to design the ethics problems, and conducting their assessment in particular. We would especially like to thank them: Sarah Whitehouse QC, Brie Stevens-Hoare QC, Zoe Saunders, Martin McKay-Smith, District Judge Craig Osborne, Philip Goodall, Christiane Valansot, Paul Gilbert, Karen Shuman and, Sean Hutton.

Lastly, but most emphatically, we would like to thank the advocates who gave their time for the survey and especially for the interviews. They participated on condition of anonymity, so we cannot name them. It is a credit to their professionalism that they saw the merit in taking part.

## **Contents**

Executive Summary.....	5
1 Introduction.....	6
2 Methods .....	11
3 Differences of approach to ethical problems revealed by the transcripts .....	17
4 Expert assessments of the interviews .....	33
5 Advocate perspectives .....	49
6 Advocate values and ethical decision making .....	69
7 Summary.....	92

## List of Tables

Table 1: Survey respondents.....	12
Table 2: Number of Interviews conducted by practice area and professional-type .....	13
Table 3: Mean relational scores by work type.....	40
Table 4: Opportunities for learning that had not been used.....	56
Table 5: Ranking of values on ten dimensions .....	77
Table 6: Balance sheet problem – advice by work type .....	84
Table 7: Balance sheet problem – advice by profession .....	84
Table 8: Balance sheet problem – by value clusters.....	84
Table 9: TV set vignette by work area .....	87
Table 10: TV set vignette by values clusters .....	87
Table 11: Drunk colleague vignette by work type .....	89

## List of Figures

Figure 1: Researcher coding of extent of fit with expert expectations .....	38
Figure 2: Relational indicators .....	39
Figure 3: Respondent views on the key elements of being able to practise ethically .....	50
Figure 4: Respondent views on principal influences on your professional conduct .....	55
Figure 5: How useful would you say the following were to your ability to practise ethically over your career so far?.....	56
Figure 6: Respondent views on the current approach to ethics training .....	58
Figure 7: Where do you think your profession should seek to improve ethical education and training.....	59
Figure 8: Schwartz circumplex .....	72
Figure 9. Advocates values compared with the European adult population .....	74
Figure 10: Clusters of values on four dimensions.....	75
Figure 11: Clusters of values on ten dimensions .....	76
Figure 12: Value scores for solicitors and barristers on each of the four composite value measures, simulated from the statistical model and controlling for other variables.....	79
Figure 13: Value scores for each practice area on each of the four composite value measures, simulated from the statistical model and controlling for other variables.....	79
Figure 14: Value scores for solicitors and barristers on all ten value measures, simulated from the statistical model and controlling for other variables .....	80
Figure 15: Value scores for each practice area on all ten value measures, simulated from the statistical model and controlling for other variables.....	81
Figure 16: Balance sheet problem – values profiles, 4 dimensions.....	85
Figure 17: Balance sheet problem – values profiles, 10 dimensions .....	86
Figure 18: TV set vignette – values profiles, four dimensions.....	87
Figure 19: TV set vignette – values profiles, ten dimensions .....	88
Figure 20: Drunk colleague – values profiles, four dimensions.....	89
Figure 21: Drunk colleague – values profiles, ten dimensions .....	90

## Executive Summary

This research examines the ethical knowledge and skills acquired by new advocates. It provides an evidence base to support improvements to ethical education and training. It does so through a survey of 349 advocates (barristers, solicitors and some Chartered Legal Executive advocates) and 77 interviews with a sample of advocates. Both the survey and interviews garnered views on ethical training and interviews assessed how new advocates would respond to a set of ethical problems. The survey also considered advocates' values and their influence on ethical decision making.

The interviews revealed a range of approaches to ethical problems amongst those we interviewed. In broad terms, expert assessments suggested a range of problems common to all work areas covered. Those performing well demonstrated a strong knowledge of professional principles and rules and confidence in their application of those rules and principles to the problems we posed to them. Such high performance was rare; even amongst the best interviewees there were generally some, albeit occasional or more minor, weaknesses on some questions.

Weaker interviewees did not spot most of the duties and principles engaged by the scenarios; failed to balance competing duties; and, showed a lack of confidence when considering implications for case handling. The poorer interviewees tended to demonstrate such problems more frequently; tended not to recognise significant ethical dimensions to a problem; showed a stronger tendency to rely on intuitive responses to problems; treated ethical dilemmas as tactical not ethical problems; and/or, got relevant rules and principles wrong. The poorest (a small minority) appeared to have a very limited grasp of ethical principles. These problems were also reflected in our assessors' views on training needs.

Interviewees did not perceive the basic knowledge deficits that our experts sometimes found, but did see a need for approaches that developed confidence in the application of ethical constructs to their practices. Whilst there were concerns about the quality of vocational ethics education, survey respondents and interviewees felt that the professions needed to concentrate on improving ethics training once practitioners entered practice as pupils or trainees and that this improvement needs to be engendered across the life course of advocates' careers.

Much of the professional focus on ethics training sees it as a rational, rule-based process; but our consideration of personal values in the report shows how professional decisions can be influenced by personal factors. An advocate that better understands his or her own values may better understand and improve their own decision making. An understanding of the subjective elements of ethical decision making may merit inclusion in ethical training. There is also a particular need for advocates to develop shared and ethically informed approaches to how to deal with uncertain fact situations and the inevitable tensions to be reconciled in ethical decision making.

# 1 Introduction

## Aims of the research

The aim of this project is to inform through independent research evidence the development of advocacy ethics training by the professional bodies and specialist practitioner groups. In this way, it should also advance the debate on education and training in ethics stimulated recently by the Legal Education and Training Review (LETR) research.

The report explores the ethical decision-making abilities of new advocates at the Bar and Solicitors with higher rights of audience. The research had hoped to consider CILEx members with accreditation for further advocacy rights but there were insufficient participants from this group to look at them meaningfully.

This report looks at: what new advocates know and how they use what they know when faced with model ethical problems; how they reason their ways through those problems; and how relevant they think their training is to their early years in practice. It engages researcher and peer assessment of better ethical judgment. As such it:

- a) Examines the ethical knowledge and skills learned from undergraduate studies, vocational legal education and work-based learning (such as pupillage, supervision and continuing professional development (CPD)) by new advocates;
- b) Provides an evidence base to support the improvement of ethical education and training; and,
- c) Establishes a basis for developing and designing improvements in the materials and approach used in professional ethical training.

The researchers were not commissioned to develop policy responses to the research findings. The ATC and its assembled group of sister organisations are to carry out this task in the light of the research.

## Who is a new advocate for the purposes of this research?

For the purposes of the project, 'new advocates' were defined as:

- Practising Chartered Legal Executives within three years of gaining an Advocate's Certificate;
- Practising Barristers within three years of obtaining a Full Practising Certificate; and,
- Practising Solicitors within three years of completing their higher rights qualification.

We set out an overview of the training regime for new advocates in Appendix 1. One of the primary motivations for the research was the ATC's wish to improve the ethics element of the New Practitioner Programme. The three year period reflected the fact that under the New Practitioner Programme all barristers have to engage in three hours of ethics training within three years of taking up a tenancy at the Self-employed Bar or entering into practice as a fully-qualified member of the Employed Bar.

There are no directly comparable requirements for CILEx or solicitor advocates with higher rights, but the three year period was felt to best define an equivalent period by which time the advocates might reasonably be expected to have equivalent ethical knowledge and skills.

### Some context

The Legal Education and Training Review research found most practitioners they surveyed saw ethics as the first or second most important 'knowledge element' for legal education. The report concludes:<sup>1</sup>

*A number of gaps and deficiencies are identified in the knowledge, skills and attributes currently developed by [legal services education and training]. The centrality of professional ethics and legal values to practice across the regulated workforce is one of the clearest conclusions to be drawn from the LETR research data, and yet the treatment of professional conduct, ethics and 'professionalism' is of variable quality across the regulated professions. There was general support in the research data for all authorised persons receiving some education in legal values and regulators are encouraged to consider developing a broad approach to this subject rather than a limited focus on conduct rules or principles.*

The evidence base for understanding the extent and nature of any deficiencies in ethical capacity is not well developed. There are a number of overseas studies but relatively few on practitioners from England and Wales.<sup>2</sup> Students receive training and are assessed on professional ethics during their vocational courses (see Appendix A). The Bar Standards Board's Central Examinations Board has published information suggesting that levels of

---

<sup>1</sup> Webb et al, 2013, Setting Standards: The future of legal services education and training regulation in England and Wales (Warwich: LETR), Executive Summary, <http://letr.org.uk/the-report/executive-summary/executive-summary-english/index.html> last downloaded 19th S

<sup>2</sup> See, empirical work focuses on commercial lawyers from a sociological rather ethical perspective. Janine Griffiths-Baker study of conflict of interests had a significant focus on commercial firms, see *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (2002); R. Moorhead and V. Hinchly (2015) *Professional Minimalism? The Ethical Consciousness of Commercial Lawyers*, forthcoming, *Journal of Law and Society*; Richard Moorhead and Steven Vaughan (2015) *Legal Risk: Definition, Management and Ethics* (UCL, London) <http://ssrn.com/abstract=2594228> or <http://www.ucl.ac.uk/laws/law-ethics/research/papers/erc-executive-report-legal-risk-definition-management-ethics.pdf>; R. Moorhead (2015) *Corporate Lawyers: Values, Institutional Logics and Ethics*, paper presented to the Symposium on Corporate Lawyers, University of Birmingham, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2626684](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2626684). James Arthur and et al, "Virtuous Character for the Practice of Law Research Report" (Jubilee Centre, University of Birmingham, 2014).

performance on the professional ethics elements of Bar Professional Training Course (BPTC) central assessments are poor, and possibly declining.<sup>3</sup> There is significant variability in the pass rates between students from different institutions, although little clue as the cause of poor performance.<sup>4</sup> Aside from such work, there is no research assessment of whether or how ethical knowledge and skills are retained or develop during the early years of practice in this jurisdiction. While the professions have requirements based on the expected outcomes of the BPTC, Legal Practice Course (LPC), pupillage, training contracts and CILEx competence requirements, these have not been tested by research. Nor has post-qualification ethics training been assessed against the background knowledge and skills of those receiving the training. There is thus a need for rigorous, empirical research basis for understanding:

- a) What knowledge and skills new advocates have in the ethical decision-making engendered by vocational and post-qualification training and experience;
- b) Differences across practice areas and practice types; and,
- c) What improvement in knowledge and skills is needed and most relevant to current levels of practice.

To maximise the project's practical utility, a 'blank slate' approach to understanding ethical decision-making or training needs was not undertaken. Instead we adopt a pragmatic, evolutionary approach. The research is thus based around current training approaches of new advocates conducted by the professional and specialist practitioner groups that make up the ATC working group. These groups are:

- The Solicitors' Association of Higher Courts Advocates
- CILEx Regulation (formerly ILEX Professional Standards)
- The Crown Prosecution Service
- Bar Professional Conduct Committee
- Bar Association for Commerce, Finance & Industry
- London Common Law & Commercial Bar Association
- Family Law Bar Association
- Criminal Bar Association

Such training typically relies on exploring ethical dilemmas drawn from practical experience. In exploring the ethical capacities of new advocates, we use a similar approach, interviewing respondents, putting ethical case studies (sometimes called vignettes) to them and asking them to discuss how they would respond to those case studies, and what rules and principles are relevant to their approach. We also ask them some more general questions about ethics and their ethical training which we explore below.

---

<sup>3</sup> *The Bar Standards Board Central Examinations Board Chair's Report*, August 2015, First Sit 2014/15.

<sup>4</sup> There is one interesting reference to institutions teaching 'common 'practice' rather than the principles as stated by the Code, but this is in relation to one question in the assessment only.

As a method of training, the ethical dilemma approach has advantages and limitations.<sup>5</sup> It engages and encourages skills in recognising and resolving ethical dilemmas. It enables a 'show how you would solve this problem' assessment of competence which goes beyond a mere knowledge test. Conversely, it is mainly focused on whether the applicable rules and professional principles can be identified and applied in theory, not whether they would be applied. There is also some artificiality in using stories placed before a trainee or practitioner with an instruction to identify the problems. They are 'on the look-out' for an ethical problem – thus whilst they may spot some problems and not others (where a vignette contains more than one problem) or may incorrectly diagnose red-herrings as ethical problems, the approach does not necessarily assess sensitivity to ethical problems.

A wider critique of a rules-based approach is that it may inhibit the development of broader competencies in ethical judgment: "rules are important ...[but] they are an incomplete guide to ethical decision-making".<sup>6</sup> Whether a lawyer has the practical skills and motivation necessary to implement ethical decisions is likely to be more difficult to develop through this mechanism.<sup>7</sup> Different approaches to training, development and assessment may be needed for this, clinical education, more pervasive and values based approaches to ethical education, and stronger work-based coaching and development, might all be considered. Similarly, there may be questions over the extent to which developing contextual judgment is fostered by teaching this way, although a discursive, case-based approach which engages experienced practitioners with the trainees may lead to some deeper understandings:

*...Lawyers need to be able to identify and interpret the ethical dilemmas they will confront and to see how best to conduct themselves in practice. There is therefore a further need for some kind of context ...once it is recognised that rules of conduct contained in the Code often collide. At this point external guidance drawing upon human and legal experience is required to assist the process of ethical decision-making. For example, just how far does loyalty to the client extend and what criteria should be used to answer this question?*<sup>8</sup>

These critiques of approaches to training apply also to a research design which uses ethical dilemmas as the central strategy for evaluating ethical capacities. If, for instance, we see motivation to behave ethically and the ability to spot ethical problems in the fast moving, complex world of legal work as key desiderata then this approach will not guarantee success. That said, our interviewees sometimes did reveal incapacity to spot ethical problems even when actively looking for them and interviews also sometimes provided clues as to motivation. On the other hand, as a means of collecting data on the basics that the ethical training currently seeks to achieve, ethical vignettes provide the best available

---

<sup>5</sup> See, for example, the McCrate Report famously emphasises these, *The Task Force on Law Schools and the Profession: Narrowing the Gap*, (American Bar Association, 1992).

<sup>6</sup> Ibid.

<sup>7</sup> See Michael Robertson, "Renewing a Focus on Ethics in Legal Education. Australian Lawyers and Social Change.," 2004, <http://law.anu.edu.au/alsc/MikeRobertson.pdf>.

<sup>8</sup> Kim Economides and Justine Rogers, *Preparatory Ethics Training for Future Solicitors* Kim Economides and Justine Rogers (London: Law Society, 2009)., p. 22

starting point, which we have supplemented by consideration of other issues including values.

# 2

## Methods

### Participants

The study was to examine the ethical capacities of lawyers in private practice in Family, Crime and Civil fields as well as those working in in-house position,<sup>9</sup> across the three professional groups of ‘new advocates’ (as defined above).

### Recruiting participants

Participants were recruited through a variety of routes:

- The four Inns of Court (Lincoln’s Inn, Inner Temple, Middle Temple and Gray’s Inn), the Chartered Institute of Legal Executives (CILEx) and the Bar Association for Commerce, Finance and Industry (BACFI) sent a number of email invites to eligible members on behalf of the research team.
- The researchers manually compiled lists of potentially eligible barristers, solicitor-advocates and CILEx advocates from a number of public registers including the Barristers’ register made available by the Bar Standards Board, the Law Society, the SAHCA members’ directory and the CILEx practitioners’ directory. These lawyers were emailed direct by the researchers where emails were available.<sup>10</sup>
- A call for participant in-house advocates was issued via the Government Legal Service mailing list.

All potential participants were sent a short introduction to the study and a link to the survey website. These combined efforts yielded 349 survey completions. Participant practice areas numbers split by profession are detailed in Table 1. Practitioners indicated they practised across a range of work types which we have simplified to illustrate most easily the main groupings. Where they indicated more than one specialization we categorise this as ‘mixed’.

---

<sup>9</sup> Although not typically thought of as advocates, the Inns provide training specifically for new practitioner barristers that move into in-house practice.

<sup>10</sup> This yielded a list of 727 barristers, 64 SAHCA members and 313 other solicitor-advocates who had the potential to fit the study criteria and for whom email addresses could be found.

Table 1: Survey respondents

		Barrister	Legal Executive	Solicitor	Total
<b>Civil</b>	n	108	2	24	134
	%	42.2%	22.2%	29.6%	38.7%
<b>Criminal</b>	n	49	1	6	56
	%	19.1%	11.1%	7.4%	16.2%
<b>Family</b>	n	25	4	3	32
	%	9.8%	44.4%	3.7%	9.2%
<b>In-house</b>	n	43	1	45	89
	%	16.8%	11.1%	55.6%	25.7%
<b>Mixed</b>	n	22	0	2	24
	%	8.6%	0.0%	2.5%	6.9%
<b>CPS</b>	n	5	0	1	6
	%	2.0%	0.0%	1.2%	1.7%
<b>Unknown</b>	n	4	1	0	5
	%	1.6%	11.1%	0.0%	1.4%
<b>Total</b>	N	256	9	81	346 <sup>11</sup>

At the end of the survey, respondents were asked if they were willing to be interviewed. Those providing their consent were contacted and, where possible, an interview was arranged. As a result, 78 interviews were secured of which 77 were used.<sup>12</sup> Table 2 details the number of interviews secured in each of the practice areas by professional-type. It will be seen that the conversion rate from survey to interview was broadly the same across the professional groups (about 20 percent).

We had hoped to interview more legal executives but CILEx established during the research recruitment phase that the number of eligible advocates that could be recruited was likely to give rise to a low number of responses. If we assume that about 400-500 barristers enter self-employed or employed practice every year, then we have a response rate to the survey of about 1 in 6 for them. This is a good response rate to the survey, but is not sufficient to enable us to claim the results are representative of all new advocate barristers. We also hoped to get a larger and better spread of solicitor advocates, but they were significantly harder to identify and recruit in practical terms.

<sup>11</sup> 3 respondents did not identify themselves by subject area and profession type.

<sup>12</sup> One interview only managed to cover three of the ethical dilemmas and so was not included in our full analysis.

**Table 2: Number of Interviews conducted by practice area and professional-type**

	<b>Barristers</b>	<b>Solicitors</b>	<b>CILEx</b>	<b>Total</b>
<b>Civil</b>	27	4	0	31
<b>Crime</b>	14	3	0	17
<b>Family</b>	10	1	1	12
<b>In-house</b>	10	8	0	18
<b>Total</b>	61	16	1	78

Whilst, the overall number of survey responses was good and enabled us to canvass a sizeable element of new advocate opinion, especially from the Bar, interviews of the kind we used in this research can only be done on relatively small numbers. We cannot claim as a result that the results are necessarily representative of all barristers. We would expect some response bias in the results towards those more interested in professional ethics, those with greater concerns about ethics training and, given the nature of the interviews, which tested participants on their ethical capacities, perhaps those who would be more confident of their abilities to deal with ethics problems. These potential biases should be held in mind when reading the results.

### Research Tools

There were two research tools:

- An online survey mainly collecting quantitative data on values, responses to three ethical vignettes and views on ethical decision making and training.
- Semi-structured interviews conducted by the researchers and transcribed for analysis. Experts assessed the anonymised transcripts using agreed criteria and provided comments on the transcripts. Researchers conducted qualitative analysis to explore the approaches of the interviewees and coded the transcripts using a more detailed framework.

### The online survey

The online survey is set out in Appendix B. It was designed to collect information on:

- Advocates' demographics (type of lawyer, etc.) and values.<sup>13</sup>
- Answers to some exploratory ethics problems (or vignettes), so we could examine the relationship between practitioner values and ethical decision-making.
- Their views on educational experiences and ethical training.

---

<sup>13</sup> The values part of the survey used Schwartz's 40-Item Portrait Questionnaire (PVQ40), designed to provide greater insight into an individual's values. The thinking behind this approach is discussed in detail in Chapter Seven.

The breakdown of our survey respondents can be seen in Table 1. 56 percent of the respondents were women. Post-qualification experience ranged up to 32 years. The latter reflected the fact that solicitor Higher Court Advocates may often have practised for a long time before taking up higher rights. Consistent with the study aims of targeting practitioners within three years of their advocacy qualification, the vast majority of respondents had five years or less PQE and the average level of PQE was three years. As we would expect, the solicitors and legal executives in our sample had somewhat more PQE on average than the barristers (two to three years more on average).<sup>14</sup>

### **The Interviews and the ethical vignettes**

A detailed interview was conducted where interviewees were asked to respond to six model ethics problems (vignettes) and indicate how they would resolve those problems. The interviews also discussed views on ethics experiences and training in more depth than the survey.

The vignettes were designed around a series of hypothetical ethical dilemma scenarios. The aim of these was to explore the ethical reasoning of the interviewees. As already noted, ethical dilemmas of this kind have limitations. They identify how well interviewees can address and reason through problems that they are presented with, but they do not indicate how the interviewee would actually respond to the scenarios. The ethical dilemma approach is also mainly focused on applicable rules and professional principles. The extent to which new advocates formulated and applied relevant principles in their ethical reasoning was considered. We also sought to examine the extent to which interviewees thought through their answers and the potential for case scenarios to develop. As such we sought to provide some assessment of deliberative thinking and foresight.

To design the case studies, we examined sample training-scenarios from organisations in the project working group. In consultation with the project working group, we identified key ethical issues that they would expect new advocates to be competent with across civil, family and criminal practice. New draft problems were formulated by the researchers and by some working group members and from these a group of problems was chosen for each of the four work areas (family, criminal, civil and in-house). In selecting the problems for final inclusion we sought to ensure the problems were at a level felt to provide an appropriate test of post-qualification ethical capacity in that they covered a range of different kinds of problem, with an appropriate level of complexity and difficulty. We also sought to ensure that similar kinds of problems were asked across the four areas, where possible, to ensure some comparability across the four groups. This was not possible for in-house lawyers, who it was felt faced rather different kinds of problems. The problems are set out in Appendix C. All problems were reviewed by the working group to ensure that they were appropriate for all three professions to be researched, that the complexity/difficulty of the problems was in accordance with the standards expected by the working group, and that the appropriate mixture of problems was included.

---

<sup>14</sup> Again, consistent with expectations about half our sample had a year or less of pre-qualification legal experience. 93 of our respondents had more than two years of legal experience prior to qualification.

The civil, family and crime scenarios covered matters such as conflicts of interest; disclosure (resisting disclosure and inadvertent disclosure of privileged material); change of evidence/change of instructions consistent with a client trying potentially to mislead the court; actually misleading the court; and, the making of allegations about an opponent/witness and restrictions on pleading fraud. In-house ethical training under the New Practitioner Programme is not mainly concerned with court-based advocacy and so there was a wider frame for potential problems for this group. As the NPP training for in-house lawyers focuses on commercial situations, our scenarios dealt with commercial law dilemmas that individuals would either have faced or be likely to face in their work, or for which they would have received training (e.g. if the respondent was a government lawyer). The in-house scenarios covered, for example, conflicts of interest, malfeasance with intellectual property, confidentiality and disclosure.

Approximately ten to fifteen minutes prior to their scheduled interview, interviewees were emailed the set of hypothetical questions so that they could familiarise themselves with the material prior to interview. They were asked not to look up the relevant Codes of Conduct and to answer the questions in the interview without the use of reference material. During the interviews respondents could re-read the scenarios and then answer a series of questions from the interviewer relating to:

- what ethical problem/s they saw the scenarios raising (if any);
- what professional duties and principles the scenarios engaged; and.
- how they would go about handling the problem/s and resolving the dilemma.

In addition to discussing how they would respond to the hypothetical ethical dilemmas presented, interviewees were also asked a series of questions at the end of the interview eliciting views on ethics training in their profession. These questions explored the interviewees' views of the quality, comprehensiveness and relevance of ethics training as well as examining the type of problems advocates generally faced in their first few years of practice and the extent to which ethics training adequately prepared them to handle such problems.

Interviews were recorded with the permission of interviewees, and later transcribed. Interviews typically took between 30 minutes and an hour although many interviewees were not able to set aside more than 30 – 40 minutes and in those cases, the interview covered as many questions as was possible in the timeframe. Consequently, in some cases, interviewees did not get a chance to cover the additional questions on training/development.

### **Interview coding and expert assessment**

Expert assessors were experienced practitioners and former practitioners with experience of training in ethics relevant to solicitors, legal executives and barristers. Our cohort of assessors included solicitors, barristers, QCs and a District Judge. Anonymised interview transcripts were assessed by a team of expert assessors using a form developed with the working group and assessors (Appendix D). Assessors underwent some training in the

approach and to facilitate consistency. Then experts were asked to assess between eight to ten interview transcripts and to give their views on the quality of the responses interviewees provided, using the pro forma. Experts were also asked to provide comments on the quality of the responses in each transcript and an assessment of the extent to which an interviewee would benefit from additional training based on their interview transcript.

The expert assessment was supplemented by a somewhat more detailed analysis by the researchers. The research team devised a series of model coding frameworks to each of the six questions within the four practice areas. Model coding frameworks were designed in consultation with the advisory ethics experts and set out the key duties, rules and guidance a good answer should cover; the key considerations/actions a good interviewee should mention; and, the key errors that weaker interviewees were expected to make. Once that coding had been done, the researchers assessed the interviews against a list of criteria similar to, but more detailed than the experts (Appendix E). Whilst that coding process was expected to emulate the kind of approach the expert assessors indicated they would use, we also wanted to explore further dimensions to ethical reasoning. In particular, the researcher coding framework also drew upon some of the existing literature on ethical reasoning to develop further criteria by which interview responses were assessed.<sup>15</sup> This included:

- a) Whether interviewees sought to balance the interests of a range of stakeholders (the client, themselves, the justice system/court, the profession and where relevant their instructing solicitor/employer);
- b) A subjective assessment of the extent to which the interviewee's answer appeared deliberative, meaning based on thoughtful (verbalised) consideration of a range of factors as opposed to being reflexive or reactionary; and,
- c) The extent to which they suggested alternative action/contingencies in the event that their initial action failed.

These last two criteria were designed to give insight into the extent to which interviewees engaged in predictive thinking and sought to exercise some foresight about how their 'solutions' would work in the real world by generating a solution to the problem and weighing the potential consequences and contingencies of their approach.

## Seminars

An initial analysis of the research was presented to seminars of practitioners, those involved in ethics training and academics to subject assumptions and findings to scrutiny and development.

---

<sup>15</sup> See e.g. Cottone, Rocco, R., and Claus, R.E. Ethical Decision-Making: A Review of the Literature. *Journal of Counseling and Development*. Summer, 78 (2000): 275-283.

# 3

## Differences of approach to ethical problems revealed by the transcripts

Before we discuss the assessments of the interviews conducted by the experts and the researchers, we look at differences in approach amongst our sample of advocates. Less committed readers may wish to skip this chapter, but we include it to provide some background and depth to the approach employed and the responses given by some of our interviewees. To keep this within manageable bounds, we only focus on one area of work here: crime. We look at each of the vignettes in the interviews in crime. We do so:

- a) as an illustration of the kinds of approaches taken to the problems;
- b) to explore elements of the questions which provoked clear differences in response; and,
- c) to explore key areas where, in the researchers' views, the answers did not appear to fit with the expert assessors' expectations.

We do not seek to provide a definitive analysis of whether any particular answer was right or wrong. The assessment of the quality of answers is left for Chapter Four. Instead, we leave it to the reader to consider answers to the questions, and the different approaches to ethics employed here. We also hope it may form a useful resource for ethics trainers and teachers, who could use the scenarios and the answers as a discussion document with students/trainees.

### Crime 1

The first Crime Scenario was:

*Your client, Mr Shepherd, was convicted of assaulting his girlfriend. The print-out of his previous convictions only contains some minor theft offences from several years ago. Your client now tells you for the first time that he was given a suspended sentence 3 months' earlier for an assault on a previous girlfriend. He thinks he got six months in prison which was suspended for a year.*

*Prosecuting counsel stands up and, when asked by the judge, says the client has no previous convictions for violence.*

***What would you do?***

***If you say nothing, how far can you go in mitigation with your client's previous criminal record as disclosed by the Crown?***

***If after, you've spoken, the District Judge says [to you] so I see Mr Shepherd has not convictions for violence, and then immediately asks you if there is any ongoing connection with the girlfriend- do you do anything?***

***Do you do anything about the suspended sentence?***

Interviewees tended to interpret the client's best interests in two different ways linked to approaches to dealing with the tensions between the advocates' duties to the client and to the court. They were:

1. It is in the client's interest to get the lightest possible sentence *on this occasion*. So, if disclosure of the unknown previous conviction can legitimately be avoided, the court should not be made aware that his record is apparently worse than that presented by the prosecution, nor that he may be in breach of a suspended sentence.<sup>16</sup>
2. It is in the client's interests to come clean, and for the court to have an up to date and accurate record of his antecedents. The truth will very likely come out anyway, either at this hearing or in the not too distant future. If so, the court may come down harder on him. If he voluntarily instigates this, his advocate can put a positive slant on it, and argue that he should get credit for being open with the court when he could have remained silent.

Interpretation 1 meant that advocates had to consider how to avoid misleading the court when mitigating, and whether they would reach a point where they would have to withdraw. Interpretation 2 might avoid those difficulties altogether; if the client accepted the advice to come clean, and gave permission for his record to be checked out, the advocate would not have to worry about what they could say in mitigation.

Several of those who went for Interpretation 1 appeared to assume that the client would not want the court to know about the previous conviction for violence or the suspended sentence:

*...my duty is to look after the best interests of my client whilst I'm in court, and their best interests would not be served by having a suspended sentence activated or by it being known to the, or it being highlighted to the court that he has previous convictions for violence, particularly against women. [Crime 4]*

Contrast that with responses which took the second view of the client's best interests, which necessitated advising the client and taking instructions on what he wanted the advocate to do:

*I think in reality what would happen though is if you went off for, say, a PSR [Pre-Sentence Report] or if he was sentenced to a community order, Probation*

---

<sup>16</sup> On the facts of the scenario, it is not necessarily the case that he is in breach; it is possible that the current offence was committed before he got the suspended sentence.

*would almost certainly know about the suspended sentence and they would then prosecute him for the breach of that, and at that point it would come out, even if that weren't on the same day. Which would obviously affect my initial advice to the client, which would be, we should probably tell the court this because you won't get away with it for long. [Crime 14]*

In general terms, it was expected that in answering this question attention would be paid to the duty to the client, the duty to the court, the duty not to knowingly or recklessly mislead the court (or permit it to be misled). Our analysis suggested this was generally done expressly or impliedly. Interviewees sometimes did not discuss more specific expectations in the codes of conduct and as indicated by our expert assessors, such as the need for the client to consent to disclose previous convictions of which the prosecution is not aware [GC12]. Indeed, about a third of our interviewees discussed disclosure and/or withdrawal without suggesting they needed to discuss it with their client fully or at all. Aside from this high-level view of the interview data we can also see more interesting differences in what follows.

#### **Duty not to mislead the court**

A key professional obligation for barristers is rC6 - *Your duty not to mislead the court or to permit the court to be misled*. It is worth observing that some of our interviewees talked about what they perceived to be a shifting in position at the Bar on the nature of this duty:

*historically the position was that as long as you didn't mitigate in a way that misled the court you would be permitted to do nothing. I have had a judge actually say to me in those circumstances that... [he/she] thought that was the case. However, I know that with the handbook there has been a change in wording so it is not just a duty not to mislead a court but also not to allow a court to be misled. I would take the view that you would risk breaching that different wording if you did allow a court to sentence on the basis of no previous convictions for violence. [Crime 1]*

*...I have to say [there is] a difference of opinion between those at the older end of the bar and the younger end of the bar. Certainly I know the attitude at the older end of the bar is well, if they don't put their house in order and they don't know what is going on, that's their look out, you say absolutely nothing. The view at the younger end of the bar tends to be well you have to assist as much as you possibly can. [Crime 3]*

As already noted in part, guidance in the BSB Handbook covers the scenario with some specificity, at gC12:

*For example, if your client tells you that he has previous convictions of which the prosecution is not aware, you may not disclose this without his consent. However, in a case where mandatory sentences apply, the non-disclosure of the previous convictions will result in the court failing to pass the sentence that is required by law. In that situation, you must advise your client that if consent is refused to your revealing the information you will have to cease to act. In situations where mandatory sentences do not apply, and your client*

*does not agree to disclose the previous convictions, you can continue to represent your client but in doing so must not say anything that misleads the court. This will constrain what you can say in mitigation. For example, you could not advance a positive case of previous good character knowing that there are undisclosed prior convictions. Moreover, if the court asks you a direct question you must not give an untruthful answer and therefore you would have to withdraw if, on your being asked such a question, your client still refuses to allow you to answer the question truthfully. You should explain this to your client.*

Interpretations of this duty varied as is perhaps best illustrated by how interviewees said they would deal with the District Judge saying , ‘so I see Mr Shepherd has no convictions for violence’ then immediately asking about any ongoing connection with the girlfriend. A clear majority indicated (in line with gC12) that if asked a direct question by the court, they had two options: either answer truthfully according to their instructions (i.e. correct the misapprehension about the client’s record) – or, if the client refused permission to do that, withdraw (because they would not be able to reconcile their duty not to mislead the court with their duty of confidentiality to the client).

However, there were two main interpretations of whether the duty to answer a direct question was brought into play on the facts of the scenario.<sup>17</sup> One was that the District Judge was simply making a statement, which the advocate appeared to feel they could essentially ignore. Another was that although what the District Judge said about previous convictions wasn’t explicitly framed as a direct question to them personally, the advocate felt it would be wrong to let it pass without dealing with it.

*In terms of the District Judge speaking to me, the District Judge is reliant upon the prosecution's evidence that there are no previous convictions and he's simply made a statement. He hasn't asked me about that. [Crime 27]*

*At the point when the district judge says to me, so I see Mr Shepherd has no convictions for violence, that is the point when I feel that to not say anything, or to remain silent there, I feel that I'm in a direct dialogue with the judge, and to not say anything there, and to not correct him, is essentially misleading him. [Crime 36]*

The second is perhaps more consistent with the spirit of the BSB Handbook and guidance, whether the comment of the District Judge is interpreted as a question to the advocate or not.

It should also be noted that about half of the interviewees did not deal with the requirement in the guidance noted above (which might involve a discussion of whether a suspended sentence was analogous to a mandatory sentence) that:

---

<sup>17</sup> A couple of responses fell between two stools, neither ignoring the DJ’s statement, nor tackling it head on, but instead suggesting they would deflect it by saying they were not instructed to or could not assist.

*If mandatory sentences apply, the non-disclosure of the previous convictions will result in the court failing to pass the sentence that is required by law. In that situation, the client must be advised that if consent is refused to your revealing the information you will have to cease to act.*<sup>18</sup>

### **Duty of confidentiality to client**

An aspect of responses which appeared problematic (and which the experts criticised) was some advocates indicated that they would 'informally' put the prosecution on notice that the client's record might be incorrect without indicating that they would need the client's consent to do that.

*...you could ward off [the problem] before it even became an issue by just sort of quietly raising it with the prosecutor and saying, 'look, I think this might be out of date'. [Crime 19]*

Crime 9 appeared to take a similar approach:

*...I think it would probably involve a quiet word with the prosecution before the hearing to say, 'Are these up to date antecedents?' ...And I would hope that would give them enough information to make them think they should check. [Crime 9]*

It may be that these interviewees would have got the client's permission before they did this, but the apparent skirting around the issue and hoping that the prosecution would discover the correct position for themselves, rather than taking responsibility for disclosing or not disclosing the conviction, suggests they might not have sought the client's consent; it also does not suggest they are ready to deal with the situation in hand, which is what to do if the prosecution has not disclosed the conviction and the judge is misled by that during sentencing.

### **Other problems**

One interviewee appeared to suggest that a half-truth or even deliberate untruth would suffice in response to this question, with their response being somewhat contingent on the seriousness of the offence, although in our view this is a response to the court which is misleading:

*I would stand up and say that my client tells me that he did receive a suspended penalty a number of years ago but I know no more of it than that. [Crime 13]*

It was three months ago, and the advocate does know more; the client has said it was for an assault on a previous girlfriend:

*And why? Because, well, I mean, the duty is to the court and if anything came back later and I was aware, then clearly that's wrong. I don't think I would say*

---

<sup>18</sup> Bar Standards Board Handbook, gC12

*nothing, I mean, it really depends what it was for. If it was for some minor, let's say we're in a traffic court and it's for a previous driving conviction, it's such a low level stuff it'd be the Crown's loss for basically messing up. But something so serious like that I think I would feel it right to inform the court. [Crime 13]*

One interpretation of this interviewee's reasoning was that they were concerned to do just enough, as they appeared to see it, to cover their back:

*I may make a note that, well, basically that I've advised, on the brief, advised the court that there was something, because if I did not necessarily agree that there weren't any convictions et al, because then obviously if it comes back then I can't be blamed for not bringing it to the court's attention. [Crime 13]*

They did not address the question of needing the client's consent for disclosure, or potentially needing to withdraw in the absence of such consent. Nor did they say what they would say in mitigation.

## Crime 2

This scenario was:

*Your client is a local councilor charged with dangerous driving. A prosecution witness will say that he saw your client in the driver's seat and driving dangerously. That is an accusation vigorously denied by your client who says the witness is lying. No s 100 Bad Character application has been made up to this point.*

*At Court the client instructs you to put to the witness that:*

- (a) He is a notorious local drunk who cannot be relied upon to see anything except with double vision;*
- (b) He is known to frequent brothels;*
- (c) He has a grudge against your client ever since he beat him in the local elections; and*
- (d) He is a freemason who is friendly with the investigating police officer who is also a freemason.*

***Do you follow these instructions?***

Almost all interviewees covered certain things in this scenario: whether the points were relevant to the defence case; the potential need for a bad character application; and/or, the risk of the client's own character being attacked. These tactical or procedural considerations were more often considered than the professional ethical dimensions to the problem: the duties not to ask questions merely to insult, humiliate or annoy; not to make serious

allegations without evidence; to act in the client's best interests; and, to maintain independence (although, the latter was often considered implicitly if advocates said they would refuse to follow certain of the instructions, as almost all did). However, some did deal explicitly and strongly with the ethical principles. This interviewee first discussed the principles/duties involved, before applying them to each of points A – D in turn:

*As independent counsel you're responsible for the decisions that you take, notwithstanding your instructions. So if your instructions are to argue something that's unarguable in your professional judgment, you oughtn't to do it. You can explain and talk to him. Equally, you can't cross-examine somebody in a way that is – I don't know if it's scandalous, vexatious, scurrilous, those kinds of words which are used I think in the code. But you certainly couldn't do stuff which is just there to throw mud to no real relevant effect. Of course, cross-examination also is putting your case and challenging the credibility of a witness who your instructions are is not to be believed. And so in these circumstances, it's a question in each of A to D of saying well, to what extent are these instructions substantial, are they supported by some kind of evidential basis, to what extent are they relevant evidence that would be admissible in any event by the court. [Crime 29]*

There were different views on whether certain of the allegations would amount to bad character requiring an application if they were to be put to the witness. Some thought saying a witness was 'a notorious local drunk' would come under the relevant provisions; others thought that it would not. The latter tended, for example, to frame a drink problem as going to the witness's ability to accurately perceive the defendant's driving. A minority suggested they would put it pretty much in the terms put forward by the client; but most would avoid use of terms like 'notorious drunk'.

Almost all said or indicated that they would not put the point about frequenting brothels, as it was not relevant. Almost all said they would put the grudge allegation, as they thought it was relevant (it provided a motive for the witness to lie). The exceptions were one advocate who suggested they would not put any of the points unless there was a proper evidential basis and another who was unclear. Responses to the freemasonry/relationship with the investigating officer point also varied depending on how plausible and relevant interviewees felt the allegations were, e.g. was there any real evidence of collusion. As an example of one such response:

*I'd probably spend time – some time saying to the client that that's very likely to backfire spectacularly, that kind of questioning, unless he's got something very – for example, I'd be looking at when the person – I'm sorry, I know this is not really ethics, but this is what I'd be doing, I'd be saying, well, this person made – when did this person make this statement? When did they witness this alleged bad driving? If he's made the statement directly after it, how are we going to suggest that the investigating officer has influenced him making that statement? It just won't – it's not going to have any weight, and it's not going to be very helpful, so – I don't know, if he gave me more information, and I began to think, he's made the statement two or three days later, and*

*that the investigating officer who took it was the one he was friends with, then perhaps I'd start exploring it, but likely not. [Crime 36]*

Crime 13 again stood out here with their flexible approach to ethics depending on which court was involved:

*I'd put A to him, yes. If this is in the magistrates court, yeah, it would be for a driving offence, well potentially. If it's in the magistrates court then yes, I'd be reluctant to in a Crown Court because it's harder to get away with, the line or the boundaries can't be pushed as much as they can in the magistrates court where they can in the Crown. I would definitely put that to him to try to discredit him.*

*[a little later in the interview] ...it may well be relevant and I think it could be. I'd be a little bit more apprehensive in the Crown Court because you generally get your neck reeled in a lot quicker. [Crime 13]*

### Crime 3

This scenario was:

*Whilst going through the night before a short trial on possession of stolen goods, you discover in material disclosed late by the CPS a note from the lead investigating police officer which appears to be passing comment on the reliability of the main prosecution witness. It also discloses that the witness was investigated for drug dealing several years ago, but that case was dropped in return for cooperation in ongoing police work.*

*You have read the note before realising that it is probably part of the CPS brief to their advocate. Earlier, as part of your preparation, you had asked for a list of antecedents of the prosecution witnesses and he is shown as a having none.*

#### **What do you do, and why?**

In this scenario, only a minority of interviewees explicitly identified the duties which the experts expected them to consider and only minorities explicitly dealt with whether they would seek further disclosure, would make a bad character application, would tell the client about the information, and whether they would withdraw. All picked up on the disclosure apparently being inadvertent, and all either said or seemed to imply that they would notify the prosecution that they had received the information.

Respondents were split roughly two to one in favour of being prepared to use the information – after notifying the prosecution that they had received it. However, there appeared to be a fair degree of uncertainty on the part of several respondents:

*I mean, privilege has, in effect, been lost once it's been passed around so, I don't know. You know, if I have it, well, technically if I have it and before I open it, let's say it's a letter, I'm aware that one shouldn't have opened it, but*

*if I've read it without realising it's privileged then I can't unread it. So as far as I'm concerned then I'm entitled to use it. I don't know whether that's right or wrong but that is the view that I would take. [Crime 13]*

*You're thinking about whether or not you can use it ... and arguably, there's been an accidental breach of privilege, in which case you can notify the other side and use it, but I'm not 100% sure about how this would work in criminal proceedings. My inclination is that if you tell the other side – and they're aware of it, then you can use the content of the document to cross-examine the witness, but – there may be further privilege issues here that I'd need to check. [Crime 38]*

Crime 15 indicated that – after consulting their instructing solicitor, somebody in chambers, and the ethics helpline, they would then hand over the decision on whether to continue or withdraw to the judge. This appeared due in part to concerns regarding the potential danger to the witness if they were revealed to be an informant, but they appeared too ready to abdicate responsibility for either looking after their client or withdrawing (see end of second extract below).

*I'd be very careful about raising this in open court because we've got a situation with a police informant, it seems, and I'd be, you'd want to be extremely careful about disclosing that in open court, for fear of endangering him in some way, and undermining the police work. So that's why I say it may be something I'd raise with the judge and request to see the judge in chambers... and see if I could raise this with him in the presence of the prosecutor and see what they say. [Crime 15]*

And later on:

*...But yes, my main concern here is about whether by withdrawing it might allow the case to proceed in a different basis without this disclosure being made, with different counsel. But that's something that I think is a decision that really would be best made by the judge, because they're best placed to decide whether I could continue or whether the judge may think that it's more important to just get on with the case and not waste the court's time for what's a minor consideration. And that's why I'd take their guidance. [Crime 15]*

Crime 27's abdication of responsibility was even stronger and was picked up by an expert assessor; they indicated that they would do what the prosecution thought right.

*But in terms of ethics, because I've already seen that document and read it, I think it would only be fair to inform the advocate for the Crown that I have seen that document and, subject to them feeling differently, I think I would say I'm professionally embarrassed.*

And later on:

*if their advocate was of the view that I should carry on and continue acting for the defendant regardless, then I would. [Crime 27]*

Two interviewees suggested that the rules allowed them more leeway if acting for the defence than for the prosecution.

*I think this is a question that you would answer differently depending on which side you were on...if I were prosecuting and I accidentally saw something that was prejudicial to the defendant, I think I'd probably have to withdraw from the case...I'd go and see my opponent first thing in the morning and say I've seen this, I shouldn't have seen it, I'd better give it back. But I think, and if this was my actual scenario I'd have to look it up, but I think the rule is that if you've seen something you weren't supposed to see you can still rely on it, if you're defending. [Crime 19]*

*My view is that it's different if you're prosecuting perhaps than if you're defending, the reason being that prosecuting, you know, you're looking to the Attorney General and dual role as an officer of the court, a Minister of Justice, whereas if you're defending, ultimately you do have your client. And if you come into possession of information that might assist them, notwithstanding the way in which you've come into possession of it, if it's giving you an avenue of disclosure that ought to be pursued, then it ought to be pursued in the interests of your client. [Crime 29]*

Another response was one in which the advocate suggested that what they would do could depend on who was prosecuting, suggesting their view of their duty to the client was modified by the strength of their relationship with the prosecutor:

*.... If I'm not using it, it might depend who my opponent is, it might depend how well we get on and what I feel about it, but I may just shred it and forget about it and never – not say anything about it. [Crime 25]*

Only two respondents briefly considered whether PII (Public Interest Immunity) issues might be raised by the prosecution witness apparently being an informant.

#### Crime 4

This scenario followed on from Crime 3:

*Continuing with the last scenario, assume that you continue to act. Your client says [via instructing solicitors] during an adjournment that he thinks the witness is a member of a local drugs gang and has it in for him because your client once raised suspicions that he was a police informant. The client makes clear that if you hint to the court that he is a grass he thinks the witness will become more sympathetic to the defence.*

***Does this change or reinforce what you would do in any way?***

Explicit identification of the relevant principles and duties was even less evident here, perhaps reflecting the way in which the two problems followed on or a general uncertainty about applicable parts of the codes.

### **Whether respondents would follow the client's instructions**

Most advocates said they would follow the client's instructions to at least some degree, usually contingent on certain conditions being met (raising whether the witness was an informant with the prosecution and the judge, and/or making a bad character application). Almost all indicated that they would not 'hint' that the witness was a grass, but would have to tackle the issue head on if they were prepared to raise it at all.

## **Crime 5**

The fifth scenario was:

*Your client is about to be tried for actual bodily harm arising out of a fight in a pub. A prosecution witness (who knows your client) identified him as the assailant shortly after the incident. Your client's instructions are that he was defending himself, having been racially abused and threatened by another man in the pub.*

*On the morning of the trial, your client says he has a feeling that the witness will say he was mistaken in his identification and that it was someone else fighting, not your client. He now says he was elsewhere on the evening in question and that a friend of his can act as an alibi witness. He says he only said it was self-defence because he had to say something, knowing he was innocent, and that he is now telling the truth.*

### **What do you do?**

*When pushed the client tells you his girlfriend knows the witness and she told him the witness had changed his mind. You cross examine the witness hard on identification but in fact he does identify your client. You then hear the alibi witness will not attend. You hear you client say, "I will say whatever it takes" in the witness box.*

### **How would you decide whether to call him?**

All but one advocate identified the duty not to mislead the court, and all but two explicitly considered whether they would need to withdraw. Approximately one third explicitly or implicitly referred to the duty to act in the client's best interests; and none to the duty to act with integrity. It may be that interviewees were focused on whether the change of instructions would prevent them from acting and perhaps took some of the latter obligations as read.

### **Interpretations of the initial change in instructions**

There was a fairly even split between those who thought the initial change from 'self defence' to 'I wasn't there' was problematic enough for them to withdraw at that stage, and those who did not. Those who would not withdraw early on tended to give as their

reasoning that it is not unusual for clients to change their instructions; telling a lie initially is not necessarily indicative of guilt; and if the client says they are now telling the truth and gives a reasonable explanation for the change, they could go with the new instructions, after advising of the risks involved. E.g.

*...clients change their instructions all the time...when your client's saying, oh yeah, I lied before, I got, my instructions were wrong before but now what I'm saying is this and this is what happened and this is what I want to run it as, I want to run it as self defence, I think that's fine, you just run it as self defence then, your clients instructions have just changed, that's quite usual. I mean, obviously I'd warn my client that if he's given an interview or whatever on the basis that it was, that he wasn't there, then the court can draw inferences from that and so on, but subject to that I think you just crack on with his new alibi defence. [Crime 14]*

Some of the respondents who said they would withdraw early on appeared to give the matter deeper consideration in that they considered the way in which the client had changed instructions. For example:

*...I had a client who said in his interview 'I wasn't there' and then...he completely changed his instructions and said, 'okay, I was there, I lied because I was scared, in fact I was acting in self defence', it's kind of the other way around. And I spoke to a more senior member of chambers...And the conclusion we reached was, if the client originally says 'I wasn't there' and then says 'I was there but I was acting in self defence', you're not professionally embarrassed and you can stay in the case. But if it's the other way round and they originally say 'I was there' and then they say 'actually, no, I wasn't there', in that case you might be professionally embarrassed...because if the client says they were there they can often give you instructions that they wouldn't be able to give if they're telling the truth about not being there. And that means you know that your client's lying and because you know they're lying then you might be in the position where you have to withdraw. [Crime 19]*

Another, a solicitor advocate, based their answer on the assumption that they would have taken the client's initial proof of evidence themselves, and explained why the change of instructions would indicate to them that he was lying.

*I wouldn't be happy in this scenario at all, because at the point when you've got to trial, you should have taken detailed instructions by this point. By this point I would have a detailed statement of several pages detailing when he went out, where he went, who he was with, what he was wearing, what happened – what he did in his self-defence, the idea that he made all of that up just to say something would – well, I'm just imagining a scenario, but I – that wouldn't ring true with me. I wouldn't be happy about that, and I would feel that I – he was – there was a strong chance he was going to mislead the court, this alibi witness coming out of nowhere, that I'd never heard of before,*

*and it was not in accordance with his instructions from the outset of the case. [Crime 36]*

And later on:

*If he said... I was too scared to say I was there, because I was involved, and I didn't think anyone would believe it was self-defence, that for me has more of a ring of truth about it, and I might be prepared to consider that, OK, that's why he'd lied, and that maybe I could carry on acting. But this way round, the, I was there and da da da da, massive long account about what happened, and then, oh, no, I just made that all up – that just – don't know. Just doesn't ring true, and I just wouldn't feel happy about going forward with it. [Crime 36]*

An example of an apparently weaker answer focused on whether the client might be saying they were guilty or not guilty; not addressing the central point - whether the client might be misleading the court, and did not indicate that they would seek an explanation from the client for the change in instructions.

*but if his plea is... not guilty...then that I must accept. There are different reasons why people lie and not always because they are guilty of the offence, it could be to cover up for someone else, it could be to make his story more believable because they didn't do it. So I don't think it would be uncommon for people who are not guilty to actually tell an untruth in the beginning and then change it. So yes, so what will I do? I will just take the new instructions from him exactly in effect what he's saying now. And then I'd advise him on the fact that it could be, the Crown may take an issue with it that you've now changed your story, and clearly that affects perhaps the strength of the evidence because it wasn't his first version, and when given the opportunity to say, he did not say, or at least say what he's saying now. [Crime 13]*

### **Whether they would call the defendant**

Most advocates said something along the lines of: strictly speaking, it was the client's choice whether to give evidence, not their advocate's; that they would be prepared to call him if satisfied he was going to tell the truth and they would not be misleading the court (according to whatever version was being accepted as the truth); but that if they were not so satisfied they would have to withdraw before he gave evidence, and if he changed his account again in the witness box they would have to withdraw at that point. However one response again focused on the client saying he was not guilty:

*...I, would I call him? I would say I generally always call the defendant because not doing so, I think, can have an adverse effect on the proceedings, not in his favour. But I would advise him that he has to say, he has to stick to one version of events, preferably the truthful ones, and provide an explanation for why there is now a different version. So I'd also advise him that lying on oath in court is perjury and potentially if he is found to do so there could be further ramifications. But I would call him, yes.*

... the overriding feature here is he is saying that he is not guilty. And yes, he may have changed his mind and he may have said that he will say whatever it takes but, as I say, people do lie for 101 reasons, not because necessarily they are guilty. So my, in effect, the duty here would be to put, well firstly to test the strength of the prosecution case and then, I guess, to put forward his version of events and bring that out of him. So yeah, I don't see anything else, no. [Crime 13]

## Crime 6

Crime 6 continued from Crime 5:

*Continuing with the above scenario, assume that the client is in the witness box. During cross-examination he now says for the first time in evidence that he was at the pub and begins to give his original story about having been threatened and racially abused. The prosecution barrister gives your client a hard time about your failure to ask the prosecution witness about these threats and insults. Your client says, "It was my brief's decision not mine".*

### **What do you do?**

Between a third and two thirds of interviewees explicitly identified the duties to the court, to act in the client's best interests and of confidentiality to the client. All picked up on not being able to speak with the client whilst he was in the witness box. No one discussed advising him to change his plea to guilty if they believed he was now lying which our expert assessors saw as an option. There was a fairly even split between those who indicated that they would or probably would withdraw, and those who would not or probably would not. One simply struggled for an answer.

Respondents seemed to generally find this scenario quite hard, with a wide variation in reasons for withdrawing/not withdrawing. In several cases it seemed to come down to respondents focusing on one aspect of the problem, rather than considering everything in the round. E.g. they thought that by saying nothing, they would be acquiescing in the court being misled and so ought to withdraw; or, they focused on the client's interests without addressing the duty to the court and so would not withdraw; they felt there was a danger of them becoming a witness in the proceedings

An example of someone who would withdraw:

*I would declare I'm professionally embarrassed and withdraw from the case. Because I can't waive legal privilege unilaterally. What he has said to me and what went on between us is legally privileged. Nevertheless I am not going to stand there and lie to the court by saying it was my decision, and therefore I can't do anything and I'm professionally embarrassed and would withdraw. [Crime 4]*

In this next example the respondent does not consider withdrawal.

*What do you do? Absolutely nothing. You sit there and keep your head down... Where you are being blamed for something you haven't done you just keep your head down because you can't interrupt them giving evidence. It will be... because there will be the documentary trail as to the previous defence was self-defence, he then seems to be saying something else clearly in his evidence in chief and then changing his story in cross examination, that something has gone on. It's a... you would be doing... you would be acting against the interests of your client if you stood up and said 'No I didn't. It wasn't my decision, it was his.' You can't reveal your instructions, they are confidential effectively...there really is nothing you can do. I think you have to just keep your head down and squirm. Horrible. [Crime 6]*

Another route to withdrawal was through the potential waiver of privilege:

*Right, well in this scenario you are professionally embarrassed, definitely, because you're now potentially a witness in the proceedings. ...if the witness says, starts talking about legal advice that he's had, then there's a real danger that you're going to be called as a witness to give evidence in the proceedings, because by talking about his legal advice he's waived privilege and... your advice to him is then arguably no longer confidential. ...I'm aware that there are these three different categories of professional embarrassment, compulsory withdrawal, discretionary withdrawal and then discretionary withdrawal where you shouldn't withdraw if, by doing so, you prejudice your client's interests. But where you're potentially becoming a witness in the proceedings, there can be no doubt about it; you've got to withdraw. [Crime 15]*

Crime 14 took a 'take the hit' line on the basis that the interests of justice were best protected by the judge or their opponent recognising and dealing with the problem:

*You just take the hit for your client. I mean, no one's going to question you about it whilst your client's in the box. I've been in the situation where I've had judges question why I didn't put particular things in cross examination or whatever it was, and the real reason for that was because my client hadn't told me to because I'd not had those instructions. But you just look to how you can deal with it then. Sometimes it might be you've got to recall a witness, if it's something less serious then you can just, the court can just draw inferences from his failure to mention that before. But I don't think that you can, it's certainly not your place to say 'I didn't put this in cross examination because I wasn't told it', you are totally shopping your client at that point... you can't mislead the court in to thinking that they were your instructions, but I think you've just got to be silent on that fact ...this happens quite often and ...I'm not sure if it's a problem or not really, ...when this happens it becomes patently obvious to people in the court that this is because the client's making it up. So I think in practice it's probably less of a problem because everyone kind of knows what's going on. Not sure that's a particularly ethical answer but that's kind of what happens. [Crime 14]*

Crime 13 was again an outlier. As before, they focused on the client's not guilty plea.

*...you could ask for an adjournment ...because you're professionally embarrassed or whatever and ...remove yourself. I don't think I would, no. Again, if he's saying he is innocent then it is down to me to test the case and just because he has told a number of versions it doesn't necessarily mean he's guilty. So what would I do? I would make a note on my brief as to the effect of what had happened previously and my advice and then what happened in the witness box. And I, yeah, I would just run with the evidence that he has given because that is his evidence in trial, so yeah.*

## Summary

This chapter illustrates some of the different approaches to one set of our ethical vignettes (the criminal ones). In relation to a problem of an undisclosed conviction, for example, we saw how interviewees interpreted the client's best interests in diametrically opposed ways. It was a specific example of a tendency to reframe ethical questions as tactical questions. This kind of tactical judgment could accentuate or diminish the extent to which ethical problems arose and were handled. To take another, for example, taking the view that a client's wish to sully a witness's reputation was not tactically wise was a different approach to articulating, recognising and dealing with the problems from an ethical perspective.

It is possible that taking a tactical approach was a signal of a lack of confidence about ethical questions. Whilst often problems led to the implicit or explicit consideration of the relevant professional core duties/principles, the more detailed elements of a problem which called in to play rules and guidance or that should have led to the articulation and balancing of conflicts between the principles was less well dealt with: for example, what to do with an undisclosed suspended sentence; how to deal with privileged information disclosed in apparent error. There were also signs of more questionable practice: informally tipping off the prosecution as to missed previous convictions without gaining the client's consent being one example.

Another interesting issue raised by the interviews was a tendency for some towards shallow interpretations of the facts which were self-serving in the sense that the interpretations avoided ethical conflicts which a more balanced or pessimistic interpretation would have had to face up to. The vignette about the client changing their instructions was an interesting example of this: some interviewees simply said, in essence, clients change their instructions and as long as they understand the risks in doing so, they can do it. Others took a much more active look at whether the change in the client's instructions was plausible, and what that meant for their complicity in any potential misleading of the court.

More broadly, the interviews revealed a range of approaches, and a varying articulation and application of relevant rules and principles relevant to the ethical problems. The differences in approach, the omission and potential errors made are assessed by our expert assessors in the next chapter.

# 4

## Expert assessments of the interviews

In this section of the report we consider how the experts assessed the interviews. Expert assessors read a sample of transcripts in their field of practice; scored them on the agreed criteria (Appendix D); and, wrote short qualitative reports on the quality of responses and any training needs revealed by the assessments. 76 transcripts were assessed in total: 31 civil, 17 criminal, 10 family and 18 in-house lawyers. They provided scores on each of 6 problems that the interviewees answered. They also made overall assessments of the answers to those problems against specific criteria governing the utilization of professional core duties and rules as well as matters such as how deliberative interviewees' approaches were; and, finally, perhaps most illuminatingly, they also provided a series of comments on the quality of the answers given by the interviewees and comments on their training needs.

We supplement expert assessments with some research analysis of the transcripts. Researcher coding took place against the background of skeleton answers from the expert assessors.<sup>19</sup> In these skeleton answers, our expert assessors indicated in broad terms what they would expect to see discussed in stronger or weaker answers. This generally covered the core duties/principles, rules/outcomes/indicative behaviours, and guidance they would expect to be considered, and the actions interviewees might be expected to take, alongside approaches they would sometimes be expected not to take – or common errors). Having considered interviews against these detailed criteria, the researcher then indicated a judgment against our main criteria of assessment (these are set out in Appendix E). The research coding was thus a fairly mechanical assessment of the extent to which transcripts fitted with the articulated expectations of our experts, but enables us to look in more detail at the answers given during the interviews.

Before we analyse the results, we consider a common concern raised in relation to ethics: the view that ethical problems leave a great deal of discretion for judgment calls and that responses may, as a result, be difficult, some would say impossible, to assess. Economides and Rogers set out a more pragmatic view:<sup>20</sup>

*...While the validity and reliability of ethics assessment are contestable and while there is not as yet a 'gold standard' (Goldie, 2000), Hamdorf and Hall (2001) provide a compelling argument for not using these as reasons not to go forward with ethics assessment: "It is generally agreed that it is better to*

---

<sup>19</sup> Researcher coding covered 77 interviews, with one extra family interview not being coded by the expert assessments: 31 civil, 17 criminal, 11 family and 18 in-house lawyers

<sup>20</sup> Economides and Rogers n. 8

*measure uncertainly the significant than to measure reliably and validly the trivial” (cited by Wong and Cheung, 2003: 7).*

We proceed here, mindful of this uncertainty and the fact that, in assessing concepts which are judgment-based rather than purely fact-based, one would expect potentially large differences of opinion. Prior to conducting the assessments we sought to engender a common understanding of the assessment task through:

- Seeking a consensus with expert assessors on key expectations in relation to the ethical problems as to the ways in which interviewees should answer the questions (the elements of their Codes they would be expected to discuss, the actions they might be expected to discuss and key errors they might hope to avoid);
- Circulating these indicators of key expectations to expert assessors as part of the assessment;
- Discussing and agreeing the criteria for assessment with the expert assessors (i.e. the questions on which they were asked to assess the interviews); and,
- Engaging in some assessor training, where assessors marked, discussed and compared assessments on a common transcript.<sup>21</sup>

The discussion with assessors and our observation of the training exercises suggested assessor judgments were similar and robust enough to provide a valid assessment of ethical capacity against the agreed criteria. Similarly, our observation of these sessions and analysis of experts’ actual assessments also suggested that, in general, their approaches were reasonably consistent. Post training, 27 of the transcripts assessed were double-marked during the project (i.e. assessors were marking transcripts separately and unknowing of their fellow assessor’s views on it). Double-marked transcripts were also compared using intra class correlations (a statistical measure of inter-rater reliability). Those assessments were inconclusive because of the small number of cases involved and one assessor appearing to assess transcripts in a way somewhat more generous than the others. As a result of the inconclusive intra class correlation analysis, we present the results here in outline, illustrating the broad profile of the expert assessors’ opinion, without attempting the more detailed modelling we had hoped to be able to carry out.

Should a similar exercise be attempted in the future, with a need to generate quantitative data from the assessments that can be used for more detailed modelling, our results suggest that a larger sample of assessments would need to be run, with an intermediate stage between training and full fieldwork whereby closer monitoring and testing of assessor consistency could be conducted in advance of a larger body of main fieldwork. This would lead to a significantly more expensive project. The costs of recruiting and managing larger samples of interviewees, were that to be possible, would be one element of extra cost. The second problem is that we relied on assessors being willing to assess cases without being

---

<sup>21</sup> It was not possible to do this for all assessors due to constraints on their time.

paid by the researchers. A larger scale exercise would probably require remuneration for the training of assessors, and their conduct of assessments to enable sufficient numbers of cases to be assessed.

## **An overview of expert assessor judgments**

### **How well was each problem dealt with?**

It will be recalled that interviewees were asked to consider six vignettes. The expert assessors were first asked to assess whether, in relation to each scenario in turn, the interviewees' overall handling of the problem was: strong or poor on a scale of 1 to 5. In broad terms:

- Normally a small majority of questions were handled in a way described as satisfactory or strong, depending on which scenario was under consideration.
- Similarly, between about one in seven and one in three answers were rated as unsatisfactory or poor.
- For around about a fifth to a quarter of questions the assessors were undecided.

There was also quite a bit of variation between questions. Performance was generally assessed as weaker when in relation to scenarios dealing with:

- accidental disclosure of privileged documents (which contained a quite difficult and pointed series of questions);
- clients lying or changing their story in the middle of a trial and then blaming the lawyer;
- resistance of disclosure by the client.

Performance was assessed most positively on dealing with conflicts and in relation to dealing with the making of scandalous, serious or irrelevant allegations against a witness (although our sample of family advocates did not cope as well as others with this).

## **Assessing transcripts as a whole**

Having assessed individual questions, expert assessors were asked to assess candidates' capacities as a whole across the six scenarios by reference to a series of criteria we discussed and agreed with the assessors and our project working group.

Firstly, they were asked whether the interviewee, "identified all the relevant ethical challenges posed by the facts in the scenarios." This question enables us to examine the problem identification capacities of interviewees. The scenarios were such that we would have expected candidates to be able to at least identify most of the ethical issues posed by the problems, yet only about half of the interviewees identified the ethical challenges in all or most questions. The rest fell below the standard which might be expected. Slightly more

than a third identified 'about half' of the relevant ethical questions; leaving about one in seven identifying less than half of all the relevant ethical challenges.

### **Assessment of different capacities by experts**

Here the assessors judged the interviewees' responses over the entirety of their transcript on a series of questions about specific capacities, such as whether interviewees applied the relevant rules/outcomes/indicative behaviours to the facts correctly; and, whether interviewees applied the relevant core duties/principles to the facts correctly.

Interviewees were somewhat better at applying the core duties and professional rules to the problems, than they were at thinking the problem through and other dimensions of ethical capacity. It is perhaps concerning, nevertheless, that assessors were only happy to agree or strongly agree that *overall* the interviewee applied the relevant outcomes/rules or core duties/principles about half of the time.

Assessors were somewhat less positive overall that:

- Interviewees generally demonstrated that they were taking account of a wide range of relevant ethical principles/duties, rules/outcomes/indicative behaviours not just the most obvious ones;
- Interviewees demonstrated that they could think carefully about how uncertainties or changes in the facts as the case developed might influence the outcome.
- The interviewee generally demonstrated that they thought about alternative approaches to the problems and considered contingencies in the event that initial action was unsuccessful.
- The interviewee demonstrated sufficient deliberation about their course of action, i.e. demonstrating that a particular course of action has been reasoned through.

### **Seeking outside help and drawing on other experiences**

One possible criticism of a method that relies on the presentation of problems and the requirement to answer them there and then may be that it can be artificial and unfair because in practice interviewees have the opportunity to seek advice or look things up. Some of the vignettes were designed to be situations where the interviewee would not ordinarily have time to seek assistance (or look matters up). This was a deliberate attempt to force the interviewees to share what they knew (or did not know) and how they would approach issues. Additionally, interviewees could and did say they would seek assistance. We recorded the extent to which interviewees indicated they would call a professional hotline for advice (only eight interviewees did this more than once); and, said they would discuss with colleagues as a source of advice (fourteen practitioners did this more than once). In general, interviewees answered the questions without taking the 'easy route' out; but most were also sometimes willing to recognise the limits of their expertise and the need to take outside advice.

Expert assessors took such indications they would seek help into account in assessing the transcripts. They looked favourably on a sensible recognition of the interviewee's own limits. However, this was only partly successful in the eyes of the assessors. About 40 percent of the time they indicated that none of the poorer answers provided by an interviewee were mitigated by the seeking of help (where it occurred), for example.

### **Researcher Assessments**

The researcher assessment provides some extra detail on the nature of the approaches adopted by interviewees. In particular, the following questions were assessed:

- The extent to which the action proposed by the interviewee was in keeping with the detailed expectations as suggested by our experts.
- The extent to which they considered the ethical implications as suggested by our experts.

A second set of issues looked whether our interviewees appeared to be reasoning from the fundamental principles (or Core Duties as the Bar's Code describes them) in the way proponents of an outcomes or principle based approach might hope, or in a narrower, more rule based approach. Two assessments were made:

- To what extent was their answer shaped by core duties/fundamental principles
- To what extent was their answer shaped by rules/outcomes

Each question was answered on a scale of 1 to 4, with 1 = not at all and 4 = completely. The mean scores of each criterion are shown in Figure 1. Consistent with the experts' assessments overall, interviewees were – on average – better at identifying the relevant rules/outcomes than they were at identifying the relevant core duties/principles in relation to a problem. They were also better at identifying the ethical implications of a problem (i.e. the nature of the problem and the rules and principles invoked) than they were at identifying action to resolve that problem, again in keeping with the experts' assessments.

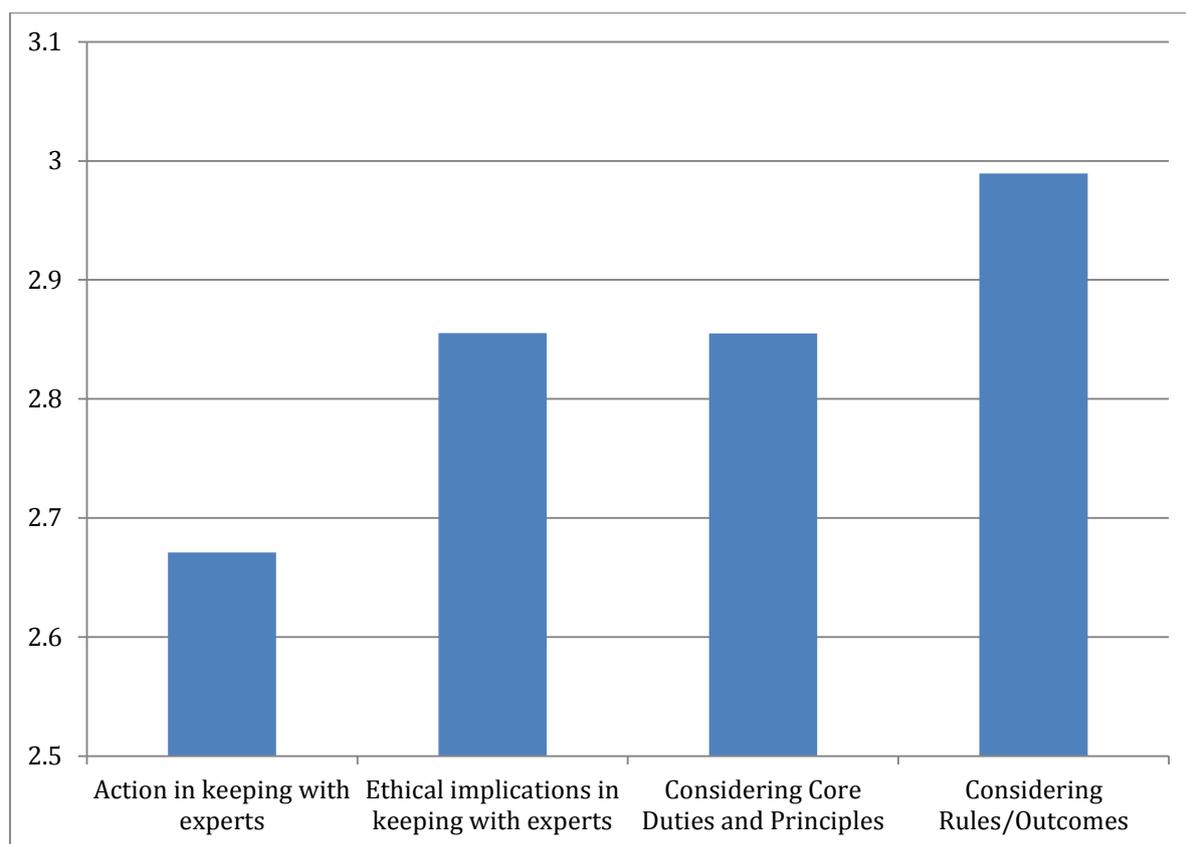


Figure 1: Researcher coding of extent of fit with expert expectations

A third set of evaluative criteria looked at the extent to which our interviewees thought in relational terms about the ethical dilemmas. In particular, the extent to which they recognised that the following interests were affected/brought into play by the vignettes:

- Their own interests (labeled “personal” in the tables below);
- The profession’s interests ;
- The client's interests;
- The court's interests and/or the interests of justice; and,
- The interests of the instructing solicitor (for barristers) and/or their employer’s interests (where relevant)

These criteria were assessed on a scale of 1 to 4, with 1 = not considered and 4 = significantly emphasised. The mean scores on these criteria are shown in Figure 2 .

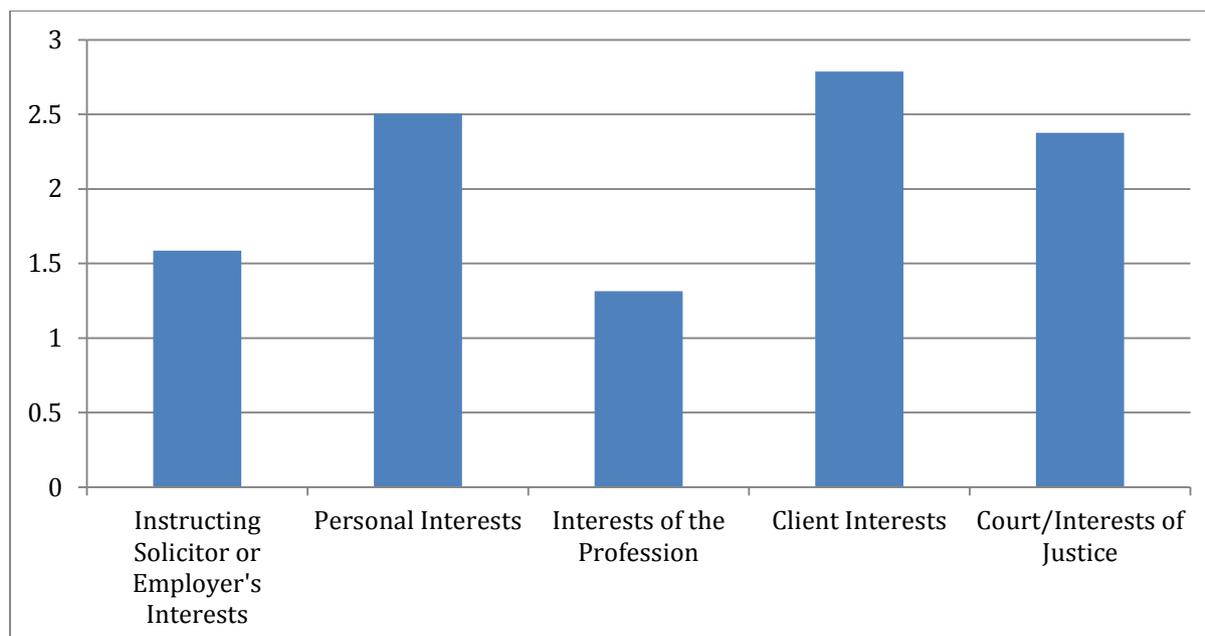


Figure 2: Relational indicators

As one might expect, the client's interests were strongest here. The client's interest was considered or significantly emphasised in 82 percent of questions. Formally under both Solicitors and Bar Codes of conduct the administration of justice (or as the Bar Code puts it, "your duty to the court in the administration of justice" takes precedence where there is a conflict between the two interests (several of the vignettes contained this conflict).<sup>22</sup> Interestingly, personal interests were next most often considered, with somewhat more emphasis given to that than given to the interests of justice/obligations to the court. Personal interests included examples where the advocates appeared to be putting the protection of their own interests before that of the client (disclosing material without the client's consent because otherwise they feared getting in trouble for misleading the court; where they were judged to be being overly or inappropriately defensive e.g. often where they said they would disagree with a client openly in court or said they would withdraw before attempting other action that might not leave their client in the lurch). The profession's interest was little considered – perhaps reflecting the nature of the problems under consideration which were not of the kinds typically seen as giving rise to concerns about bringing the profession into disrepute.

Table 3 shows the mean relational scores by work type (higher scores mean this was more emphasised across more questions and a lower score meant it was less emphasised). We would particularly highlight that criminal practitioners emphasised the duty to the court/interests of justice more (even though several of the problems involving family and civil respondents were of a similar kind to those we posed to criminal practitioners and did often raise interests of justice issues). Notice also the much stronger instantiation of the interest of the employer for the in-house lawyers, which is unsurprisingly on a par with the

<sup>22</sup> See gC1.1 of the The Bar Standards Board Handbook, 2nd Edition – August 2015 and note 2.2. SRA Principles 2011, SRA Handbook , 30 April 2015.

interest of the client (there being effective overlap between the two concepts for the in-house lawyer).

**Table 3: Mean relational scores by work type**

<b>Recognising whose interests are affected/brought into play</b>						
	Personal	Profession's	Client's	Court/loJ	Instructing Sol or Employer	Total
<b>Family</b>	2.3	1.1	2.7	2.3	1.2	65
<b>Criminal</b>	2.4	1.4	2.8	2.7	1.1	101
<b>In-house</b>	2.6	1.4	2.8	2.3	2.9	106
<b>Civil</b>	2.6	1.3	2.9	2.4	1.3	184

### How problems might develop

Our fourth set of criteria sought to engage with the ability of interviewees to think more carefully about how problems might develop.

- Evidence of deliberative action, demonstrating that a particular course of action has been reasoned through. On average, respondents tended towards being hesitant on this rather than unable, unsure or confident.
- Thinking about uncertainties or changes in the facts might influence the outcome. Just over half of the time respondents demonstrated their ability to think about uncertainties or how changes in the facts might influence the outcome.

This tends to support the view that deliberative action and being able to think about how problems might develop were not well demonstrated in the interviews.

### A more detailed picture from the experts

We can get a stronger flavour of the nature of the assessors' judgments by looking at their more detailed comments on the transcripts. They were asked to report on two questions: what they saw as the key strengths and/or weaknesses of each interviewee and whether they saw any clear training needs arising from the transcript (and what those were in outline terms).

### Strengths and weaknesses

We deal with the summary of strengths and weaknesses here first and look at each work area in turn. First, we consider the criminal advocates.

## Criminal

Interviewees scoring well were praised for having a "very strong grasp of principles and showed ability to consider all aspects in carefully structured answers"; or, "a structured approach, thinking about each question in stages and answering before moving on to the next stage;" or, demonstrating, "some good lateral thinking and ...also able to take into account the wider issues that may arise".

Even in the best scoring interviews, there were sometimes some problems identified by our assessors but as answers got a little weaker the tone shifted towards saying the interviewee did not always spot enough of the duties and principles engaged by the scenarios; or that they failed to consider the client's interests when deciding they needed to uphold their obligations to the court: "generally the interviewee just looked at the ethical issues from their own perspective rather than how they may impact on the client." Another interviewee tended to show, "good overall awareness of the duty to the court" but be less explicit, "as to the duty to the client and seeking consent." Another, lacked confidence and was, "unable to think the problem through to develop their response and consider alternative courses of action."

The assessments described so far were in the better half of interviews according to the experts. If we look to the assessments that scored more poorly we start to see broadly satisfactory performance on some questions coupled with serious errors in relation to one or two of the scenarios; or an inability to, "articulate why what s/he was being asked to do was unethical". Sometimes these slightly weaker assessments were because interviewees failed to indicate that the client would be properly advised of the implications of a chosen course of action or because they seemed to have, "failed to see the wider implications posed by the scenario." More often there was a more partial grip on relevant principles and rules, e.g. the answers show, "an overall grip on the relevant points but answers lacked awareness of the duty of integrity and duty to keep the client informed." One was criticised for tending, "to hand the responsibility for the decision as to what to do as an advocate to the Judge," such as whether to ask inappropriate questions of a witness. Another took positions on an ethical problem on the basis that, "there might be a different approach in the M[agistrates] C[ourt]/C[rown] C[court] because you can "get away" with it in the MC." The reviewer commented, "reference was made to a lot more 'rope' in the MC which did not seem an ethically minded approach."

Interviewees with the weakest scores showed some tendency to see ethical questions more as tactical ones. Inadvertent disclosure by the Crown was seen as a case of "more fool them [the Crown]". Similarly, alluding to the possibility that a witness was a 'grass' was criticised for failing to consider the consequences for the witness and the quality of evidence to support the allegation. Answers to scenarios were sometimes seen as, "dangerously wrong". Failure to think through the options and being too ready to consider withdrawing, "without considering other means of resolution," were also criticised. Once again, taking decisions without giving consideration to the implications for the client and being able to advise them on those implications was criticised. The two most poorly regarded interviews were criticised for giving, "very little consideration to the relevant ethical principles" and a failure to consider the basic ethical dilemmas at the heart of the scenarios. Once again, matters were seen as tactical, not ethical ("whether s/he would "get away with it"). An assessor

concluded, “This interviewee had very limited grasp of quite basic ethical principles and so had no hope of applying them to the facts”.

Other problems identified in specific interviews included the following:

- Saying they would withdraw from a case without speaking to the client first.
- Indicating, “they would 'informally' disclose confidential material to the prosecutor.”
- Explaining why it would be in the client's best interests to disclose his full record in Scenario 1.
- Failing to get the client’s consent to disclose previous convictions the prosecution had not disclosed.
- Being hesitant about withdrawal when it is required under the rules.
- A failure to consider either the relevance or reasonableness of cross-examining on a controversial subject.
- A failure to recognise a client was lying and the implications arising from that.

## Civil

The best quarter of civil advocates were praised for, “excellent concise answers”, getting to the “core issue but then fruitfully thinks around problem”. Other identified characteristics were confidence, decisiveness, being positive, good analysis, practicality, commonsense and being able to see when they needed to seek advice, as well as being able to think, “widely about the problem from stance of clients, court and firm.”

Yet even in this group there were some problems. One interviewee was gently criticised for, “initially acting too defensively”. Another, “failed to act in client's best interest in [Scenario] 6” and adopted a protective stance to protecting their own interest which was not thought through. The failure to think through implications for the client when an obligation contrary to the client’s interests was being dealt with was a common problem. Hence, another interviewee was praised for, “Good analysis of core duties and an appreciation of tension between duty to court and client,” but also criticised for:

*Not thinking enough through effect of conflict on client in sufficient details.  
[As well as] Failure to appreciate cannot take instructions for client when giving evidence.*

Other criticisms included a lack of confidence in their own judgment, verbosity and a failure to be able to deal with specifics of the problems, and to decide and make practical choices in relation to problems:

*...often returns to ramble around the facts sometimes almost self-contradictory in the end. ...no decisive practical outcome chosen for real and frequent problem that often arises.*

Another, “struggled with the practicalities and finally making the hard decisions.” Others were seen as being generally good but had significant problems with specific scenarios such as a, “failure to identify core duties either explicitly or implicitly in 1 and 2.” Another, “failed to see point of [an] important element” in Scenario 2 and, “did not acknowledge grey areas or scope for doubt.” A third, got, “very panicky at the proximity of the last scenario - needs to be a bit more detached in analysing his[her] own position.. And a fourth, failed, “to understand duties when [they have] inadvertently seen privileged doc[uments].”

All of the above were scored in the top half of civil advocates.

The third quartile were criticised for inconsistency; failing to understand and/or apply all the relevant principles to a problem; being too inclined to accept the client’s interests should be trumped without balancing that against alternative or mitigating approaches (accepting there was a conflict of interest when there might not be; or being overly ready to “confess all” to the court on behalf of a client). More specifically one was criticised for a poor understanding of client confidentiality alongside an attitude that, “considers that all the answers are in their instincts and whilst their instincts contain some of the answers they are a pretty blunt instrument”. Another was criticised for hasty and incomplete judgment:

*...the interviewee was too inclined to make a decision without (i) fully exploring the true rather than apparent factual position, (ii) without considering all duties owed to all participants/the system, (iii) without considering how to balance all those duties and (iv) without explaining and exploring with the lay client. The responses included too much readiness to see a conflict of interest and not enough recognition of when it may be necessary to withdraw*

The poorest quartile were criticised for being “poor”; admitted ignorance of their Code of Conduct; and, making clearly wrong decisions - alongside the more familiar problems of prevarication/indecisiveness, being vague and failing to arrive at clear answers to outcomes to questions. Some had, “broad general knowledge of ethics but [were] unable to analyse practical application” and showed, “clear flaws”, were “actually wrong” or floundered, “in generalities and some questionable responses”.

## Family

There were expert assessments of ten interviews with family advocates. The better ones were described as: impressive, practical, pragmatic, sensible, strong and confident throughout. Again, even some of the stronger ones had, “an odd blip” on a question or were a little hesitant or, “defensive/self-protecting” in their approach.

In the middle band of these interviews, the now familiar mixing of praise with some criticism sees assessors concerns grow steadily. One interviewee was, “Clearly more aware of some ethical issues than others.” Another, “leans towards self-protection.” Again the problem of

vagueness, superficiality and indecision was discussed and the inability of interviewees to balance competing obligations:

*some understanding of issues but lack of balancing different duties... ...this interviewee was indecisive and rather vague, hedging bets and wishing there was more information. ...but says nothing positively wrong....*

Poorer performers were criticised for being “verbose... ..seat-of-the-pants... ..pragmatic and occasionally incoherent and woolly.” For this interviewee, the point of some questions was “completely missed”. Another, interviewee was, “badly wrong on two issues and vague and generalised on two others.” Again they were criticised for lack of knowledge and responding instinctively rather than in an informed and principled way. Finally, one more was said to be, “positively [and sometimes very badly] wrong and sometimes self-contradictory.”

### **In-house lawyers**

There are a number of differences between the interviews conducted with in-house lawyers and those conducted with the other advocates. Whereas there was some similarity in the types of problems posed to civil, family and criminal advocates, the nature of the problems posed to in-house lawyers were different. They were not conventional advocacy type problems but problems likely to be faced by in-house lawyers working within commercial organisations. This fits with a good deal of the in-house lawyer training done on the NPP. Many of our respondents were drawn from the Government Legal Service and so responded to problems which they were not expecting to come up against in practice. Equally, the problems of principle raised were thought to be sufficiently analogous to merit assessment. A further difference was that whilst the professional principles (or core duties) naturally applied to these problems there were relatively few detailed rules and guidance in the professional codes which were specifically relevant. As a result, the nature of the task was somewhat different: a more general exploration of the application of professional principles without the more detailed help, or complication – depending on one’s perspective – of much in the way of professional rules. In spite of these differences, in-house lawyers did not generally do more poorly than the private practitioners.

The better interviewees were praised for: clarity; being able to engage in thoughtful analysis; seeing how to push issues on and identifying solutions to problems; being “thoughtful about the context”; and, identifying gaps in their own knowledge or in the facts known. We can see in comments such as the better interviewees being “generally right” or “close to all the important points” that the better performers might have some room for improvement and sometimes there were comments such as, “Bases of Code not known hence unable to address Q4” or lacking in “core knowledge”.

Weaknesses start to show through more strongly in the middle third of interviewees. These interviewees could be, “thoughtful and measured [*whilst also*] revealing knowledge gaps but acknowledging them... [*alongside*] ...a lack of specific detail on some duties ...of concern.” Or, “not reflective enough, not open enough [to thinking through the ethical dimensions of a problem] and too pragmatic on occasions too.” In this group, interviewees were criticised for, “Patchy responses” and sometimes poor or over-simplistic analysis.

Some solutions to problems suggested by interviewees were said to be unrealistic; and there was more often a lack of knowledge of, “the basic principles ...and [the] relationship between [the professional] Code and contract of employment”. There was an unwillingness, “to engage from first principles. Knowledge of duties not great and so fell back on generalisations rather than specific points.” One interviewee, failed, “to identify issues and propose any solutions [in two of the scenarios] but ended up on last 2 problems showing good analysis and showing more good problem solving ideas.”

The poorest third often appeared to lack knowledge of, or the ability to work with key principles/core duties and rule/outcomes. One interviewee needed, “to develop [a] more analytical and considered approach to problem solving”. Another, “revealed a poor grasp of issues and concerns. Hesitant, lacking detail and with flawed thinking.” A third was, “weak on core principles ...and sophistication in analysis.” Hesitancy and lack of knowledge accompanied a:

*lack of [ability] to spot issues; [s/he] overcomplicates issues possibly confusing [her/]himself; some aggressive positions in two cases; simultaneously too defensive and lacking ...in finding solutions.*

This range of comments across the work areas indicates a broad range of concerns, with significant deepening of that concern as one gets into the bottom half of each interview group and with concerns becoming increasingly strong and wide after that.

### **Training Needs**

A further way of understanding how the assessors judged the interviewees was in their response to a request to identify any training needs for the respondents. Of our 76 assessed interviewees, 69 were identified as having training needs. Often these training needs were described by the assessors in ways which we would describe as indicating minimal or modest refresher type training (33 interviews). When describing the training needs of these interviewees the assessors often simply indicated some minimal training was necessary or specified that it might be they needed brief formal training with case-studies; or that some training could be targeted at ‘core knowledge’ and developing more analytical or methodical approaches to solutions on ethical problems. Where more sustained training was suggested it fell into three categories.

One training need was targeted at specific segments of the code or types of problem where there were failings in the interviews themselves (such as what to do when a client attacks a lawyer personally; obligations of confidentiality; better understanding obligations not to mislead the Court; the limits of the duty to the Court; and, duties to keep the client informed)

A second identified a need for more practice on problem analysis and resolution across a range of areas:

*in which the interviewee can see that their responses are within an acceptable range.*

*the interviewee can feel the pressure of making decisions in situ and balancing the client's position with the courts and their own.*

*[or the interviewee can learn] to be more practical and more consideration of the practical realities.*

Through this mechanism it appeared to be felt that interviewees might develop better, more practical problem-solving skills and (sometimes) more circumspection or confidence – depending on whether they lacked or had too much confidence in their judgment – in how to respond to problems. Some needed this at a deeper and more sustained level. Assessors spoke of training that tried to:

*instill a real awareness and grasp of the core principles and to think about alternatives and weigh them up.*

*focus on (i) what a conflict of duty actually is, (ii) how the duties rank against each other, (iii) practical steps to task. [And included] exercises in which the cores duties engaged are identified and the interviewee is asked to consider how they fit together and which changes to the facts which make each one a non-issue or predominant*

*[inculcate] a step by step method of applying the core duties to facts to come up with properly reasoned solutions.*

*[enable the trainee] to cope with ethical issues that may arise in practice and to have an effective strategy that will cover most situations.*

This group also suggested broader and deeper knowledge gaps in the Code and the need to develop the capacity to spot issues quickly; to gain in confidence; develop more lateral thinking/agility and problem solving skills.

The final level we describe as requiring considerable training. Ten interviews fell into this category, where interviewees were said to need: “Considerable formal training”, “Formal re-training”, “Thorough re-training by formal tuition”, “A comprehensive course of retraining.”, or “Complete retraining”.

As with the general assessments of ethical capacity we get a sense of a widespread need for some (albeit perhaps modest) improvement amongst most of the cohort and a need for more considerable training for some. A need for practice and skills building in analytical and practical decision-making (accompanied we would suggest by good systems of feedback into the process) is particularly interesting as is the small but important group's performance that merited more thorough-going retraining.

## Summary

Overall a reasonably clear picture emerged across a range of indicators from the assessments. About half the cohort of interviewees performed well or reasonably well; a third performed well only about half the time and the remaining proportion generally performed poorly.

We get a good sense of the range of performance and the problems within the cohort of interviewees from the comments of the expert assessors. The problems seem to be common to all work areas covered. In broad terms, those performing well demonstrated a strong knowledge of professional principles and rules but, importantly, were also confident in their application of those rules and principles to the problems we posed to them. They were able to think round a problem and think forward in terms of how things might develop. Such high performance was rare; even amongst the top slice of interviewees there were generally some, albeit occasional or more minor weaknesses on some questions.

Weaker interviewees:

- Did not always spot enough of the duties and principles engaged by the scenarios;
- Failed to balance competing duties (a common problem was to recognise the need, or potential need, to withdraw from a case, but to fail to mitigate that response by considering alternatives to withdrawal and/or advising the client on that situation);
- Showed a lack of confidence in dealing with relevant professional rules and principles and their implications for case handling;

The poorer interviewees tended to:

- Demonstrate the above problems, but more frequently;
- Tended not to recognise significant ethical dimensions to a problem;
- Showed a stronger tendency to rely on intuitive responses to problems;
- Treated ethical dilemmas as tactical not ethical problems; and,
- Got relevant rules and principles wrong.

The poorest (a small minority) appeared to have a very limited grasp of ethical principles.

These problems were reflected in our assessors' views on training needs. Most interviewees were felt to need some training although a large proportion of these were thought to need only minimal or modest refresher type training.

Where the failings were more serious, recommendations were for training targeted at particularly weak areas of the interviewees' performance and/or in developing more analytical or methodical approaches to solutions on ethical problems. There was a need for more practice on problems across a range of areas to establish what the range of acceptable responses were and to get the advocates used to thinking through ethical problems in a more principled and practical way. It is worth noting that this was partly about developing appropriate circumspection or confidence in the interviewees' decision-making in the area.

Deeper training was needed for a significant minority of interviewees. The nature of what this training would cover seemed largely similar to the previous group, but with a stronger need to go back to basics and a more comprehensive look across the range of ethical

obligations and potential problems. Beyond this, a significant minority were felt to need something akin to total retraining.

# 5

## Advocate perspectives

In this section we consider perspectives on ethical capacity and the training they receive in ethics from those we surveyed and interviewed. Quantitative data is derived from the survey and qualitative data from the interviews with advocates and comments made by survey respondents at the end of the survey. Here we can see how the advocates themselves see ethical capacity; what they regard as important to their ethical practice; and, how they perceive their development and training needs.

### **The key elements of being able to practice ethically**

Survey respondents were asked, “What would you say are the key elements of you being able to practise ethically?” and asked to rate six possibilities: understanding fundamental principles; understanding the detailed rules; being able to anticipate and prevent/mitigate ethical problems; developing skills for dealing with ethical problems (such as asserting oneself); developing a sense of common professional values; and, personal integrity. The results are illustrated in Figure 3 below.

As one might expect, all six elements were generally seen by respondents to be important or very important. We get the strongest sense of a difference in emphasis from the proportions indicating an element was very important. Understanding fundamental principles and personal integrity were particularly emphasised, and understanding the detailed rules was the least strongly emphasised. There is an interesting echo of the concerns seen above where interviewees did not know, or were not confident about applying, the rules in their Code of Conduct. Similarly, if we recall that candidates were sometimes criticised for pragmatic, even intuitional approaches, to ethics – we can see how an attitude which sees grasp of the principles and having personal integrity as being essential and the more detailed knowledge and competencies as only being desirable might contribute to diminished ethical capacity.

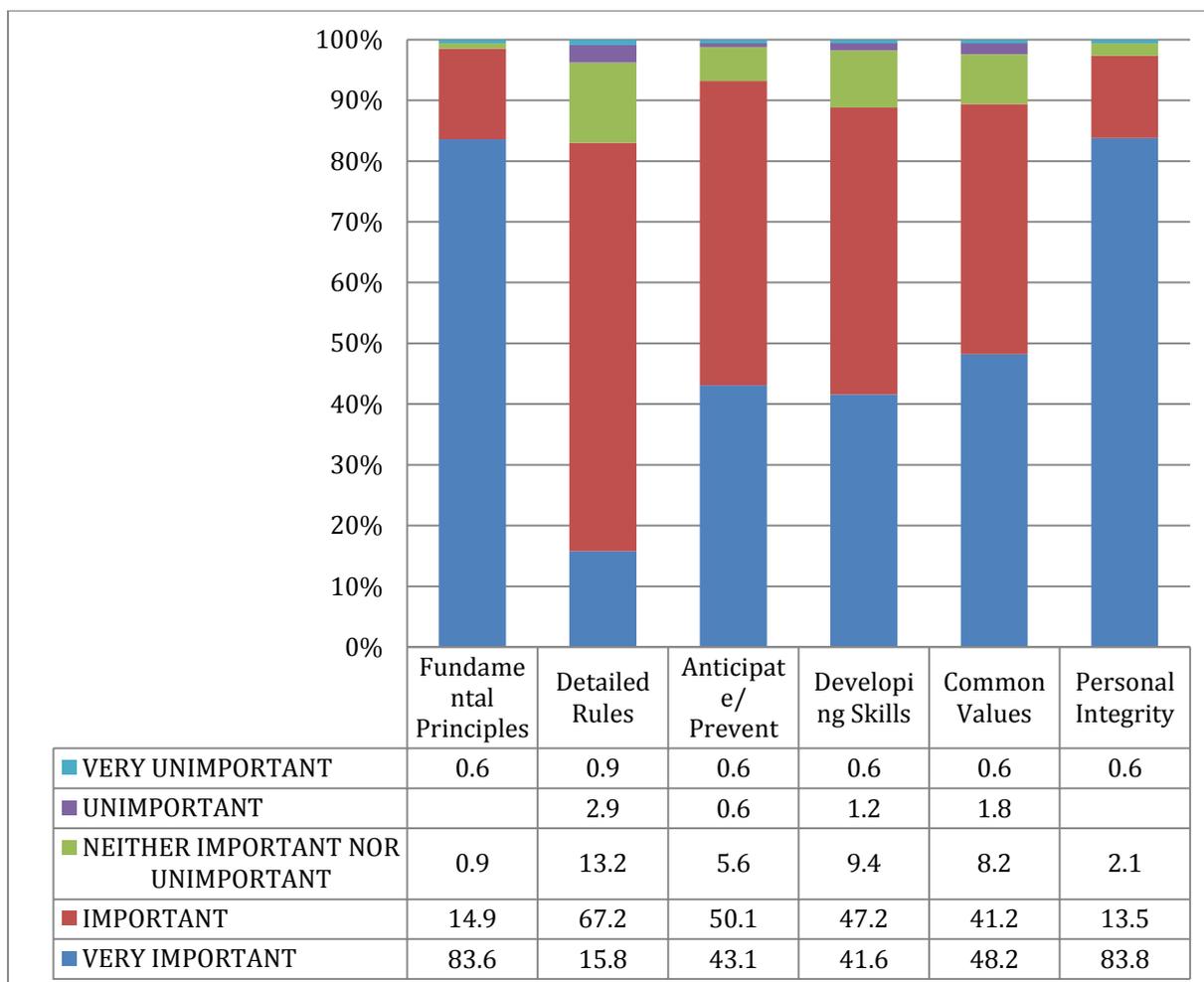


Figure 3: Respondent views on the key elements of being able to practise ethically

In the interviews, where we had time, we discussed with candidates what could be improved about ethics training. We specifically encouraged some consideration of these key elements, to see if interviewees had more detailed views on them.

Most people felt that the current training adequately covered fundamental ethics principles and rules in sufficient depth, although one interviewee thought that:

*Probably more could be done in general terms about the general principles because they tend to be lost and, I mean, they're instilled in to you when you're in practice but early on I'm not sure they really are. I think there's probably an over focus on the specific rules early on because that's what you need to pass the exams so that's what people focus on. [CRIME 14]*

Another felt training should focus on broader principles rather than detailed rules because, “no training that focuses on detailed rules is really retained” [INHOUSE 34]. Interestingly, another felt it was ‘easier’ to train on rules than principles. Some people felt that the issue with conveying a better understanding of the rules/principles was not associated with learning the rule or principle but rather understanding how they should be applied and it was here where there was room for improvement in training. As explained by one interviewee:

*Once you've got the rules and you've read them they're there and they're fairly, they're clear in as much as they are and then you just have to apply them to your particular issue. And, I mean, that's where it can sometimes be a bit complicated because things aren't always as cut and dried as they might, as you might like them to be to apply the rule." [FAMILY 11]*

This fits with the training need often identified by our expert assessors for greater practice in the application of ethical rules and principles to ethical problems and opportunities for advocates to compare their judgment with experienced peers.

Most interviewees said it was impossible to avoid ethical problems. Whilst some supported and others were not necessarily opposed to training in anticipating or preventing problems, they did suggest that the ability to avoid, or mitigate ethical problems was something that came more easily with experience. There were those who felt that training through discussions with other practitioners would be the most useful way of acquiring a better understanding of how to avoid ethical problems:

*I don't recall really ever being given any formal training on how to avoid ethically difficult situations arising. I certainly was, when I was a pupil, given practical advice by my supervisors as to little tricks and things that you can do to try and avoid these kind of things from happening... So, I mean, I suppose an easy way to do that again [have this training] would simply be to have practitioners telling stories about things they've done to avoid ethical difficulties or, even better, I suppose, telling stories about things they didn't do that led to ethical problems arising and how they could have avoided it. [CRIME 14]*

While ethical problems will never be entirely avoidable, better training around stakeholder relations and client management may have the effect of inhibiting ethical issues arising and may mitigate the impact of ethical issues when they do arise.

### **Developing skills for dealing with ethical problems**

When exploring whether training should focus more on an advocate's skills for dealing with ethical problems (such as assertiveness training) those interviewed were almost unanimous in saying that assertiveness training was not necessary. Advocates tended to rebuff the notion (they felt that almost by definition having chosen to become advocates they were already assertive enough). As we will see, though, they were more open to training in relationship management. Similarly, advocates suggested that often it was less about being assertive and more about being persuasive, particularly in an in-house environment. It was also noted it would be useful if training reassured advocates that they should not be afraid to ask for help, and also reinforced to advocates that they need to recognise the limitations of their own knowledge.

One interviewee questioned whether there was a process chart that could be developed to help new advocates determine the appropriate steps to take when dealing with an ethical problem and help new advocates better understand how more experienced practitioners would arrive at a particular solution. Another felt that training relating to dealing with

ethical situations must necessarily encompass training on dealing with professional relationships. The interviewee explained that:

*As the junior practitioner what you have to deal with is, one, you probably feel that you're in over your, out of your depth anyway because you suddenly have like solicitors of ten or twenty years asking you, practitioner of mere weeks, what you think you should do, and it's generally quite terrifying. You don't want to piss the solicitor off, you don't want to lose the relationship, you don't want to have to go to your clerks and explain that you advised that you couldn't do something and the solicitor said, oh go away, I'm never coming back to you again, I mean, these are all, you're terrified that if you annoy the solicitor you'll never get any more work and you'll starve. [CIVIL 29]*

The interviewee suggested it is not just a case of how to deal with the ethical dimension of the problem (i.e. what is the ethical action to take) but once you have decided what action to take: “How do you get everyone to a position where they understand what your ethical problem is and why you're saying no.” [CIVIL 29] Whilst interviewees tended to see this more as managing professional and client relations than managing ethical problems: we see signs that, contrary to the predominant view that assertiveness was not a problem, being able to stand up to instructing solicitors, clerks, or fellow members of chambers was part of an ethical advocates’ necessary toolkit. In this regard, another felt that lessons could be drawn from the business sector:

*There are certainly ways in which you can train people in dealing with those difficult conversations and I know that in the business sectors, for example, they use a lot of training people on giving feedback and when they have to deal with dissatisfied customers and that sort of thing. And I think there probably is, there are lessons to be learnt from the business environment as to how we communicate that both to our clients and to our opponents and especially if there's a conflict in our lay client and professional client. [CIVIL 39]*

Another said that this type of training would benefit from more role-play situations where advocates have to play out situations with difficult clients:

*Having a practical...with an actor who is being realistically firm with you, would be much – a much better way of doing it, I think, and much better preparation for how things go in real life than, here's an exam question. [CRIME 25]*

When it came to in-house lawyers and employed solicitor-advocates, the circumstances of their employment gave rise to particular suggestions. One suggestion put forth was that there needed to be better systems in place to protect individuals dealing with ethical dilemmas arising in the context of their employment. This was explained as follows:

*I do think there's room for skills training, without a doubt, but maybe employers need to have some kind of system in place, some kind of whistleblowing system, to reassure employees that if they do bring something*

*to their attention it can be dealt with appropriately and they're not going to be reprimanded. Or their interests are going to be protected too. I mean I'm not aware of there being any kind of whistleblowing policy for legal employers. [INHOUSE 43]*

Another in-house lawyer indicated that skills training also needed to address people's discomfort with going against potential workplace 'norms':

*There's a lot of pressure, like organisational pressure, cultural pressure, to conform to whatever practice has been in the past, or whatever is being proposed now, and that's always very difficult to – if you feel like you've identified an ethical issue that nobody else has, it's always very difficult to stand up and say, I think this is actually wrong, if nobody else has said anything. [INHOUSE 34]*

### Developing common professional values and integrity

Most advocates were of the view that training did not need to address common professional values whilst some questioned what form such training would take. These points might reflect the absence of any exposure to such education, rather than a more considered view. One queried whether there was a form of ethics testing that could be implemented prior to training to weed out people predisposed to act unethically. One solicitor-advocate noted something of a divide between the Bar and solicitor-advocates and felt that more could be done to blur lines between the two and reduce perceived snobbery although they did not speculate as to how training might contribute to this objective. Another noted that developing common professional values might best be achieved by encouraging a culture of whistleblowing and reporting of unethical behaviour.<sup>23</sup>

When it came to personal integrity, advocates felt that this was not something that could realistically be taught. Most thought that this was very much a personal matter, that personal integrity was a 'given'. This view that integrity is a given is contrary to a great deal of research on ethical decision making: the evidence suggests moral identity can and does develop in adult life.<sup>24</sup> In a way, the interviewees recognised this when saying that much of their training occurred from observing how more senior professionals acted, and that this helped them develop a sense of personal and professional integrity. Practitioners may benefit from a greater understanding of how moral development can occur and how dependent on environmental and situational influences ethical decision making may be.

---

<sup>23</sup> rC66-rC69 of the Bar Standards Board Handbook obliges barristers to report serious misconduct by other barristers and O(10.4) of the Solicitors' Regulation Authority Code of Conduct requires solicitors to report serious misconduct by any person or firm (or employee, manager or owner of the firm) authorised by the SRA.

<sup>24</sup> For a discussion in relation to law see Neil Hamilton and Verna Monson, "The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law," *Geo J. Legal Ethics* 24 (2011): 137–85

## Other suggestions

At the conclusion of the interview, advocates were given the opportunity to add any further comments about ethics training and/or professional ethics.

## Materials & support systems

In order to assist practitioners in keeping up to date it was suggested that there should be more content on ethics in practitioners' magazines and possibly examples of how practitioners have dealt with certain situations. One barrister explained how it was often difficult to see the wheat from the chaff in terms of communications from relevant professional bodies and more needed to be done to help ethics stand out by providing separate ethics bulletins for practitioners. Another indicated that they 'missed' the more specific guidance on that they felt used to be provided by the BSB/Bar Council. Another suggested that the professions needed to work together to distil the core ethics rules for activities done by solicitors, barristers and legal executives.

Some solicitors complained that their handbook was difficult to utilise, and the outcomes focused approach was not as useful as black and white lists of what one can and cannot do. One felt it was quite consumer based and less about personal integrity and more about ensuring that clients perceived the lawyer's actions as appropriate and justifiable. Barristers also noted difficulties with the Bar Handbook. It was criticised for lack of clarity and being overly complicated in its structure.

Other suggestions included changing the way in which the ethics helplines give advice. A number of advocates noted that when they had used their helpline in the past, operators had been reluctant to offer any advice and had simply read out various part of their Code. Others felt that the ethics helplines should provide advice in written format as a form of documenting that an advocate took appropriate action:

*It would help if when you called up the bar hotline they were prepared to give you a statement in writing of the position to take as this helps endorse your action. [CRIME 04]*

## What influences ethicality?

Having asked survey respondents what they saw as the key elements of ethicality, the survey then asked, "What would you say are the principal influences on your professional conduct?" Figure 4 sets out the results.

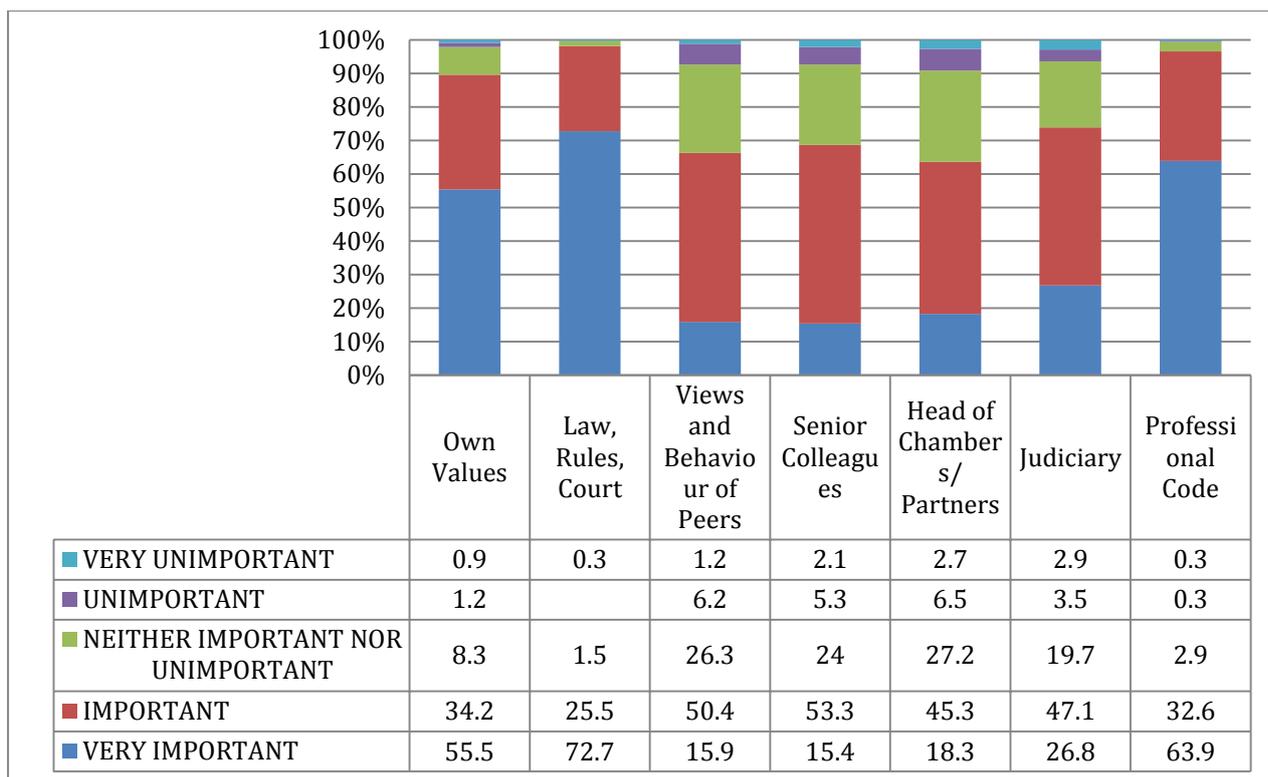


Figure 4: Respondent views on principal influences on your professional conduct

Here we see some interesting differences. There was a marked tendency amongst the vast majority of respondents to see their Code of Conduct, the law and the rules of court and their own values as important or very important. As a principal means of understanding ethical obligations rules and principles (be they manifested via court rules, professional codes or the law) appear, in the assessment of the advocates themselves, to be the strongest influencers of professional conduct. The influence of peers and senior colleagues appears important but less strong. The views and behaviour of their peers; senior colleagues/line managers; heads of chambers/senior partner/director or equivalent or the judiciary (“generally or when [they] appear before them”) were regarded as very important by a minority and were not regarded as important by upwards of a quarter of respondents. This may suggest that the ethical culture in practice is being set by, or regarded as being set by, the rules and being less commonly or influentially set by discussion amongst colleagues; an interesting point for regulators considering a greater emphasis on principles over rules.

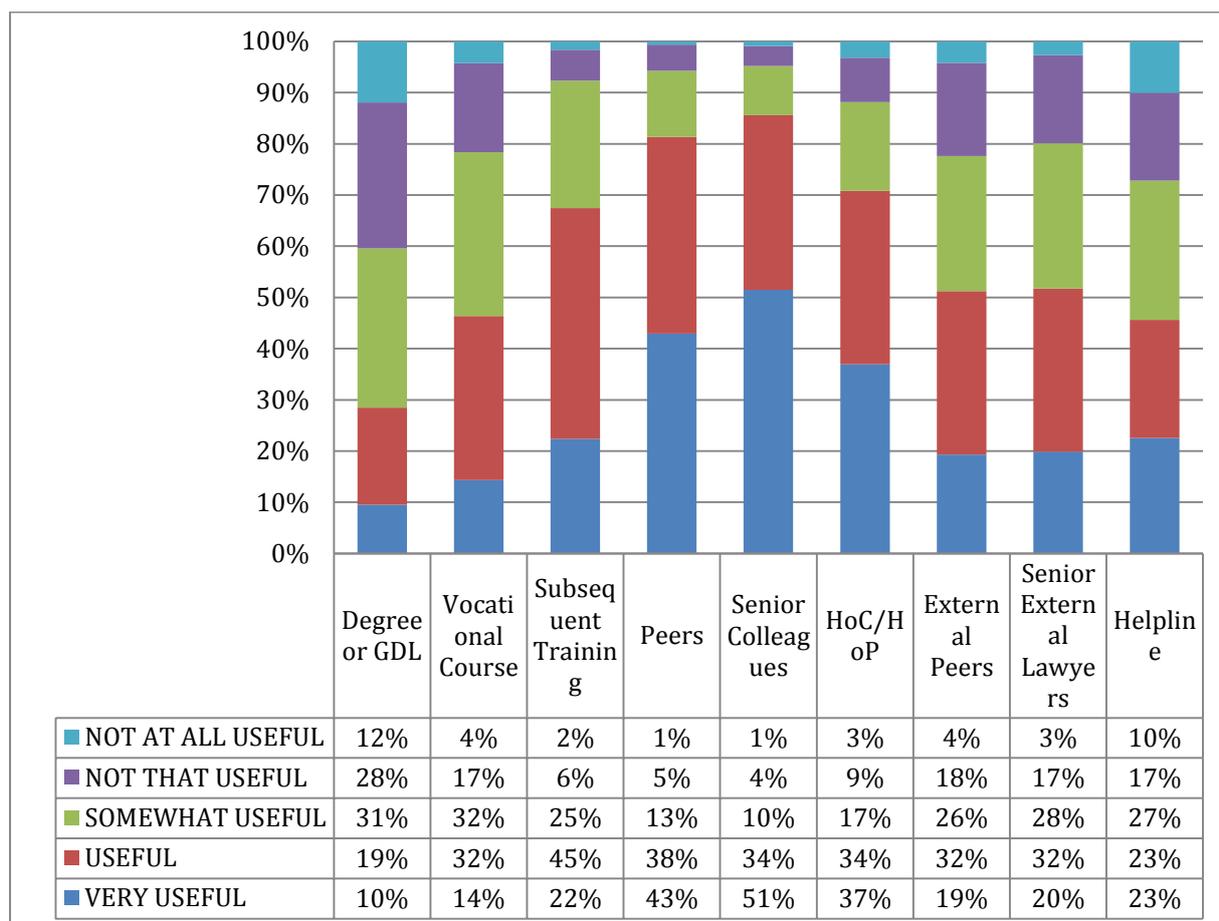
### Most useful sources of learning

A contrasting approach is to look at the way in which survey respondents felt ethics was learnt or developed. To evaluate how important different modes of, or opportunities for, learning were for our respondents they were asked, “How useful would you say the following were to your ability to practice ethically over your career so far?” and they were given a series of options around training and discussion with peers and more senior colleagues to consider. In relation to the options they could also indicate modes of learning in which they had not participated.

**Table 4: Opportunities for learning that had not been used**

	Received None
Discussion with Helpline	41.5%
Ethical Training on Degree or GDL	41.3%
Discussion with Senior External Lawyers	33.7%
Discussion with Head of Chambers /Head of Practice	25.1%
Discussion with External Peers	15.9%
Subsequent Professional Training	7.9%
Ethical Training on Vocational Course	3.8%
Discussion with Peers	2.6%
Discussion with Senior Colleagues	2.1%

From this we might deduce that most ethical training and development takes place within later training, peer groups and within their organization (the firm or chambers). We can see in Figure 5 that the dominant modes of ethically useful learning for our respondents appeared to be discussion with colleagues, vocational and post-vocational training.



**Figure 5: How useful would you say the following were to your ability to practise ethically over your career so far?**

Here we see some interesting differences in what was perceived to be useful. What has been done on the degree is not often perceived as useful (perhaps unsurprisingly given whatever ethical education on the degree course occurs is varied in nature and extent and is not necessarily aimed at making students practice ready). The vocational courses (such as the BPTC and LPC) are perceived as useful or very useful by less than 50 percent. Also less than half of those who had used their profession's helpline had found it useful or very useful to their ability to practice ethically over their career so far.

Discussion with peers and senior colleagues (especially those within their firms or chambers) was perceived as the most useful. Over 80 percent of respondents perceived that as useful or very useful. Here, we can see how peers and more experienced colleagues may be an important vehicle for the evolution of ethical capacity and that these influences are more likely to be stronger within their organisation (firm or chambers) than outside of it. One likely explanation is that such development often takes place informally (although we are also aware that some chambers and firms provide more formal, internal workshops on ethics, which have been well received). Another interesting question is what kinds of discussion are going on here. Discussion with more senior colleagues and the helpline may be seeking approval for a course of action, whereas discussion with peers may be more exploratory of ethical problems and the possible courses of action.

To summarise, in broad terms we see then that advocates view the principles and rules established by their Codes of Conduct, and by the law, and their own values, as the principal influences on their decision making but the strongest influences on the *development* of their approach to ethics comes from interactions with colleagues. We now turn more directly to their views on training.

### **Respondent views on the current approach to ethics training**

We asked questions designed to understand how our respondents viewed the current approach to training. These elements focused on the nature and quality of their ethics training, whether it is targeted at the right kinds of problems, whether ethics education begins too late (given the relative paucity of undergraduate education in the area). They were asked to express a level of agreement or disagreement with each of several statements. Figure 6 summarises the results. Net agreement was calculated by summing the percentage of those agreeing and deleting them from the percentage of those disagreeing.

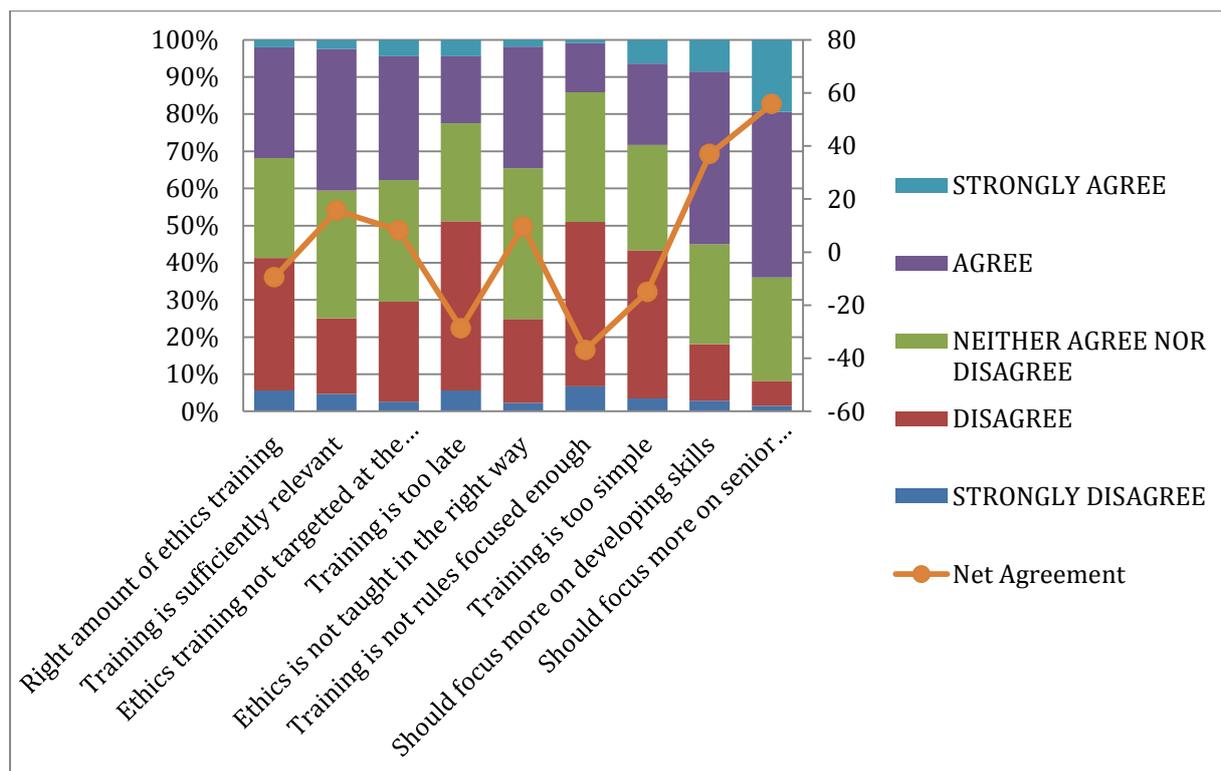


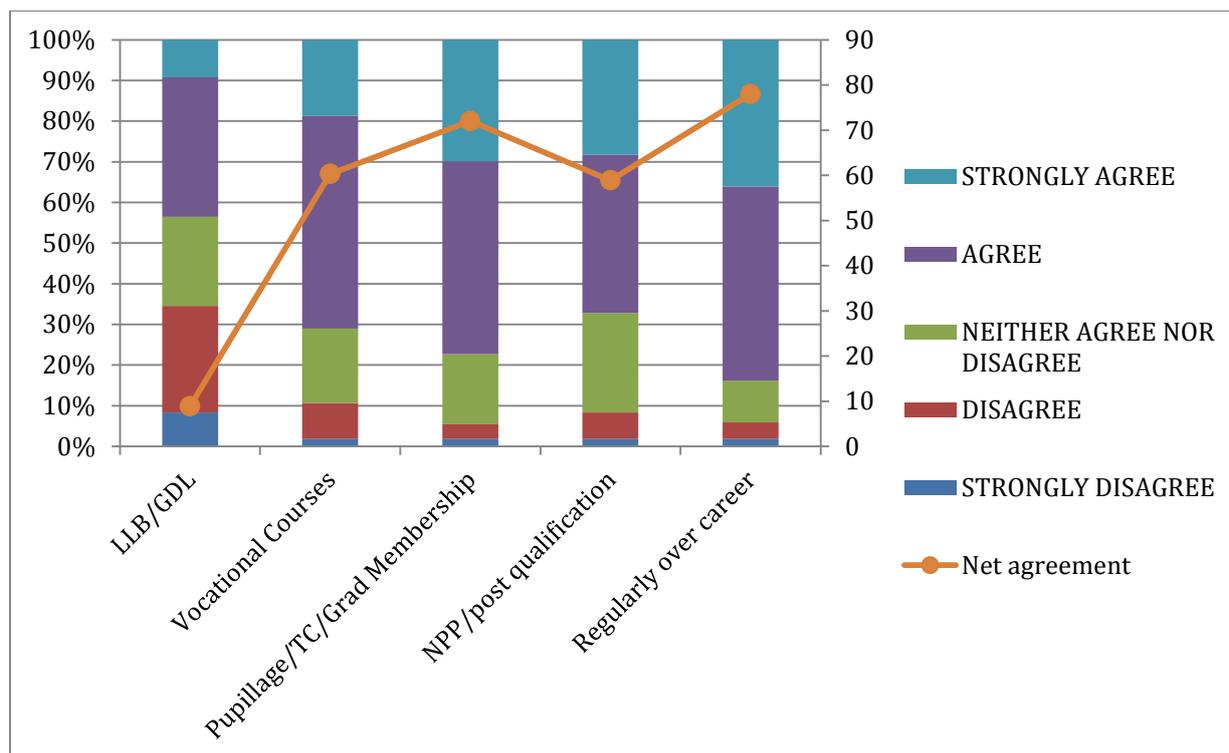
Figure 6: Respondent views on the current approach to ethics training

Most respondents did not think training began too late or that it was not rules focused enough. They also tended not to think that the training was too simple. As a group, views were more equivocal or negative on whether the amount of training was right and they were relatively evenly split on whether ethics training was sufficiently relevant; targeted at the right kinds of problems; and, taught in the right way.

There was quite high agreement that ethics training should focus more on the skills needed to avoid difficult situations and that ethics training also needs to be targeted at more senior practitioners. This is particularly interesting given the importance of discussion with senior practitioners seen earlier in the report.

### Opinions on improving ethical education and training

We then asked respondents the stage at which they thought the profession should seek to improve ethical education. At the moment the professions do not require ethical education to occur as part of the qualifying law degree, and thereafter ethical education is frontloaded to the vocational courses and, for the Bar, early professional education under the New Practitioner Programme (NPP). This question considers where our practitioners thought improvement should be concentrated.



**Figure 7: Where do you think your profession should seek to improve ethical education and training**

It was a consistent theme throughout the interviews that training at the undergraduate level rarely covered professional ethics and that at the vocational (LPC/BPTC/BVC<sup>25</sup>) level coverage could be limited or cursory. It is possible that some of our interview cohort had not benefited from the greater emphasis supposed to be put on ethics in the BPTC in recent years, but in general the barristers we interviewed largely agreed that the ethics training received on the BPTC/BVC was the least useful training they had received. This training was described as being very focused on the Code of Conduct, fairly detached from practice and difficult to contextualise without any experience on which to draw. Some described ethics as being presented like a box ticking exercise. It was also a fairly consistent view that trainers did not appear particularly invested in the training that they were delivering.

*I personally felt that ethics was badly taught on BPTC. The way it was done by the provider was that the whole content of the ethics training was essentially two very long sessions, one at the beginning and one at the end of the course effectively. It really very much felt like ethical training was a box that had to be ticked which was sort of piled through as quickly as possible with multiple choice type questions. And I certainly would want to see ethical training much more embedded into practical scenarios, so you're doing an advocacy type exercise, say, and an ethical conundrum is thrown in and then really explored in that context [CIVIL 37].*

<sup>25</sup> The BVC (Bar Vocational Course) was the forerunner to the BPTC.

That said, the survey respondents appear to support a view that improvement of ethical education should be concentrated at every stage post degree but with a particular emphasis on the need to improve training regularly throughout their careers post-qualification. This was also supported by our interviews. Interviewees emphasised the strengths and weaknesses of post-vocational training as being the most critical to them. In particular, the idea of learning through experience over rote or theoretical learning of the Code was consistently perceived as the best method of gaining an understanding of how to handle ethical problems. Of course, to be able to learn from experience, individuals have to have a sufficient base level of knowledge to recognise an ethical problem and a means of getting feedback on their approach to such problems. This reinforces the importance of knowledge of the rules and principles, and engagement with others (be they trainers, peers or senior colleagues) but also suggests that such training should continue to be supplemented by additional teaching methods, including scenario based discussions, shadowing of practitioners, discussion of real life experiences with practitioners etc. Some also questioned whether ethics would become more of a priority for teaching and learning if it became an assessed element of training, although most were opposed to an ethics exam.

### **NPP**

Many of the barristers were very positive about the NPP Ethics courses that they had attended. This was often felt to be the most the most useful ethics training they received for a number of reasons. Firstly, advocates seemed to agree that the timing of the training was appropriate, because, “You had a level of experience to be able to understand the ethical issues at play and the real forces that are on you” [CIVIL 22]. Conversely, a number noted that, at the NPP stage, ethics training was a relatively small component compared to the amount of advocacy training individuals undertook.

Some were critical of the way in which the NPP was delivered. This may suggest that the personal learning preferences and/or differences in the quality of the course individuals elected to attend may have had an influence on their overall experience:

*On NPP you sit in a horseshoe and there is no hiding place for anything but it's really slow because you don't get everything out of the scenario. Left NPP training a lot more confused than when I walked out. [It] undermined what confidence I had. [CIVIL 06]*

On the whole interviewees spoke highly of the case-study format in which scenarios were discussed. Discussions were often led by experienced practitioners in a forum format where they felt they could contribute. As one interviewee explained:

*NPP was much better because I actually still vividly remember that ...they were sort of group sessions led often by silk and... there was a lot of discussion about who would do this, who would do that, why would you do this, why would you do that, what is actually the right answer. So it was... dedicated discussion, you voice the issues in an open, safe environment; you say, well actually, you know what, I don't think I would do that. And it wouldn't matter if you were right or wrong. And you're watching other people's views as well, which was reassuring in itself, so I think that worked*

*much better in terms of open discussions, safe environment to make mistakes and learn. [CRIME 26]*

That said, one of the most common issues arising in the context of NPP provision, was the instructors not agreeing on the most appropriate way of handling ethical dilemmas. Whilst there are often no easy answers to ethical problems, differences of opinion between instructors on how to handle ethical scenarios requires careful handling. As one advocate explained:

*[I] didn't find ethics part of NPP very helpful and they had three judges and they didn't agree on the crib sheet answer. That made it difficult to get a handle on what the actual answer was. Because the new Code of Conduct was just in people were struggling with the difficulties of this. There was a trainers crib sheet, but the fact that the trainers didn't agree with this didn't help. [CRIME 03]*

The feeling some interviewees had was that such differences were sometimes swept under the carpet rather than articulated and tackled in an explicit, principled and rational way.

### **Pupillage**

Experience in pupillage was variable. Some interviewees spoke highly of the training they received during pupillage, specifically the informal and in-depth discussions they had with their pupillage supervisors some of which covered ethical problems. Others indicated they did not receive any ethics training during pupillage, whilst others suggested that most of the training they received during pupillage came from observation. This suggests that much may be dependent on an individual's pupil supervisor and the extent to which ethical issues arose and were discussed during the shadowing period.

Occasionally specific courses were mentioned (an optional course on a GDL on lawyers' ethics, or a mediation course which also focused on ethics). Others reported well run chambers where the initiative was taken to organise training sessions including some on ethics. Overall however, interviewees were in agreement that ethics did not receive sufficient attention at all levels of legal training.

### **Solicitor-Advocates**

Solicitor-advocates had often undertaken their higher rights training with a particular provider and many spoke highly of this training provision. The training was described as having pervasive ethics elements right the way through the course which was considered good because it made people more attuned to ethics problems as they cropped up in practice rather than temporarily putting them 'on alert' for an ethics issue.

### **In-house lawyers**

Not all in-house lawyers will have completed the NPP if they moved in-house immediately following their BPTC. Government Legal Service (GLS) lawyers have their own training requirements which include ethical components which some interviewees reported as being useful, however many indicated that these were training courses that they were 'supposed' to go on, but had not attended. There was no clarification as to the extent to which attendance at training was enforced, reviewed or required by the GLS. However one

interviewee suggested that there was very much an open culture of dialogue and discussion about ethical issues in the public sector:

*The government legal service has an in-house ethics programme, have done probably less hours than the NPP but directly relevant training with live scenarios, with lightly disguised facts relevant to current issues, so. I would say there is a culture of discussing ethics, principles, that sort of thing, it's sort of in the air. [In-House 02].*

### The need for more training throughout their career

Interviewees were largely of the view that more training on ethics was needed and that more on-going training needed to occur over a professional's career. They tended to the view that there needed to be an annual CPD requirement and that ethics training needed to form a more pervasive aspect of legal education. As one explained:

*I would definitely welcome more training and particularly perhaps in so far as people were able to be talking about actual issues they had come across themselves to try and inject new examples in to things and things like that, because that's what's most useful as a junior practitioner, sort of speak to real life examples, and particularly ones that you're more likely to come across in your practice area than others... I mean, you can't simply put out to memorise the Code of Conduct, firstly, no one would do it and, secondly, it doesn't help because there's no point being able to parrot the rules if you don't know what they mean. [CIVIL 28]*

For the interviewees, a requirement for on-going training over the course of a professional's life would also help address imbalances that might exist between different chambers (or firms):

*In our chambers we have a particular member who is senior and a QC and who is very engaged in training generally. So we, I'm very, very lucky being in a set of chambers where someone has personally taken responsibility for ensuring that ethics trainings is part of chambers and any changes that come in to the Code of Conduct is, or generally to the bar, is always put up at a seminar... So I'm kept informed through the means of having a very active chambers and also they have a huge amount of staff... I was at a very small set to start with where ...no one [was] particularly interested in chambers life, but everyone [was] just being [an] independent practitioner using chambers as a means of admin. [CIVIL 03]*

In-house advocates raised concerns that there was not sufficient ethics training directed at their circumstances since the advice given may differ for employed advocates as opposed to those who are self-employed, as this advocate described:

*[There] needs to be a lot more availability for employed bar [where] I think the ethical issues are just completely different. The advice tends to be, in relation to the self-employed bar, that you can withdraw. In lots of ways that's just completely unrealistic if you're employed, because you can't just be*

*withdrawing left right and centre, and you've got to try and figure out ways of persuading your client to act lawfully. [INHOUSE 01]*

Advocates were also strongly of the belief that training needed to be cross-generational and should not just be aimed at new practitioners. It was felt by our interviewees that older practitioners may not be as up-to-date with changes to the Code of Conduct or may be practicing in a manner that is no longer acceptable. Many also objected to changes in CPD and the fact that CPD was becoming in their eyes 'less strict'. They felt that this was a backward step.

### **What do interviewees think they need training on?**

Some suggestions as to what interviewees felt they needed training on can be gleaned from the interviews.

### **Their sense of the most common, pressing and difficult ethical problems**

In the interviews, when asked what the most common, pressing and difficult ethical problems new advocates tend to face they tended not to identify a lack of knowledge of, or experience in applying, the detailed rules or principles of their Codes. Instead, they tended to frame the problem as managing relationships around them.

### **Managing relationships with instructing solicitors**

Barristers most commonly mentioned difficulties arising in managing relationships with instructing solicitors, particularly where solicitors were acting in a way they felt was negligent. A need to ensure good ongoing relationships, for themselves and for their chambers conflicted with their desire to ensure that clients were being treated fairly and that their interests were being properly protected. Cases which were poorly prepared by instructing solicitors were noted by some advocates as posing real challenges particularly where statements in their brief were contradicted by a client's verbal statements (which may, of course, not always be to do with poor preparation).

They also complained about the pressure to do an increasing amount of unpaid work, providing preliminary advice, or, providing training. Some described this as the sort of work which could be perceived as an inducement in kind. This was an area which had divided trainers in an NPP training session:

*the room was divided between senior counsel so everybody that was getting training was left a bit lost... On the one side you are told, we're allowed to build relationships, and on the other, you're not allowed to improperly provide some kind of advantage or welcome for work. [CIVIL 10]*

Some respondents also spoke of solicitors occasionally pressuring junior barristers to change their advice or to handle the case in a manner which they thought conflicted with their duty to the court. One interviewee said issues such as this posed particular problems for junior advocates less likely to be comfortable asserting their independence:

*I think there is always a bit of a difficulty when you have a very big law firm who's perhaps a major client and they, for example, want you to argue a point which you don't think can properly be argued, or you've discovered an authority which goes against your position and you tell them that you have to show it to the judge and they say, well, I'm not sure about that, do you really have to? Maybe it's better if we don't and so on, by which they really mean don't do it. And it can be difficult if you're very junior and you've got a big magic circle law firm, it can be difficult to be sort of firm and say actually this is what needs to be done. But it is something obviously that you have to do and I think it's probably more difficult for very junior practitioners to do that. [CIVIL 50]*

The capacity to assert independence is something one advocate spoke of as something which came with time, but that junior barristers were often unduly worried by the implications of standing up to more experienced instructing solicitors and losing clients, but needed to be assured that this was the right thing to do.

### Managing relationships with clerks

Barristers spoke also of managing relationships with clerks as presenting challenges, particularly when receipt of late instructions meant that the advocate could not adequately prepare for cases. More often, those interviewed spoke of difficulties, particularly when first starting out in practice, in understanding the limits of their competencies and having this respected by clerks. It was understood that there was a fine balance between appearing receptive to receiving instructions, but also not taking on cases where they did not have the requisite level of skill to undertake the work. As one interviewee put it, “you can't overcome the overwhelming pressure to keep the clerks happy, not be a pest etc.” [CRIME 04] This advocate felt that clerks would benefit from ethics training requirements as well. They developed their concerns in this way:

*Being sent to do stuff which is above your ability... Biggest issue for me is when my ethical standpoint contradicts with the commercial interests of the chambers. Seems to be a real issue with clerks who need training. If you're making waves for them, they will stop briefing you. [CRIME 04]*

Of course, some noted that the pressure was often placed on clerks by solicitors who were instructing late in the day with poorly prepared cases (which may in turn have been a function of when a client sought legal advice). As one barrister explained:

*...the clerks have been told it's one thing, the clerks have therefore passed on that message to me that it's that thing, I'm in court all day, it's a case for the next day the clerks have made a judgment call that, no, this is simple, [I] can do that, and actually it turns out to be something completely different. I don't get back to chambers until 6 o'clock at night, try and phone my instructing solicitors, they're not there, what do you do? [Say]...I can't do it, I don't have the requisite level of experience or skill, also it's not my area, I'm sorry, you're going to have to return it? [FAMILY 01]*

The interview responses show that although late instructions were not always avoidable, they suggested better filtering of cases to new advocates and training requirements for clerks may help address some of these challenges. Although, where problems manifest, it is also likely to be an issue of chambers management.

### Managing relationships with clients

Managing relationships with clients spanned a number of issues, but the most common issue noted by interviewees was difficulties arising when clients changed their instructions, especially for criminal advocates. It was also noted that difficulties arose when clients asked barristers to mislead the court for them, either explicitly, or implicitly, by admitting that the real story was 'x', but asking that the advocate present the story as 'y'. Similarly, issues emerged around an advocate's duty to the court, a duty which was not always understood by clients and often perceived by clients to be something which negatively impacted on their case. One advocate summarised the issues as follows:

*I think clients who want you to put forward something you know to be untrue, particularly if you're doing lots of sort of pro bono work or free representation [present a challenge]. Advancing or telling a court about a case which is detrimental to your client, that happens, that comes up quite often, which the other side perhaps haven't spotted and you have got a duty to disclose, to inform the court if there is a case that's against you. [CIVIL 48]*

Issues were also raised with clients who failed to tell advocates the whole truth, and the advocate suspected the client was lying (but did not have proof). Once a lawyer knows a client is lying, the courses of action are relatively clear under their codes, but a particular difficulty appeared to be judging uncertainty over the *possibility* that the court might be misled.

Some also raised situations where clients threatened to do harm to third parties. In respect of the latter, the concerns were focused around knowing when to action these concerns and when a breach of privilege was permissible.<sup>26</sup>

For crime practitioners, two advocates raised concerns in respect of fitness to plead and where a client is clearly under the influence of alcohol. A number also indicated that PNC records (records of the client's antecedents) could often be out of date, emphasising the potential importance of the scenario we interviewed on.

An issue that could also raise tension and difficulties with clients was the challenges arising when facing a litigant in person. As a new advocate there were challenges in getting the balance right between assisting the litigant in person but at the same time, ensuring that this assistance was not perceived negatively by an advocate's own client. In addition to this, there were also challenges in ensuring one was going far enough to fulfill their duty to assist the litigant in person.

---

<sup>26</sup> Interestingly, the solicitors' code used to have guidance on this, but now does not.

## Managing internal relationships

The concept of managing internal relationships was specific to in-house advocates although it did have parallels with the concerns above about managing relationships with instructing solicitors, clients and clerks. Interestingly, in-house lawyers (who were mainly Government Legal Service lawyers) often spoke of being free from the economic pressures of the employed bar. At the same time, a different set of challenges arose as a result of their unique employment situation. One advocate spoke of challenges in sometimes identifying who the client actually was because:

*there might be a number of their government departments that are also interested in the case – and it's just making sure that you're clear on who's giving you instructions – because the different departments might have slightly different interests in the outcome of the case, so you do have to be careful as well, in that respect, as to who exactly is instructing you. [IN-HOUSE 24].*

Another spoke of challenges in remaining independent and ensuring that the organisational hierarchy does not overshadow where the legal line should actually be drawn. As explained by one in-house Government lawyer:

*We get quite a lot of freedom of information requests and I think we get quite a lot of pressure not to release stuff that probably we should...I think we have to push that quite often and say I don't think the same exemption does apply when clients are actually hoping that it does. [Another challenge was] Ministers wanting something to happen where there is not necessarily the power to do it in law, sort of pushing back on that. [IN-HOUSE 33]*

Difficulty ensuring independence was echoed by another in-house lawyer who said that:

*I think probably as an advisory lawyer where ministers want to take a certain position, one of the key things that advisory lawyers need to do is not let that pre-formed decision impact the advice that they give. So they need to very clearly draw out the legal risk to that, and not feel in any way that they need to fall in line with a certain decision which ministers might want to take, or a policy that they might want to follow. I think basically, it's a – it's an independent point [sic]. [IN-HOUSE 30]*

Remaining independent and ensuring that their legal opinion was respected was the most common difficulty mentioned by those working in-house. However in-house lawyers also mentioned difficulties around disclosure of documents as another challenge they regularly faced, generally in situations where clients were reluctant to disclose documents.

## More specific pointers

Several interviewees queried whether training on disclosure problems was sufficiently realistic. As with problems where the client might be trying to implicate an advocate in misleading the court, it was felt that disclosure problems often presented themselves in less than black and white terms: how, they wondered, was an advocate to respond to a

disclosure problem where it was not clear whether a document or a potentially adverse authority needed to be disclosed. This is similar to the point mentioned above when dealing with a client who may be, or probably, was lying: how should advocates judge such probabilities and balance the competing interests of client and court.

There were also practitioners who felt that there could be more bespoke training made available, for example, for those working in the Youth Court where it was felt that particular circumstances were more likely to arise.

Some in-house advocates and family practitioners had quite often attended civil or criminal focused ethics NPP classes and felt there were not, or they were not aware of, specialist courses aimed at their needs.

## Summary

The views of our sample of advocates as gleaned through the survey and the interviews support the view that the professions need to provide more training in ethics and need to concentrate their endeavours on improving ethics training once practitioners enter practice as pupils or trainees. Similarly, they thought this improvement needs to be engendered across the life course of the advocate's career not simply at its beginning. The criticality of entry into actual practice was that practitioners then had real experience and an understanding of the pressures they faced and so could more meaningfully grapple with and understand ethical dilemmas.

Interviews highlighted that advocates felt their biggest ethical challenges stemmed not from a lack of understanding as to how the rules or principles operated, but as a result of their interaction with others in the justice system and often as a result of their inexperience. They framed their most common ethical problems as one of managing clients, and (for barristers) clerks and instructing solicitors. The tension between a barrister's duties to the client and the court and the interests of chambers is one that may deserve more attention than it currently gets. Training needs which focus more on managing relationships with instructing solicitors, with clients, with clerks and for in-house advocates, with employers might go some way to addressing the needs expressed by interviewees.

Interviewee views that principles and rules are understood is somewhat in tension with the view of our expert assessors. This may signal overconfidence. Expert assessments suggest that often new advocates do lack the knowledge of relevant rules and principles of professional practice. However, one can see considerable overlap between the advocates and the assessors' views when one sees the emphasis amongst our advocates on the need to develop experience and judgment in applying their minds to real professional problems. Assessors too saw this as a significant problem for some in the cohort. The advocates themselves saw the most useful way of doing this as being through scenario-based discussions with experienced practitioners. Those discussions need to be safe, and engaging of individuals within groups, but also testing and repeated with some frequency. Where problems give rise to areas of genuine differences of opinion, those differences need to be confronted, and the professionally principled alternative ways of dealing with them

articulated. That senior practitioners are sometimes visibly disagreeing but then fudging that disagreement is not conducive to learning. Disagreement may be unavoidable, but glossing over the disagreement is avoidable and potentially counter-productive.

Comments from our interviewees suggested also that a range of other issues might be considered: the adequacy of vocational training in ethics was frequently doubted; experience of pupillage was inconsistent; and on these interviews the quality of the NPP, whilst generally praised, was not uniform. Some founds sessions thorough and rewarding, whilst others felt that discussions only scraped the surface of the ethics problems with which they were asked to deal. Some sub-sets within the profession (notably in-house and family lawyers) felt the lack of courses tailored to their work areas limited the utility of the training for them.

# 6

## Advocate values and ethical decision making

We have seen that our respondents attach a great deal of importance to their own integrity and values as influences on their professional conduct. Yet it is rare for personal values, and their influence on ethics, to be explored in an explicit, still less, empirical way. This project provides an opportunity to explore the values of new advocates in an evidence-based manner. It is part of the broader series of projects being conducted by the researchers with others.<sup>27</sup> In the context of this project, the work provides an opportunity to examine the values of new advocates and how they might influence ethical decision-making.

We have seen in the interview data, discussed above, a point at which advocates grow concerned that practice involves them not just in understanding the black and white boundaries of clearly appropriate or inappropriate conduct but also dealing with greyer judgment calls. A great deal of ink has been spilt setting out how our decisions are influenced by rational and more intuitional modes of thinking.<sup>28</sup> There are various opportunities for subconscious influence on sophisticated decision making: over-optimism bias, client bias and different attitudes to risk being just three.<sup>29</sup> In exercising their discretion, it may be that advocates' own values are one such influence on their approach.

As a result, a better understanding of advocates' values may provide some insight into differences between advocates and ways of beginning to explore subjectivity and discretion in ethical decision-making. We use values here as a research tool but understanding values might also form part of a process of training. More specifically, much of the professional focus on ethics training assumes a rational, rule-based process; but there is merit in understanding and exploring the less overt, formally rational elements of decision-making. An advocate that better understands their personal values may better understand and improve their personal decision making.

As a result, one part of this project explored the extent to which values might play a part in ethical decision-making; whether different kinds of advocates may have different values; and whether values might have an impact on ethical decision-making. As part of that process we sought to pilot an online, web-based tool as a way of examining individual values and ethical decision making and considering whether such a tool has potential utility as part

---

<sup>27</sup> In particular, a project on law students values, professional identity and moral outlook, R. Moorhead, C. Denvir, M. Kouchaki, R. Cahill O'Callaghan and S Galoob, *forthcoming*.

<sup>28</sup> Kahneman's work on System I and System II thinking is the best known. Daniel Kahneman, *Thinking, Fast and Slow* (2012). A number of texts have developed behavioural approaches to legal ethics. See, for example, Perlman, Andrew M., *A Behavioral Theory of Legal Ethics* (September 4, 2013). *Indiana Law Journal*, *Forthcoming*; Suffolk University Law School Research Paper No. 13-31. Available at SSRN: <http://ssrn.com/abstract=2320605>

<sup>29</sup> See Perlman, *ibid*.

of a training package. The tool was contained in the online survey and consisted of: an online version of Schwartz' portrait values questionnaire (see below) and, a suite of short ethical problems to explore differences in ethical decision-making.

There is the potential for this to form an online tool for use in ethics training sessions. In parallel, one author has been using a similar approach with other practising lawyers to explore its utility as a training tool with very positive feedback. It might also provide an opportunity to reflect more broadly on the kinds of training that could be useful for advocates.

### Schwartz' values tools explained

There are many ways of defining values. We use the leading approach of Schwartz, used – for example – in the European Social Survey.<sup>30</sup> Schwartz defines values as human goals that apply across all social contexts. These values are not specific to 'work' life. Schwartz shows that whilst individuals appear to recognise the same values, and structure them in broadly the same way, they prioritise these values differently. So, for example, we all value excitement, novelty, and challenge but we may differ in how much we value them over (say) respect for tradition.<sup>31</sup> Schwartz's theory claims to be comprehensive in the sense that it encompasses – in broad terms - all major sets of human values and is cross-cultural, having been tested in numerous developed nations across a wide range of cultures internationally.<sup>32</sup>

Under this theory, values structure our understanding of approach to choices. They 'frame' our understandings and help us prioritise which elements of any given situation we find salient. As a result, values have been found to exhibit predictable associations with a range of more specifically defined attitudes. Examples include: attitudes toward war, political orientation, human rights, environmental attitudes, and materialism.<sup>33</sup>

Schwartz defined ten, "basic values that people in all cultures are likely to recognise":

**Power:** Social status and prestige, control or dominance over people and resources

---

<sup>30</sup> An academically rigorous, pan-European survey repeated biannually and supported by the European Commission, <http://www.europeansocialsurvey.org/about/>

<sup>31</sup> The first work to apply Schwartz in a legal context was undertaken by Rachel J. Cahill-O'Callaghan (2013) 'The Influence of Personal Values on Legal Judgments' 40/4 *Journal of Law and Society* 596–623.

<sup>32</sup> Schwartz, S. H. (2012). "An Overview of the Schwartz Theory of Basic Values. Online Readings in Psychology and Culture," 2(1). <http://dx.doi.org/10.9707/2307-0919.1116>

<sup>33</sup> J. Christopher Cohrs et al., "Personal Values and Attitudes Toward War," *Peace and Conflict: Journal of Peace Psychology* 11, no. 3 (2005): 293–312; Dario Spini and Willem Doise, "Organizing Principles of Involvement in Human Rights and Their Social Anchoring in Value Priorities," *European Journal of Social Psychology* 28, no. 4 (1998): 603–622; Shalom H. Schwartz, "Value Orientations: Measurement, Antecedents and Consequences Across Nations," *Measuring Attitudes Cross-nationally: Lessons from the European Social Survey* (2007): 169–203; Wesley Schultz and Lynnette Zelezny, "Values as Predictors of Environmental Attitudes: Evidence for Consistency Across 14 Countries," *Journal of Environmental Psychology* 19, no. 3 (1999): 255–265; James E. Burroughs and Aric Rindfleisch, "Materialism and Well-being: A Conflicting Values Perspective," *Journal of Consumer Research* 29, no. 3 (2002): 348–370.

**Achievement:** Personal success through demonstrating competence according to social standards

**Hedonism:** Pleasure and sensuous gratification for oneself

**Stimulation:** Excitement, novelty, and challenge in life

**Self-direction:** Independent thought and action—choosing, creating, exploring

**Universalism:** Understanding, appreciation, tolerance and protection for the welfare of all people and for nature

**Benevolence:** Preservation and enhancement of the welfare of people with whom one is in frequent personal contact

**Tradition:** Respect, commitment and acceptance of the customs and ideas that traditional culture or religion provide the self

**Conformity:** Restraint of actions, inclinations, and impulses likely to upset or harm others and violate social expectations or norms

**Security:** Safety, harmony and stability of society, of relationships, and of self

Each of these ten is related to, or in tension with, the others. Because of this relationship, the ten values are typically portrayed in a circle form (a circumplex) to capture the relationship between each of the ten. Those adjacent to each other are typically related (if a person values tradition highly, they tend to value conformity highly, for example). Those opposite are usually in tension (e.g. people who are very achievement oriented tend not to value benevolence highly).

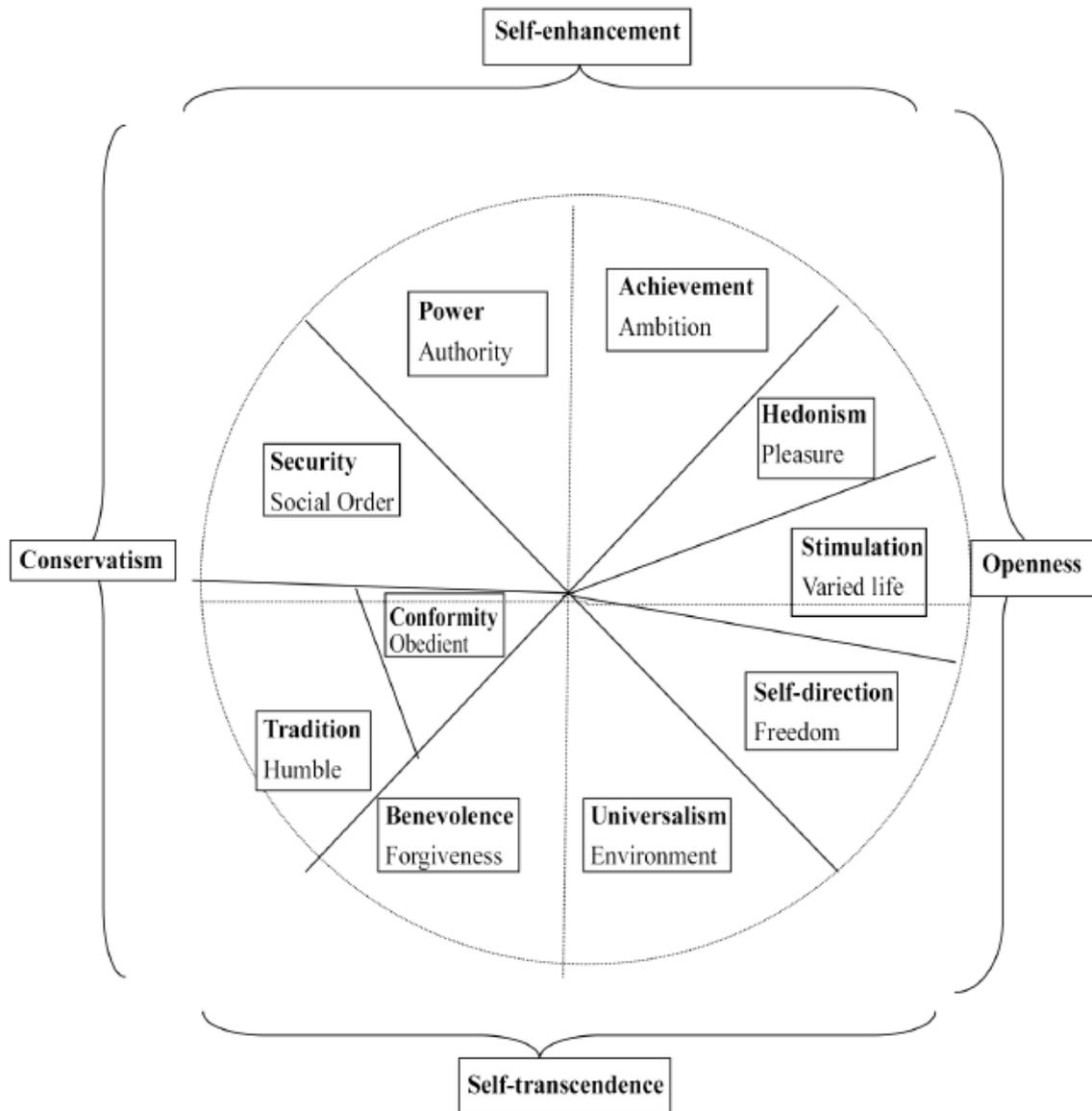


Figure 8: Schwartz circumplex<sup>34</sup>

Schwartz' model can be further simplified into four dimensions. **Self-transcendence** shows a valuing of intrinsic, other-regarding values – in broad terms we think of it as representing 'selfless' virtues or things which are valuable in and of themselves, such as justice, fairness and kindness.

Its opposite is **self-enhancement** and is representative of extrinsic values, things we value for the benefits they give to our self. In crude terms we think of this as reflecting a more selfish orientation, the desire for power (which includes economic reward) and socially recognised achievement. **Conservation** (what the diagram refers to as conservatism) speaks

<sup>34</sup> From, Cahill-O'Callaghan, n. 31, p. 604

to an anxiety to protect the status quo and contrasts with its opposing value set **openness** which is a valuing of change and new experiences.

Values have to be activated to affect behaviour.<sup>35</sup> There has to be a conscious or intuitive process of recognition that the value is important to the person in the particular context. So values may affect how we see any particular event. As Schwartz puts it, “self-transcendence values incline bystanders to see an assault as a situation requiring help, security values as one to avoid harm.”<sup>36</sup> The more important (say) benevolence is to me, the more I am likely to be motivated by empathetic concerns. Beyond recognising and framing a problem, values may impact on motivation. Actions which fit with our value preferences are more satisfying to us. They may impact on the extent to which we feel responsibility to become involved in any given situation. So, for example, higher self-enhancement values may minimise the likelihood of accepting responsibility for something which does not affect oneself.

The significance of values as influencers of decisions can be seen in the various studies that have correlated values profiles and ethical behaviour.<sup>37</sup> Pro- or anti-social behaviour is particularly influenced when self-transcendence and conservation are highly valued (or in more detailed terms, when universalism, benevolence, conformity, security, and power are engaged).<sup>38</sup> Security and power (self-enhancement) typically oppose pro-social behaviour, whereas openness has a more unpredictable influence.<sup>39</sup>

For these reasons we hypothesised that values may provide interesting and useful insights into our respondents’ predispositions and may sometimes influence ethical decision-making.<sup>40</sup> To explore this we must measure values. We used Schwartz’s 40-Item Portrait Questionnaire (PVQ40):<sup>41</sup> a series of 40 statements intended to describe a person’s values. It provides a reasonably robust quantification and ranking of values for each individual. Positive value scores are associated with values being particularly important to an individual, and negative scores with values that are less important.

The survey also presented respondents with a series of vignettes, each presenting an ethical dilemma. Respondents were asked to indicate how they would react in the circumstances and given a range of multiple-choice responses from which to choose (see Appendix B).

---

<sup>35</sup> Verplanken, B., & Holland, R. W. (2002). Motivated decision making: Effects of activation and self-centrality of values on choices and behavior. *Journal of Personality and Social Psychology*, 82, 434-447.

<sup>36</sup> Schwartz n. 32, p. 14

<sup>37</sup> Shalom H Schwartz, “Basic Values: How They Motivate and Inhibit Prosocial Behavior,” in *The Hebrew University of Jerusalem*, ed. Mario Mikulincer and Phillip R Shaver, vol. 1 (American Psychological Association, 2010), 221–241.,

<sup>38</sup> *Ibid.* p. 6

<sup>39</sup> *Ibid.* pp 6-7

<sup>40</sup> We are conducting similar work elsewhere, see, Moorhead et al, n. 27

<sup>41</sup> Power; achievement; hedonism; stimulation; self-direction; universalism; benevolence; tradition; conformity; and, security.

Figure 9 shows the values profile of our advocates' sample. It compares that profile with a large sample of law students from England and Wales,<sup>42</sup> and the European Social Survey (ESS), that measures the values of a representative sample of adults in thirty European nations.<sup>43</sup> The lines show the averages for each group on each of the ten values.

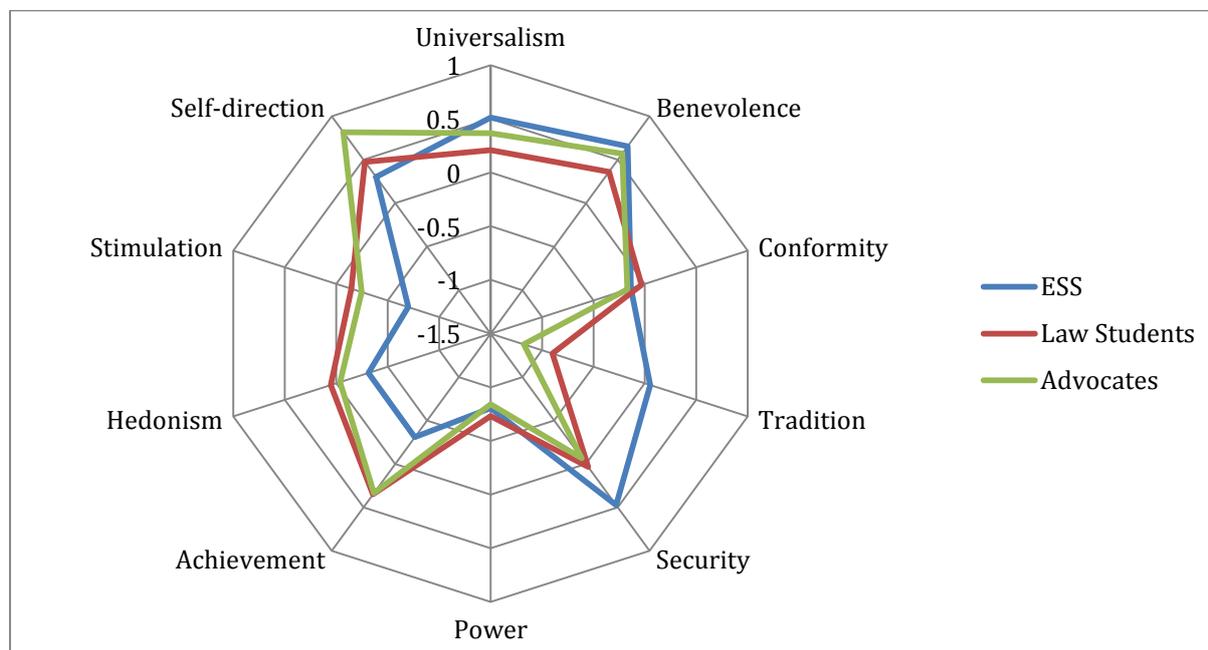


Figure 9. Advocates values compared with the European adult population

We can see in particular that the advocates we surveyed value self-direction very highly: more strongly than adult Europeans generally and law students. It is consistent with a highly intelligent occupation and of course consistent with an advocates' ethos of independence. The advocates also value universalism and benevolence highly, the intrinsic values within Schwartz' values profile. Interestingly, stimulation, hedonism and achievement are more highly valued than European adults generally and security and, particularly, tradition are less highly valued. Thus, up to a point, some of the values associated with greater ethicality by Schwartz are highly valued (benevolence and universalism) by the professions, but so are some of the values associated with a greater likelihood of less ethical behavior (high values for hedonism, stimulation, and achievement; low values for tradition and security).

#### Different kinds of values profile within this group of advocates

It is worth emphasising that values are not consistent across the group. As we would expect with any group of individuals, there are a wide range of values profiles within our sample. To assist with understanding the differences a cluster analysis was conducted.<sup>44</sup> Cluster

<sup>42</sup> Derived from Moorhead, Denvir, Cahill-O'Callaghan, Kouchaki and Galoob, 2015, *forthcoming* n. 27.

<sup>43</sup> More information about the ESS can be found here <http://www.europeansocialsurvey.org>

<sup>44</sup> See, SPSS (2001) *The SPSS Two Step Cluster Component*, [http://www.spss.ch/upload/1122644952\\_The%20SPSS%20TwoStep%20Cluster%20Component.pdf](http://www.spss.ch/upload/1122644952_The%20SPSS%20TwoStep%20Cluster%20Component.pdf)

analysis is a way of grouping data together so that cases within the group (a cluster) are more similar than cases in another cluster. Our analysis looked for clusters in the values of our respondents as measured using the ten dimensions. Four clusters were produced.<sup>45</sup> We can see the profiles of these different clusters in Figure 10.

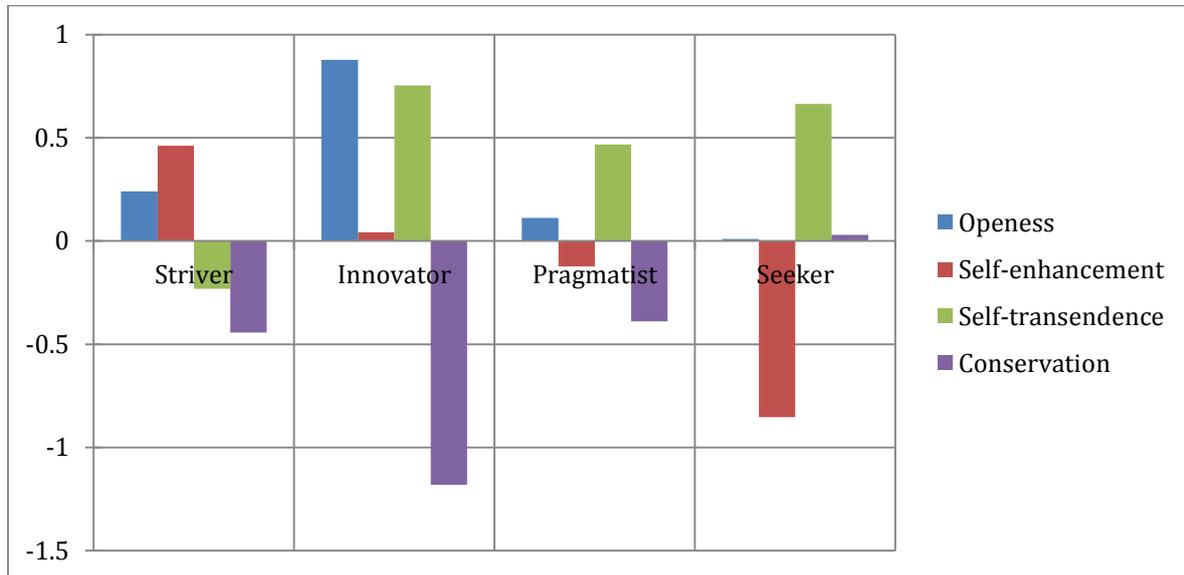


Figure 10: Clusters of values on four dimensions

We have labelled the first group as the ‘strivers’ – as this group values self-enhancement most: they were likely to be most motivated by what advances them, as well as being quite motivated by openness. Self-transcendence and conservation were the least highly rated sets of values. 50 respondents fell into this category.

‘Innovators’ were so labelled because openness to new experiences is what they valued most but they also value self-transcendence highly, thus whilst they respond well to change, they are more likely to prioritise intrinsic values over themselves. Conservation values were very weakly valued by this group. 81 respondents fell into this category.

The ‘pragmatists’ are so called because they have what look like relatively modest differences between the four values. They are like the strivers in this respect but less motivated by self-enhancement and value self-transcendence more highly. 112 respondents fell into this category.

‘Seekers’ value self-transcendence highly – these may be the group most likely to value justice and/or the interests of clients most highly. That contrasts very strongly with the low emphasis on valuing self-enhancement. They value openness to change the least and conservation more than the other clusters. 93 respondents fell into this category.

<sup>45</sup> The measure of cohesion and separation (i.e. how coherent the clusters appeared to be in the data) was classified as fair. Cluster sizes were reasonably even (the groups were a similar size) and the clusters were not dominated by any particular value.

We can get a more detailed sense of the differences in values within these clusters by looking at the ten dimensions:

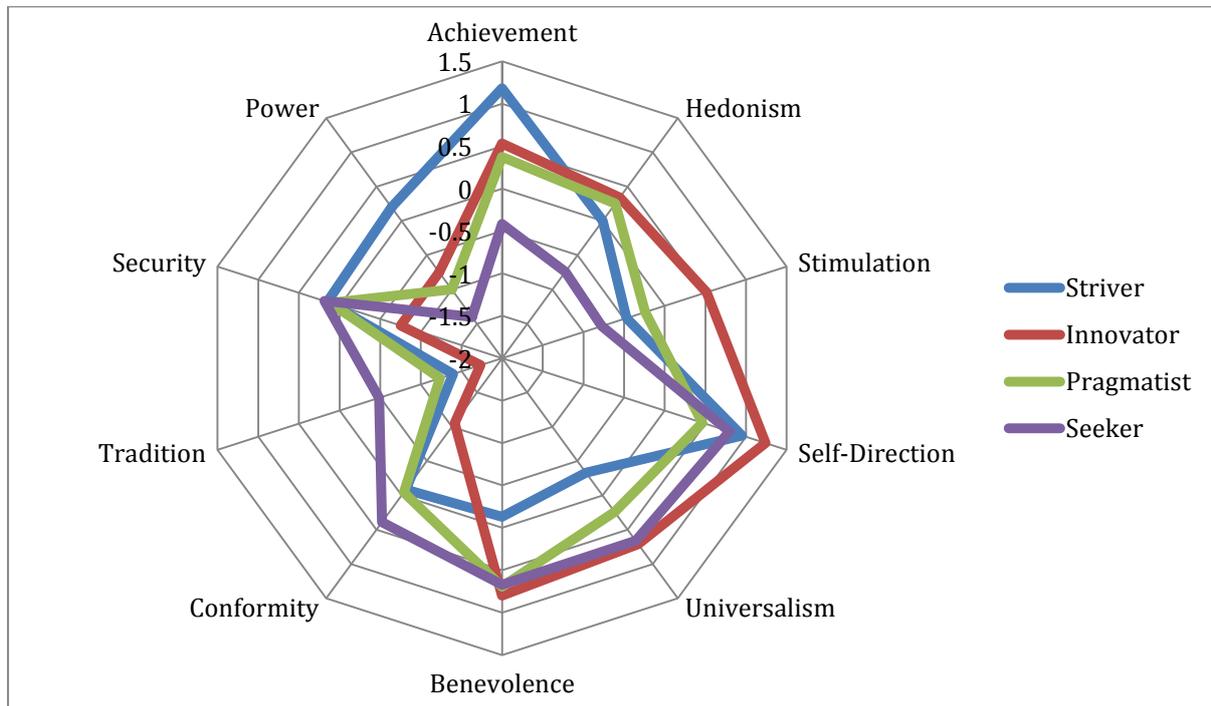


Figure 11: Clusters of values on ten dimensions

Another way of looking at this is by seeking the ranking of each value in order of importance as shown in Table 5.

Table 5: Ranking of values on ten dimensions

	Striver	Innovator	Pragmatist	Seeker
1	Achievement	Self-Direction	Benevolence	Self-Direction
2	Self-Direction	Benevolence	Self-Direction	Benevolence
3	Power	Universalism	Achievement	Universalism
4	Security	Achievement	Hedonism	Conformity
5	Hedonism	Stimulation	Universalism	Security
6	Conformity	Hedonism	Security	Achievement
7	Benevolence	Power	Conformity	Tradition
8	Universalism	Security	Stimulation	Hedonism
9	Stimulation	Conformity	Power	Stimulation
10	Tradition	Tradition	Tradition	Power

We can see that Strivers are most strongly motivated by a suite of self-oriented values, garnering recognition for their achievement, being able to think things through and decide things for themselves, influence and economic recognition (power). The values of benevolence (valuing the interest of those close to them (e.g. be they colleagues or clients) and universalism, are unusually lowly prioritised.

Innovators value a mixture of self-direction, and socially validated achievement, alongside benevolence and fairness. Values that might constrain risk-taking (conformity and tradition) are the least important to them.

The pragmatists valued benevolence highly but universalism less strongly, and these pro-social values were separated by self-direction and more self-interested values. It is also worth noting that the difference in the means of these values was smaller. If one looks at Figure 11 it can be seen that pragmatists had fewer of the high values scores.

Seekers value self-direction, universalism, benevolence and conformity highly: their sense of self was most strongly articulated in being able to think things through for themselves, but the results suggest this would take place in the context of valuing justice, the interests of those close to them and whilst also valuing conformity highly.

### Do different kinds of lawyers have different values?

Whilst we can see that there are differences within our sample of advocates in terms of what they value and that those differences might be quite sizeable, a question of interest was whether the values of different *kinds* of lawyers might be *systematically* different. If

they were, then there might be systematic differences in the ways in which such practitioners see the world which could influence the way they decide problems. For instance, were the values of criminal practitioners different from in-house lawyers? And, were the values of barristers different from solicitors? If they were, this might suggest different types of professional or those working in different kinds of law might have different motivations and dispositions when it comes to dealing with ethical problems.

To examine whether the values profiles of the professions differ two multivariate models were fitted, one using the four composite value measures and the other using the full ten values measures. The models looked at whether solicitors or barristers or lawyers working in different fields (criminal,<sup>46</sup> family, civil and in-house) had different values. The models are explained in more detail in Appendix F. Given the small number of CILEx advocates in the data, these could not be included in the model.

### **Model 1 – Four value dimensions**

Figure 12 shows value scores for solicitors and barristers on each of the four composite value measures, simulated from the statistical model and controlling for other variables.

While solicitors had slightly lower self-enhancement scores than barristers, the difference fell short of statistical significance.<sup>47</sup> There was little evidence of variations in the valuing of self-transcendence or conservation and no evidence of differences in the valuing of openness by solicitors and barristers.

---

<sup>46</sup> Six respondents specifying 'CPS in house' were included as criminal practice.

<sup>47</sup>  $\chi^2_1 = 2.84$ ,  $p = 0.092$ .

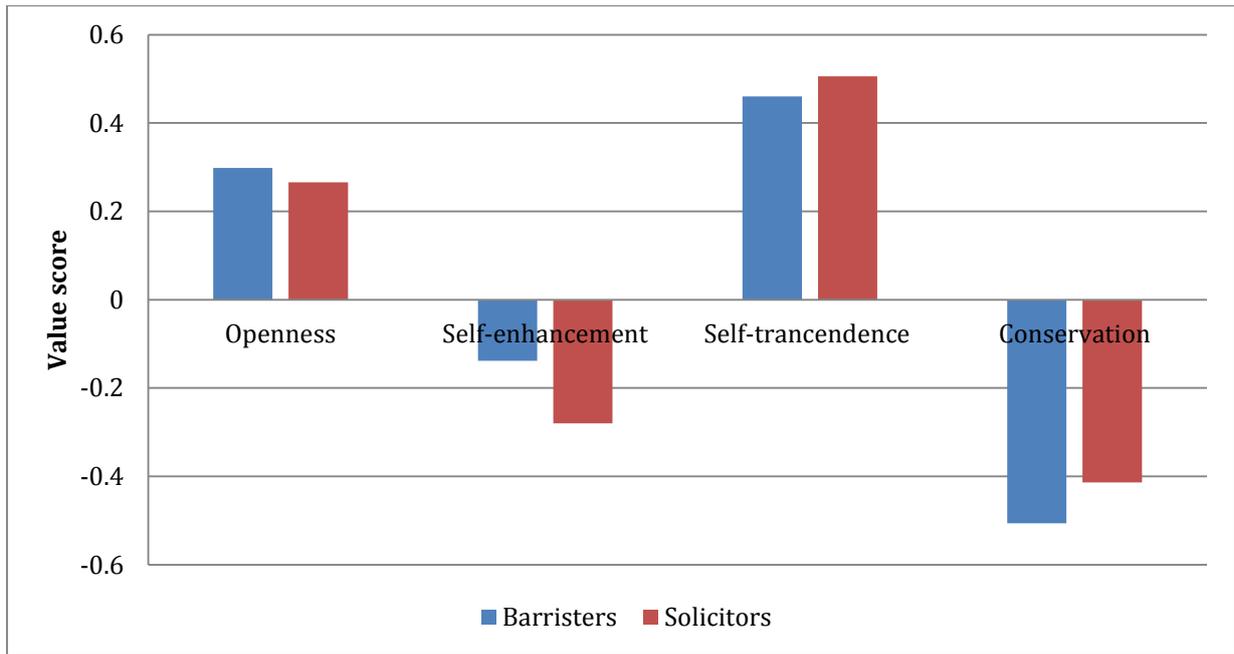


Figure 12: Value scores for solicitors and barristers on each of the four composite value measures, simulated from the statistical model and controlling for other variables

Figure 13 shows value scores for each practice area, again controlling for other variables.

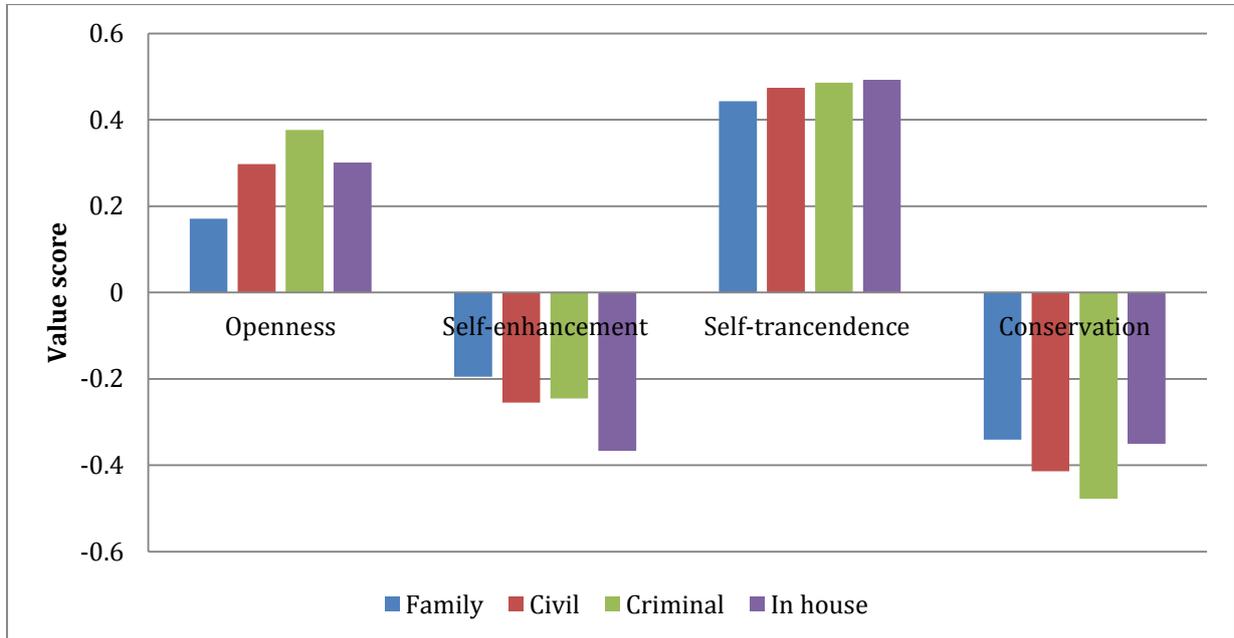


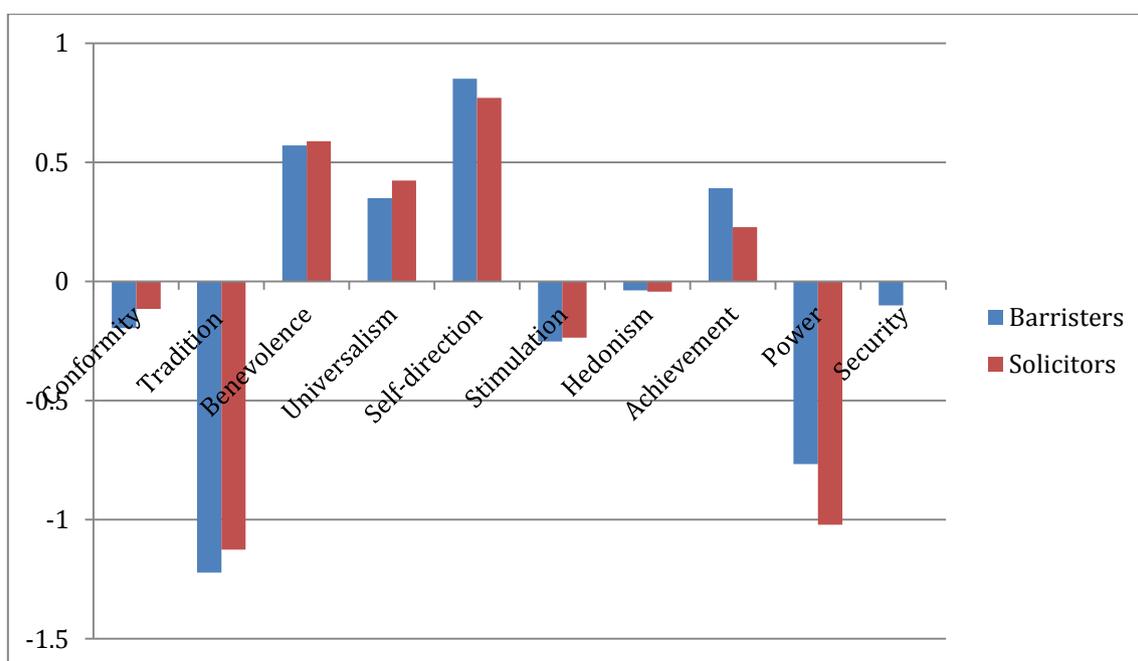
Figure 13: Value scores for each practice area on each of the four composite value measures, simulated from the statistical model and controlling for other variables

Respondents in family practice tended to have somewhat lower openness to change scores, with slightly higher scores for those in criminal practice.<sup>48</sup> This suggests that criminal practitioners value independence and readiness to change more than family practitioners. Readiness for change perhaps reflects an appetite for more unpredictability in their experiences.

The in-house practitioners (who were mainly Government Legal Service lawyers) were associated with significantly lower self-enhancement scores: that is they were less motivated by personal status and success.<sup>49</sup> There was some evidence of variation in conservation scores by practice area, with particularly low scores for criminal practitioners and higher scores for family and in house practitioners.<sup>50</sup> The latter may value order more and be more inclined to self-restriction, for instance.

### Model 2 – All ten value measures

Figure 14 shows value scores for solicitors and barristers on each of the ten composite value measures, simulated from the statistical model and controlling for other variables.



**Figure 14: Value scores for solicitors and barristers on all ten value measures, simulated from the statistical model and controlling for other variables**

Valuing power was the second least important value to our respondents on average but it is also the only individual value score with a significant difference between solicitors and

<sup>48</sup> While neither type of practice had differences significant on their own, there *were* differences if criminal and family practitioners were compared directly with each other. Comparing family to criminal practitioners;  $\chi^2_1 = 4.27$ ,  $p = 0.039$ .

<sup>49</sup> Testing the 'in house' term;  $\chi^2_1 = 7.42$ ,  $p = 0.006$ .

<sup>50</sup> With the 'in house' term just reaching statistical significance;  $\chi^2_1 = 4.08$ ,  $p = 0.043$ .

barristers. Once the type of work they had done was controlled for, solicitors valued power less than barristers, a difference that was statistically significant.<sup>51</sup>

Figure 15 shows value scores for each practice area, again controlling for other variables.

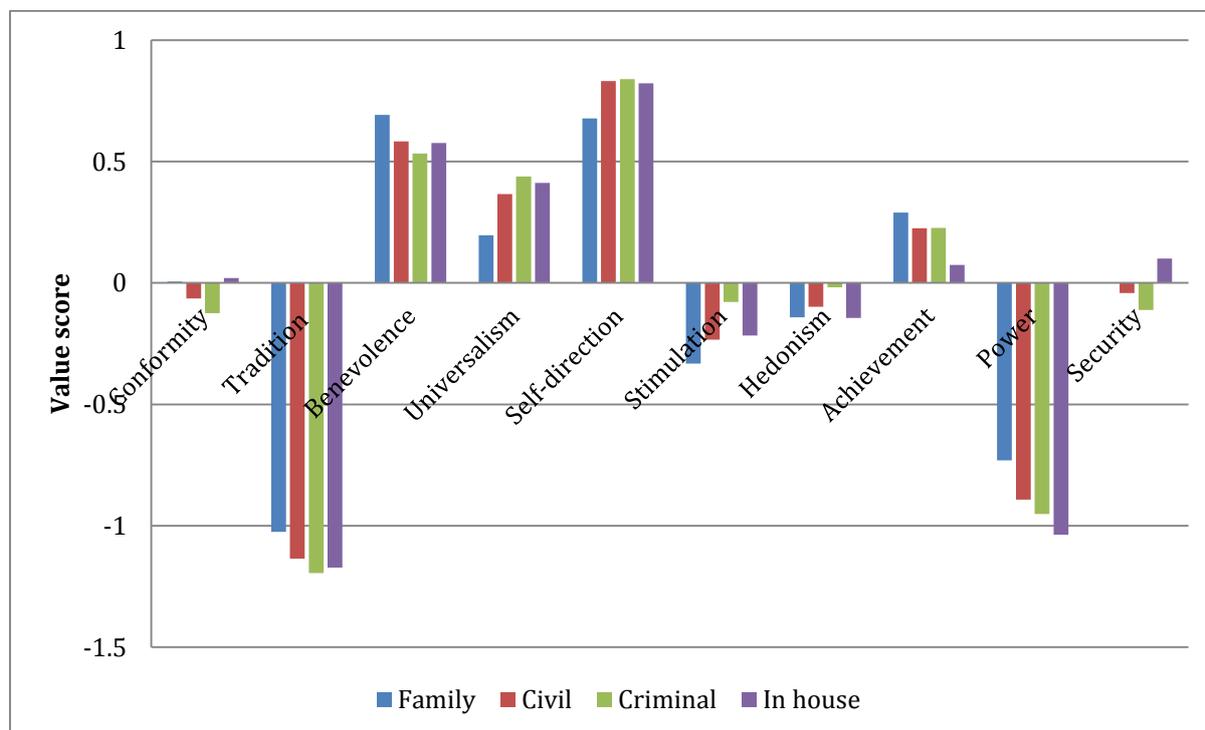


Figure 15: Value scores for each practice area on all ten value measures, simulated from the statistical model and controlling for other variables

Differences in values that were statistically significant were:

- **Universalism** - with lower scores for family practice.<sup>52</sup>
- **Achievement** - with lower scores for civil and in house practice and higher scores for family practice.<sup>53</sup>
- **Power** - the higher scores were for family and the lowest scores for in house practice.<sup>54</sup>
- **Security** - higher scores were associated with in house practice.<sup>55</sup>

<sup>51</sup>  $\chi^2_1 = 4.54$ ,  $p = 0.033$ .

<sup>52</sup> For example, when contrasted with criminal practice;  $\chi^2_1 = 5.51$ ,  $p = 0.019$ .

<sup>53</sup> Both the civil and in house model terms were statistically significant;  $\chi^2_1 = 3.93$ ,  $p = 0.047$ . and  $\chi^2_1 = 6.73$ ,  $p = 0.009$  respectively

<sup>54</sup> As indicated by the significant in house term;  $\chi^2_1 = 4.10$ ,  $p = 0.043$  and significant difference when directly contrasting in house and family practice;  $\chi^2_1 = 5.28$ ,  $p = 0.022$ .

From this analysis of values we can see some difference in relation to work area but little or no difference in values when comparing barristers and solicitors, save for power. Some of the differences by work type are predictable, criminal practitioners valuing the constellation of values behind openness to change is consistent with the claimed unpredictability and excitement of criminal advocacy, for instance. That criminal practitioners would also value conservation values – keeping things as they are, respecting traditions and rules – less, speaks also to the sometimes maverick reputation of elements of the criminal bar.

A point of note is that, insofar as values are associated with more ethical decision-making, the in-house lawyers in our sample are associated with significantly lower self-enhancement scores. This may well reflect that most of the in-house lawyers responding to the survey were government lawyers, there is work suggesting students wanting to be government lawyers have a less self- or financially-driven view of their own work (and so a stronger disposition to ethicality).<sup>55</sup> This is supported by their lower valuing of achievement and power and higher valuing of security when looking at the 10-dimensions model. Values are not the only determinant of ethical disposition, but it is an interesting indicator that the in-house lawyers surveyed here may be *somewhat* more *disposed* to ethical decision making.

What is surprising in these results is that the family lawyers surveyed valued universalism somewhat less and achievement and power somewhat more than the other advocates in our sample. This does not fit the stereotype of family practitioners, although – more predictably - their valuing of benevolence is higher. This seeks to measure the importance of preservation and enhancement of the welfare of people with whom one is in frequent personal contact, which could include clients. It may also be the case that more family practitioners in our survey were engaged in privately paying client work, whereas criminal and civil practitioners might generally have more of their work funded by legal aid or CFA type agreements respectively which may have a relationship with their interest in achievement and power. Another possible explanation is that a concern for justice in family may be seen as more conflicted: with family disputes not uncommonly being intractable and messy, and practitioners typically acting for men and women, they may feel less attraction to the idea of justice simpliciter; whereas civil and criminal practitioners may tend to have a more definite commitment to one side of a dispute (e.g. defendants in criminal work, claimants in personal injury work).

In sum, some interesting – if modest – differences between practitioners working in different areas of law were teased out by the survey instrument which would tend to suggest there may be some – again modest – differences in disposition of different kinds of practitioner to ethical problems related to work area. These differences were significantly less strong than the four clusters we identified, suggesting that thinking of practitioner value dispositions in terms of their work type is not particularly helpful.

---

<sup>55</sup> Testing the in house term;  $\chi^2_1 = 4.77$ ,  $p = 0.029$ .

<sup>56</sup> See, Moorhead et al, n. 27

## Ethics problems

It will be recalled that Schwartz' theory suggests that a person's values may influence their ethical decision making. For this reason we gave each respondent to the survey a short series of ethics problems to enable us to examine their responses and see if those responses appeared to be influenced by their values.

The questions were introduced in the following way:

*We now want to ask you to consider some ethical dilemmas. This is not a test. There are no right answers to these questions. Here we are interested in what you think you would do, not what you think you ought to do. Please select the option that best fits with your answer.*

## Balance sheet problem

The first question was as follows:

*You are asked to advise a large investment bank on a transaction that it wants to use to lower its leverage by engaging in off balance sheet accounting. There is room for doubt as to whether the transaction is legitimate under accounting rules, but your view is that it is probably not. One of the tests under the accounting rules is whether the transaction is a true sale. They ask you to give an Opinion saying the transaction is a true sale. You expect that will help them make the case that the accounting treatment is lawful, even if it is probably not. That Opinion will be competent and correct: you are sure the transaction is a true sale. You are not asked to advise on the accounting rules. The Opinion may lead to accounting breaches associated with off balance sheet accounting, but you do not know that it will. Would you give the Opinion?*

The respondents were given two options: yes or no. The point of the problem is that the lawyer is asked to give a piece of advice which can be competently and correctly given but may lead to unlawful, even criminal conduct. Should they do so?<sup>57</sup> When this scenario has been used anonymously with more senior commercial and in-house lawyers in a training context, then about 25 percent have said they would give the opinion.<sup>58</sup> If we regard the giving of the opinion as the ethically more risky approach then it is perhaps surprising that 58 percent of our respondents said they would do this. The distribution of yes and no varies significantly by work type (Table 6).

---

<sup>57</sup> The scenario is a significantly abridged and simplified version of a problem manifesting in relation to Lehman Brothers. See, David Kershaw and Richard Moorhead, "Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession," *The Modern Law Review* 76, no. 1 (2013): 26–61, doi:10.1111/1468-2230.12001.

<sup>58</sup> Information on file with the authors.

**Table 6: Balance sheet problem – advice by work type**

	<b>Family</b>	<b>Civil</b>	<b>Criminal</b>	<b>IHLs</b>
No	59.6%	31.3%	51.2%	40.9%
Yes	40.4%	68.8%	48.8%	59.1%
Total	47	160	80	93

It is noticeable how much more appetite the civil practitioners had for giving the advice, with the in-house lawyers being the next most likely (although, interestingly, within that group only 40 percent of in-housers working in the commercial sector said they would give the advice). Differences by profession type are shown in the next table; it shows the (small number of) chartered legal executives were much more cautious than the barristers or solicitors surveyed.

**Table 7: Balance sheet problem – advice by profession**

	<b>No</b>	<b>Yes</b>	<b>Total</b>
Barrister	39.5%	60.5%	256
Legal Executive	100.0%	0.0%	9
Solicitor	42.0%	58.0%	81
All	41.6%	58.4%	346

If we think about the results in terms of the four clusters of values types we would predict - can see - that the seekers and the pragmatists were less inclined to say they would do this than the strivers or the innovators.<sup>59</sup>

**Table 8: Balance sheet problem – by value clusters**

	<b>Striver</b>	<b>Innovator</b>	<b>Pragmatist</b>	<b>Seeker</b>
No	30.5%	35.8%	42.9%	51.6%
Yes	69.5%	64.2%	57.1%	48.4%
Total	59	81	112	93

Let us now examine the influence of values, firstly along the four dimensions (Figure 16). We can see some significant differences suggesting some association between values and the decisions on this problem.<sup>60</sup>

<sup>59</sup> Bivariate analysis suggested there was a significant difference,  $\chi^2(3, N = 345) = 8.024, p = .046$

<sup>60</sup> T-tests were conducted \* denotes  $p < .05$  and \*\*  $p < .01$ .

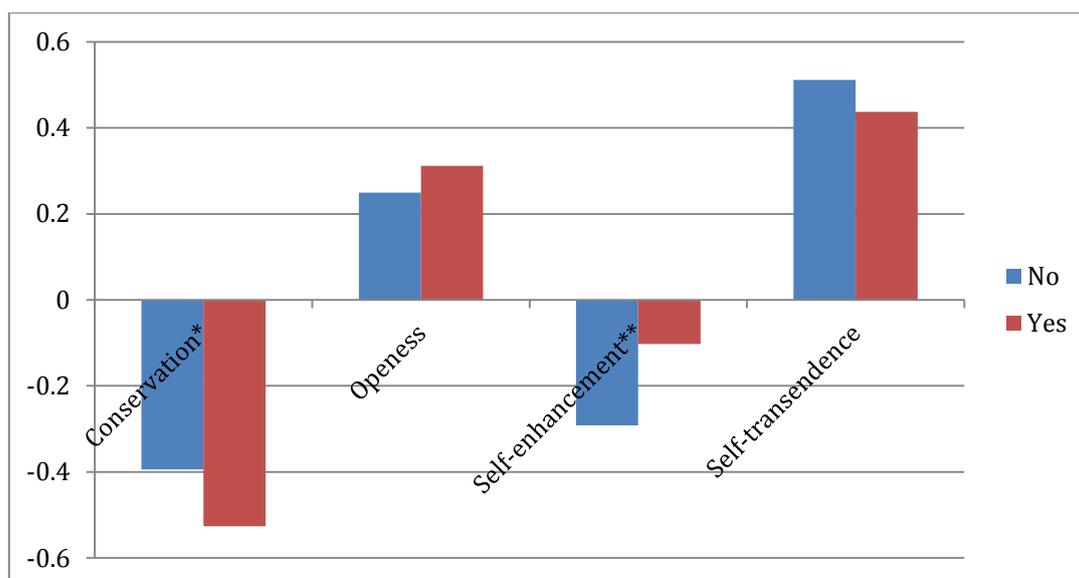


Figure 16: Balance sheet problem – values profiles, 4 dimensions

Weaker valuing of conservation is associated more with a willingness to take risks, fitting with the assumption that giving the advice here is the riskier path. Similarly, higher valuing of self-enhancement is associated with a somewhat less ethical disposition and so we find here. If one assumes that pleasing the client is in one's interests and that it is possible to articulate a defensible professional conduct position on giving the opinion, or it is unlikely one's opinion would be exposed to scrutiny, then the course of action would be more likely to enhance the self.

Figure 17 looks at the ten dimensions of values. Tradition is significantly less highly valued and power significantly more highly valued by those saying they would give the opinion. Achievement was also more valued by those giving the opinion, but this was not quite significant. In terms of ranking, we can see that those saying they would give the opinion tended to rate achievement more highly than universalism, whereas the position was reversed for those saying they would not give the opinion.

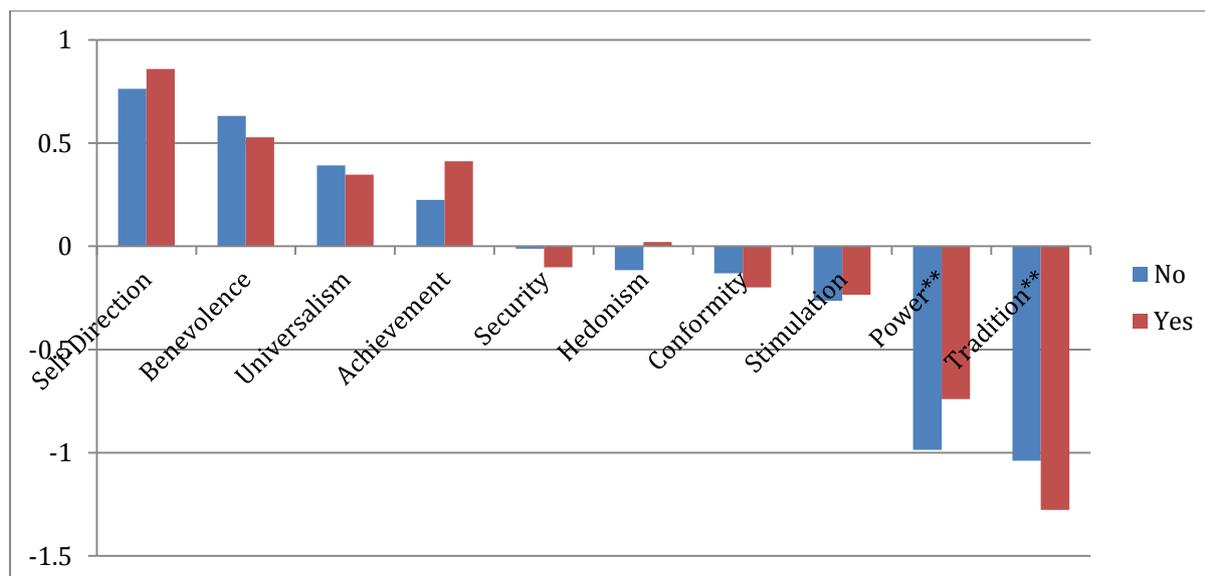


Figure 17: Balance sheet problem – values profiles, 10 dimensions

### Stolen TV problem

In the next question the advocates are asked this:

*A defendant is tried for possessing stolen property, a TV set found in the rear seat of his car. The defendant's lawyer knows that the boot of the car would not open because of a broken lock and this is the explanation for the TV being on the back seat. The lawyer cross-examines the police officer who found the car with the TV in it.*

*If it helps them get their client acquitted, is the defendant's lawyer right to ask the police officer in cross-examination, "Isn't it odd that someone in possession of a stolen TV would put it on the back seat of the car in full view?"*

They are given two options again: yes or no. The problem aims to test a willingness to risk asking a question which potentially misleads the court. The advocate knows that the TV set is on the back seat because the boot of the car cannot be opened, but it implying that it is there as an indicator of innocence. Hence, answering yes here is the riskier approach.

A similar question was used in the Jubilee Centre's recent research on virtues. In that study, 34 percent of barristers and 70 percent of solicitors would ask the question.<sup>61</sup> In our study, barristers, solicitors and legal executives all answered yes or no in similar proportions so Table 9 shows the results by work type where there is more variation (although these differences are not statistically significant).

<sup>61</sup> James Arthur and et al, "Virtuous Character for the Practice of Law Research Report" (Jubilee Centre, University of Birmingham, 2014), 34.

**Table 9: TV set vignette by work area**

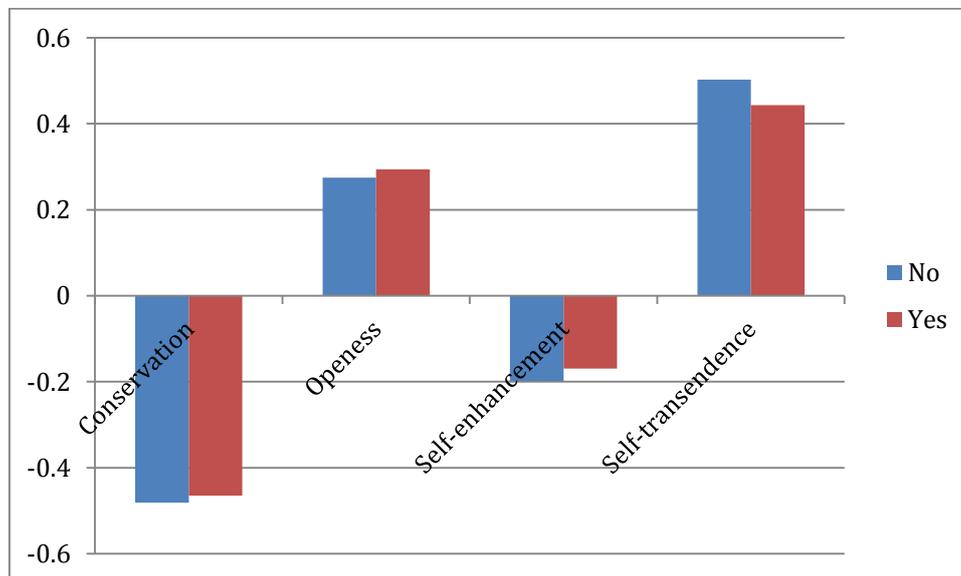
	Family	Civil	Criminal	IHLs
No	44.7%	38.1%	40.0%	48.4%
Yes	55.3%	61.9%	60.0%	51.6%
Total	47	160	80	93

If we look at the results by values clusters then the strivers are seen to be taking the more risky path but the differences are not in fact significant (Table 10).

**Table 10: TV set vignette by values clusters**

	Striver	Innovator	Pragmatist	Seeker
No	35.6%	44.4%	41.1%	44.1%
Yes	64.4%	55.6%	58.9%	55.9%
Total	59	81	112	93

Figure 18 shows the mean values profiles of those who answered yes and those who answered no using the four dimensions. The differences are not significant but self-transcendence is slightly lower and self-enhancement slightly higher for those who indicated yes.



**Figure 18: TV set vignette – values profiles, four dimensions**

Figure 19 shows the situation for the ten dimensions. Bivariate analysis suggests universalism is significantly more highly valued by those saying “no” again consistent with predictions.

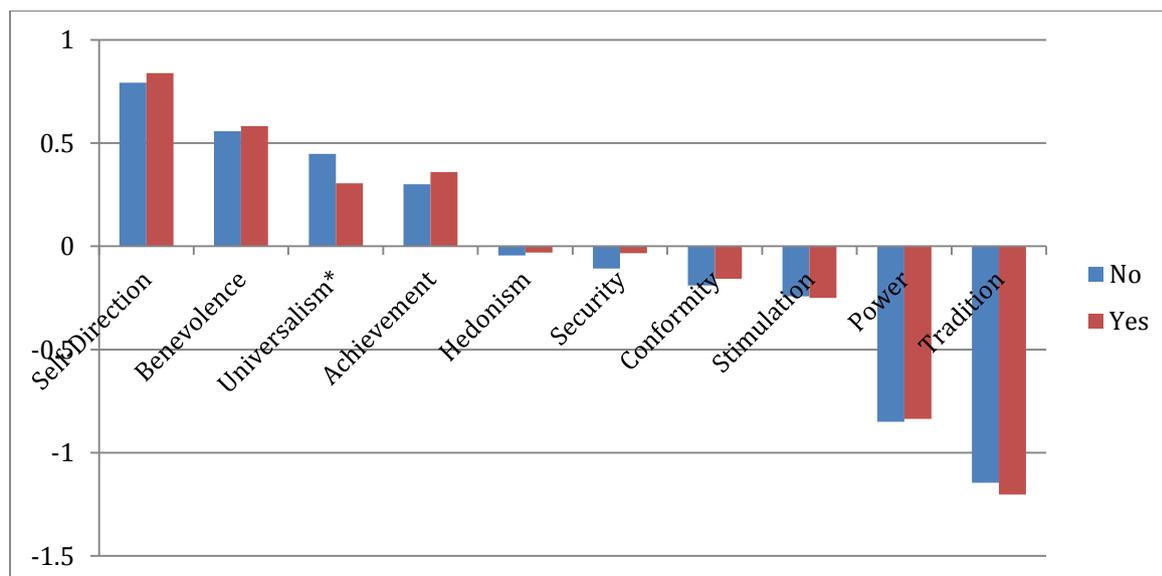


Figure 19: TV set vignette – values profiles, ten dimensions

### Drunk colleague vignette

The final problem was this:

*You are an advocate in court being led by a more senior barrister from your chambers or a more senior solicitor from your firm on a two day case. Each of you is prepared to deal with different parts of the case. After lunch on day one your colleague returns late and smelling strongly of alcohol. S/he appears confused. When you attempt to speak to him/her s/he brushes you off and when you attempt to challenge him/her as to whether she has been drinking s/he is rude and aggressive and goes straight in to court to recommence the hearing. The afternoon of the trial, with which your more senior colleague is dealing, goes very badly. At the end of the day the court adjourns and your colleague rushes off before you can speak with him/her further, what do you do?*

The options given were:

Wait to raise the matter with him/her the next morning in the hope that you can get more sense out of her

Raise the matter with the client immediately after the hearing and recommend he sack your colleague

Call the BSB, SRA or IPS immediately to report him/her for serious misconduct

Allow the matter to proceed and hope that no harm results

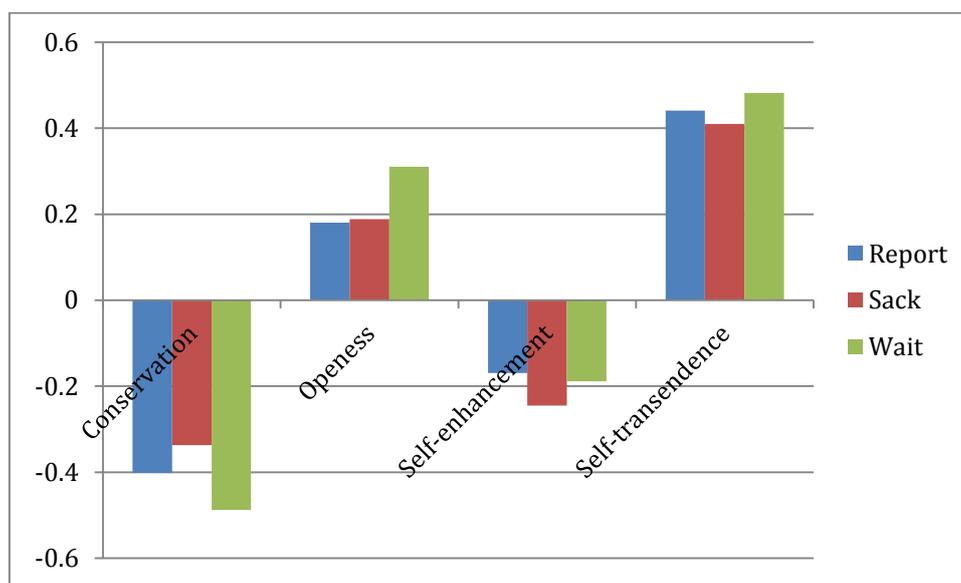
In this problem we see interesting tensions between the clients' interests, the interests of justice (both those in the court room and also in relation to how the apparently drunk

colleague is treated) and the interests of the individual lawyer. Although both the SRA and BSB require a solicitor or barrister be reported for serious misconduct, only 15 percent of barristers, compared with 7 percent of solicitors said they would report their colleague (the difference in the distributions did not appear to be significant). The results are shown by work type in Table 11(although, again, the differences were not significant).

**Table 11: Drunk colleague vignette by work type**

	Family	Civil	Criminal	IHLs
Allow the matter to proceed and hope that no harm results	0.0%	0.0%	0.0%	1.1%
Call the BSB, SRA or IPS immediately to report him for serious misconduct	19.1%	9.4%	13.9%	15.1%
Raise the matter with the client immediately after the hearing and recommend he sack your colleague	0.0%	8.2%	3.8%	8.6%
Wait to raise the matter with him the next morning in the hope that you can get more sense out of him	80.9%	82.4%	82.3%	75.3%
<b>Total Number Respondents</b>	47	159	79	93

It is more difficult to predict the potential influence of values in this scenario. Waiting is the course of action which is likely to lead to the most unpredictable outcome, hence we might (and indeed do) see a higher valuing of openness (Figure 20).



**Figure 20: Drunk colleague – values profiles, four dimensions**

Similarly, an analysis of the ten dimensions does not produce any significant differences (Figure 21).

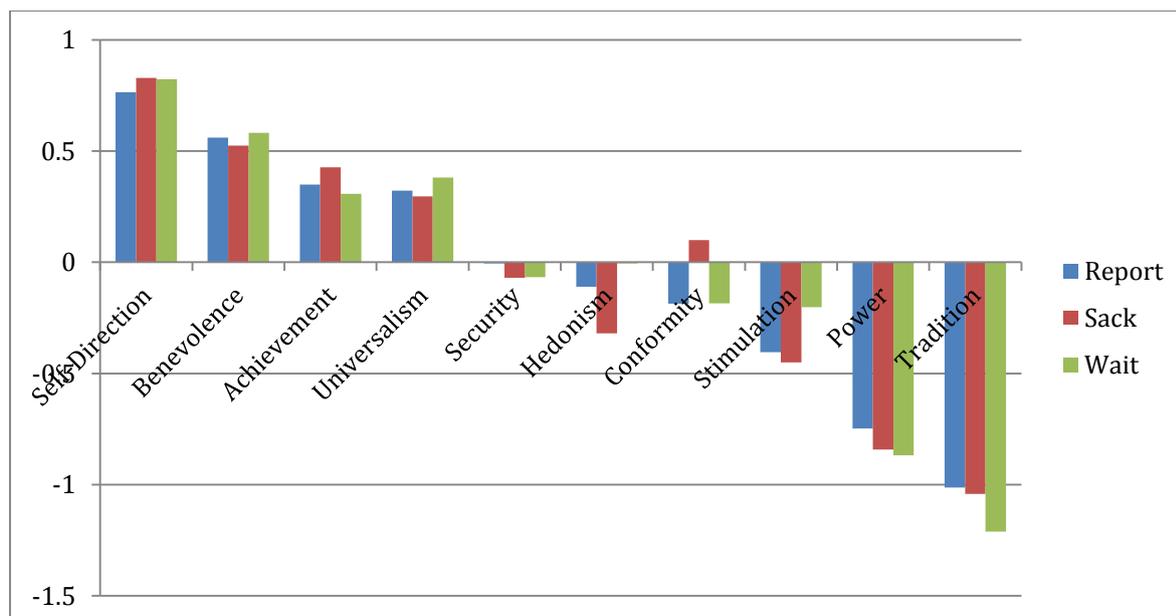


Figure 21: Drunk colleague – values profiles, ten dimensions

Overall, then we see significant associations between values and ethical decision making in the first scenario; but a much less conclusive relationships in line with the predictions in the second scenario and a weaker position still in the third scenario. As such, on the basis of this evidence, what have we learnt about the values tool? It provides an interesting way of exploring differences in the value preferences of advocates. On the basis of this research and our experience of using it in training sessions we can see it is a useful way of exploring subjectivity with lawyers. We can see this particularly from the four clusters of value types that our advocates were categorised under. We can see also that values may have some relationship between values and ethical decision making and that the relationship is consistent, for some problems, with the predictions of Schwartz. Equally, as one would expect and hope, ethical decision making is influenced by other factors – including the applicable professional rules and principles. Values may provide some added insight but it is a long way from the total picture.

## Summary

Advocates in the survey attached a great deal of importance to their own integrity and values as influences on their professional conduct. Yet it is rare for such personal values, and their influence on ethics, to be explored in an explicit or meaningful way in research or training on lawyers' ethics. This project explores these questions.

Better understanding advocates' values may provide some insight into differences between advocates and ways of beginning to explore subjectivity and discretion in ethical decision-making. Much of the professional focus on ethics training sees it as a rational, rule-based process; but there may be merit in understanding and exploring the less overt, formally rational elements of decision-making.

An advocate that better understands his or her own values may better understand and improve their own decision making. We have seen that advocates do not have one

consistent values profile. To illustrate this we identify four groups of advocate values profiles:

- Strivers who appear most motivated by a suite of self-oriented values.
- Innovators who are the most open to change, for whom values that might constrain risk-taking (conformity and tradition) are the least valued.
- Pragmatists who valued a mixture of pro-social and self-oriented values highly.
- Seekers who valued justice, the interests of those close to them and conformity, highly.

We saw some significant associations between values and ethical decision making in the first of three ethical vignettes; much less conclusive relationships, nevertheless in line with the predictions, in the second scenario and a weaker position still in the third scenario. The values tool provides an interesting way of exploring differences in the value preferences of advocates. On the basis of this research and our experience of using it in training sessions we can see it is a useful way of exploring subjectivity with lawyers. Equally, as one would expect and hope, ethical decision making is influenced by other factors – including the applicable professional rules and principles. Values may provide some added insight but it is a long way from the total picture.

# 7

## Summary

This research examined the ethical capacities of ‘new advocates’. It:

- a) examined the ethical knowledge and skills learned from undergraduate studies, vocational legal education, and training and pupillage by new advocates;
- b) provides an evidence base to support the need for improving ethical education and training; and,
- c) establishes a basis for developing and designing improvements in the materials and approach used in professional ethical training.

One of the primary motivations for the research was the ATC’s wish to improve the ethics element of the New Practitioner Programme and for other interested professions to be able to consider their own education and training. For the purposes of the project, ‘new advocates’ was defined as:

- Practising Chartered Legal Executives within three years of gaining an Advocates Certificate;
- Practising Barristers within three years of getting a full practicing certificate; and,
- Practising Solicitor within three years of completing their higher rights qualification.

The three year period reflected the fact that under the New Practitioner Programme all barristers have to engage in three hours of ethics training within three years of taking up a tenancy.

## Methods

Participants were recruited who practised in family, crime and civil advocacy and in-house positions. Recruiting sufficient interviewees was difficult. In the end the project did not recruit as many solicitor Higher Court Advocates as it had hoped. The number of CILEx members with relevant advocacy qualifications was small and as a result very few were recruited to the research.

Requests to new advocates to participate in an online ethics survey yielded 349 survey completions. 256 barristers, 81 solicitors and 9 CILEx members participated. The survey explored advocates’ attitudes and approach to ethics and ethics training as well as collecting data on their values and responses to three short ethics problems included to explore the influence of values on ethical decisions.

At the end of the survey, respondents were asked if they were willing to be interviewed. 78 interviews were secured: 61 with barristers, 16 with solicitors and 1 with a CILEx member, one of which was not used because only three of the ethical vignettes were completed. There was a good range of participation from different work areas (civil, crime and family) and from in-house lawyers in the Government Legal Service.

The interview was based on six vignettes containing ethical problems which the interviewees were asked to respond to by saying what they would do and what governed their decision. It was not a memory test; interviewees were not expected to remember specific rule numbers and the like, but we were examining what principles and rules they identified and applied to the problems. The vignettes were designed with the assistance of the project working group and expert assessors (experienced practitioners and trainers both with significant experience in legal ethics). The interviewees also discussed advocates' thoughts about ethics training.

These interviews were analysed by the researchers and were anonymised for, and then assessed by, the expert assessors.

### **Differences of approach revealed by the transcripts**

The ethical vignettes exposed a range of approaches to ethical problems. To illustrate this Chapter Three takes us through some of the different approaches to one work area's vignettes (the criminal ones). In relation to a problem of an undisclosed conviction, for example, we saw how interviewees interpreted the client's best interests in diametrically opposed ways: one approach was that it was in the client's interest to disclose the conviction (thus nullifying the ethical problem if the client consents) the other that it was not. The former approach suggests a tendency to reframe ethical questions as tactical questions and so enable the advocates concerned to ignore or play down ethical problems. To take another example, a client's wish to sully a witness's reputation was discouraged as tactically unwise rather than articulating, recognising and dealing with the problems from an ethical perspective (that certain kinds of allegation had to be supported by reasonable evidence).

It is possible that taking a tactical approach was a signal of a lack of confidence about ethical questions. Whilst the vignettes most often led to the implicit or explicit consideration of the relevant professional core duties/principles, the more detailed elements of a problem which called in to play rules and guidance or that should have led to the articulation and balancing of the conflicts between the principles and rules was less well handled. Sometimes more questionable practices were articulated: informally tipping off the prosecution as to missed previous convictions without gaining the client's consent being one example.

Another interesting issue raised by the interviews was a tendency for some towards a shallow interpretations of the facts. These were sometimes self-serving in the sense that the interpretations avoided ethical conflicts with which a more balanced or pessimistic interpretation would have forced a confrontation. The vignette about clients changing their instructions was an interesting example of this: some interviewees simply said, in essence, clients change their instructions and as long as they understand the risks in doing so, they can do it. Other took a much more active look at the whether the change in instructions

was tenable, and what that meant for their complicity in any potential misleading of the court.

More broadly, the interviews revealed a range of approaches and a varying quality of articulation and application of rules and principles relevant to the ethical problems.

### **Expert assessment of interviews**

Overall a reasonably clear picture emerged across a range of indicators from the assessments. About half the cohort of interviewees performed well or reasonably well; a third performed well only about half the time and the remaining proportion generally performed poorly.

We get a good sense of the range of performance and the problems within the cohort of interviewees from the comments of the expert assessors. The problems seem to be common to all work areas. In broad terms, those performing well demonstrated a strong knowledge of professional principles and rules but, importantly, were also confident in their application of those rules and principles to the problems we posed to them. They were able to think round a problem and think forward in terms of how things might develop. Such high performance was rare; even amongst the top slice of interviewees there were generally some, albeit occasional or more minor, weaknesses on some questions.

Weaker interviewees:

- did not always spot enough of the duties and principles engaged by the scenarios;
- failed to balance competing duties (a common problem was to recognise the need, or potential need, to withdraw from a case, but to fail to mitigate that response by considering alternatives to withdrawal and/or advising the client on that situation); and/or,
- showed a lack of confidence in dealing with relevant professional rules and principles and their implications for case handling.

The poorer interviewees tended to:

- demonstrate the above problems, but more frequently;
- tended not to recognise significant ethical dimensions to a problem;
- showed a stronger tendency to rely on intuitive responses to problems;
- treated ethical dilemmas as tactical not ethical problems; and,
- got relevant rules and principles wrong.

The poorest (a small minority) appeared to have a very limited grasp of ethical principles.

These problems were reflected in our assessors' views on training needs. Most interviewees were viewed as needing some training although a large proportion of these were thought to need only minimal or modest refresher type training.

Where the failings were more serious, a need for training targeted at particularly weak areas of the interviewees' performance and/or in developing more analytical or methodical approaches to solutions on ethical problems was perceived. There was a need for more practice on problems across a range of areas to establish what the range of acceptable responses were and to get the advocates used to thinking through ethical problems in a more principled and practical way. It is worth noting that this was partly about developing appropriate circumspection or confidence in the interviewees' decision-making in the area.

Deeper training was needed for a significant minority of interviewees. The nature of what this training would cover seemed largely similar to the previous group, but with a stronger need to go back to basics and a more comprehensive look across the range of ethical obligations and potential problems.

Beyond this, a significant minority were felt to need something akin to total retraining.

### **The perspectives of the advocates themselves**

The views of our sample of advocates were gleaned through the survey and the interviews. There was an interestingly consistent view that the professions need to concentrate on improving ethics training once practitioners enter practice as pupils or trainees and that this improvement needs to be engendered across the life course of the advocates' career. Entry into actual practice was critical: then practitioners had real experience and an understanding of the pressures they faced and so could more meaningfully grapple with and understand ethical dilemmas.

Interviewees presented their biggest ethical challenges as stemming not from a lack of understanding of the rules or principles, but as a result of their interaction with others in the justice system and often as a result of their inexperience. They framed their most common ethical problems as one of managing clients, (and for barristers) clerks and instructing solicitors. The tension between a barrister's duties to the client and the court and the interests of chambers is one that may deserve more attention than it currently gets, particularly as new forms of practice become more prevalent under alternative business regimes. Training needs which focus more on managing relationships with instructing solicitors, with clients, with clerks and for in-house advocates, with employers might go some way to addressing the needs expressed by interviewees.

The view that principles and rules are well understood is somewhat in tension with the view of our expert assessors. Their assessments suggest that often new advocates do lack the knowledge of relevant rules and principles of professional practice. Furthermore, one can see considerable overlap between the advocates and the assessors' views when one notes the emphasis amongst our advocates on a perceived need to develop experience and judgment in applying their minds to real professional problems. Assessors too saw this as a significant problem for some in the cohort. The advocates themselves saw the most useful way of doing this as being through scenario-based discussions with experienced

practitioners. Those discussions need to be safe, and engaging, but also testing and repeated with some frequency.

Comments from our interviewees suggested also that a range of other issues might be considered: the adequacy of vocational training in ethics was frequently doubted; experience of pupillage was inconsistent; and on these interviews the quality of the NPP, whilst generally praised, was not uniform. Some found sessions thorough and rewarding others that discussions only scraped the surface of ethics problems that they were asked to handle. Instructors were sometimes thought to be excellent and on other occasions differed on the 'right' answer to problems but fudged those differences unhelpfully. Where ethical problems give rise to areas of genuine differences of opinion, those differences need to be confronted, and the professionally principled alternative ways of dealing with them articulated. That senior practitioners may be visibly disagreeing *but then glossing over that disagreement* in some training is not conducive to learning. Some sub-sets within the profession (notably in-house and family lawyers) felt the lack of tailored courses limited the utility of the training for them.

### Values and ethics

Advocates in the survey attached a great deal of importance to their own integrity and values as influences on their professional conduct. Yet it is rare for such personal values, and their influence on ethics, to be explored in an explicit or empirical way in research or training on lawyers' ethics. This project explores these questions.

Better understanding advocates' values may provide some insight into differences between advocates and ways of beginning to explore subjectivity and discretion in ethical decision-making. Much of the professional focus on ethics training sees it as a rational, rule-based process; but there may be merit in understanding and exploring the less overt, formally rational elements of decision-making. An advocate that better understands their personal values may better understand and improve their personal decision making.

As part of that process we sought to pilot an online, web-based tool (part of the online survey) as a way of examining individual values and ethical decision making as a way of considering whether such a tool has potential utility as part of a training package. The tool consisted of: an online version of Schwartz' portrait values questionnaire; and, a suite of short ethical problems to explore differences in ethical decision-making.

Advocates do not have one consistent values profile. To illustrate this we identify four groups of advocates with somewhat similar values:

- Strivers are motivated by a suite of self-oriented values, garnering recognition for their achievement, being able to think things through and decide things for themselves, influence and economic recognition (power). The values of benevolence (valuing the interests of those close to them, e.g. be they colleagues or clients) and universalism, are unusually lowly prioritised.

- Innovators value a mixture of self-direction, and socially validated achievement, alongside benevolence and fairness. Values that might constrain risk-taking (conformity and tradition) are the least valued.
- Pragmatists valued benevolence highly but universalism less strongly, and these pro-social values were separated by self-direction and more self-interested values. It is also worth noting that the difference in the means of these values was smaller.
- Seekers value self-direction, universalism, benevolence and conformity highly: their self-interest was shown in being able to think things through for themselves, but in the context of valuing justice, the interests of those close to them and whilst also valuing conformity highly.

Our analysis showed some difference in values associated with work type (family, crime, civil or in-house) but little or no difference when comparing barristers and solicitors, save barristers valued power more. In sum, some interesting – if modest – differences between practitioners working in different areas of law were teased out by the survey instrument which would tend to suggest there may be some – again modest – differences in disposition by the type of work lawyers practice.

We did see some significant associations between values and ethical decision making in the first of three ethical vignettes; much less conclusive relationships in line with the predictions in the second scenario and a weaker position still in the third scenario. What therefore, can we say about the utility of the values tool? It provides an interesting way of exploring differences in the value preferences of advocates. On the basis of this research and our experience of using it in training sessions we can see it is a useful way of exploring subjectivity with lawyers. Equally, as one would expect and hope, ethical decision making is influenced by other factors – including the applicable professional rules and principles. Values may provide some added insight but it is a long way from the total picture.

## Gap Analysis

In considering the results of this research and, in particular, the apparent shortcomings in the capacities of the new advocates this research evidences, it is worth returning to the basic regulatory expectations.

The Bar Professional Training Course specification and guidance sets out the expectations of those passing the BPTC.<sup>62</sup>

*The ethos of the course requires a method of delivery that:*

*...seeks to inculcate a professional approach to work and to develop in students a respect for the principles of professional ethics...*<sup>63</sup>

---

<sup>62</sup> Bar Standards Board (2013) *Bar Professional Training Course: Course specification requirements and guidance*, [https://www.barstandardsboard.org.uk/media/1623145/bptc\\_handbook\\_2013-14.pdf](https://www.barstandardsboard.org.uk/media/1623145/bptc_handbook_2013-14.pdf) last accessed 13th July 2015

Intended Learning Outcomes give the clearest indications of what is to be expected of students:<sup>64</sup>

*By the end of this unit the student will be able to:*

- 1. Understand and appreciate the core professional values which underpin practice at the Bar of England and Wales, particularly the additional moral responsibilities held by the profession (over and above the population in general) due to decision-making roles, functions and authority which are key to practice at the Bar*
- 2. Correctly identify issues of professional ethics and conduct which appear in given situations as likely to arise in a barrister's practice (e.g. conflict of interest)*
- 3. Demonstrate a sound working knowledge of the provisions of the Code of Conduct of the Bar of England and Wales, including the equality and diversity rules, and demonstrate existing and future adherence to that Code*
- 4. Demonstrate the capacity to provide a professional and responsible approach to clients who place trust in the profession on the basis that the service provided will be of benefit*
- 5. Display a professional and responsible approach to the course, staff and other students, and to observe the Code of Practice in order to prevent exploitation of clients and preserve the integrity of the profession, maintaining the public's trust and ensuring continuance of the provision of service*

The document also emphasises the centrality of ethics and that it is intended to be taught pervasively throughout course modules.<sup>65</sup>

*All teaching and learning must be designed to enable students to appreciate the core principles which underpin the Code of Conduct. Providers must ensure the participation of experienced practitioners in the design and delivery of professional ethics issues within the course. Professional ethics issues should be included in group discussions and other course activities, so that Providers can demonstrate that professional ethics pervade all aspects of their course.*

---

<sup>63</sup> Id. 10

<sup>64</sup> Id. 39

<sup>65</sup> Id. 39-40

*Professional ethics must be taught as a separate unit, seriously and in-depth. Case studies (highlighting practical dilemmas) and practical examples should be used.*

There is also the potential for an ethics failure on an assessment to constitute a 'fatal flaw' meaning the student does not pass the course.<sup>66</sup>

*A 'fatal flaw' is normally defined, for these purposes, as an error of law or procedure. However, an Ethics issue in a skills assessment may also be regarded for consideration as a 'fatal flaw.'*

[This would include] ...[s]erious professional misconduct that would result in action by the BSB.

Expectations of LPC students are set out in the Legal Practice Course Outcomes.<sup>67</sup>

*On completion of Stage 1 students should be able to identify and act in accordance with the core duties of professional conduct and professional ethics which are relevant to the course.*

*...By the end of Stage 1, a successful student should be able to demonstrate an understanding of and ability to apply the Principles and the Code of Conduct to issues and situations relating to work likely to be encountered by trainee solicitors...*<sup>68</sup>

Within most of the modules that make up the LPC there is a requirement that the students be able to, "recognise conduct issues and act within the Code of Conduct."<sup>69</sup>

As we have seen, within our cohort of interviewees:

- There were those who struggled to understand and appreciate the core professional values (as identified by the principles/core duties applicable to them);
- Only about half mostly or always correctly identify the issues of professional ethics contained in our problems (even though they were explicitly on the look out for such problems) and similarly demonstrated a sound working knowledge of their Codes of conduct;
- Significant proportions of the cohort needed or would benefit from an improvement in applying the codes to ethical problems and developing, through collaborative

---

<sup>66</sup> Id. 93

<sup>67</sup> Legal Practice Course Outcomes 2011, <http://www.sra.org.uk/documents/students/lpc/LPC-Outcomes-Sept2011.pdf> accessed 13th July 2015

<sup>68</sup> Id. 6, the document goes on to list the main headings such as client care, confidentiality, conflicts of interest and the client and the court.

<sup>69</sup> See for example, Id. 8.

discussion or otherwise, a sounder sense of the judgment calls that can be and should be made in relation to ethical problems; and,

- A small but not insignificant minority were performing at levels which appear to give rise to significant concern against these regulatory expectations.

A question of course arises as to how representative of the broader population of new advocates this group is. Under the conventions of social science, we cannot with confidence assert that this group is typical. The regulators of advocacy and the promoters of training in the field will need to consider how persuaded they are by the insights we have gleaned. As we noted at the outset of this report, among our interviewees we would expect some response bias in the results towards those more interested in professional ethics, those with greater concerns about ethics training and, given the nature of the interviews, which tested them on their ethical capacities, perhaps those who would be more confident of their abilities to deal with ethics problems. These potential biases should be held in mind when reading the results.

### **A need to go further?**

The consideration of capacities we have focused on here essentially concentrates on the ability of respondents to identify ethical problems (and only in situations where they ‘know’ there are ethical problems to be spotted); their ability to then identify the relevant rules, principles to be applied and actions to be taken; and, their ability to show how they say they would apply those rules in the practical circumstances before them. We have seen deficits in each of those elements but there are other parts of the ethics picture that are not scrutinised. We sometimes saw indications on one of these: the motivation of the candidates (when candidates refer to getting away with more in the Magistrates’ Court for example), but generally the methods are not well placed to understand an advocate’s motivation to act ethically and whether they have the character and skills to see things through.<sup>70</sup> Nor do they assess whether candidates would actually behave ethically.

Our results do suggest the importance of Boon’s analysis:<sup>71</sup>

*The consensus in the literature is that character and virtues are developed through the repetition of reasoned actions.<sup>72</sup> Ideally, this involves performing a role under supervision, so that difficulties, dilemmas and temptations can*

---

<sup>70</sup> These are two of the four elements that Rest sees as essential to the development of ethical behaviour. J Rest ‘Background: Theory and Research’ in J Rest and D Narvaez (eds.) *Moral Development in the Professions: Psychology and Applied Ethics* (Hillsdale, NJ & Hove: Lawrence Erlbaum Associates, 1994)

<sup>71</sup> Andrew Boon (2010) *Legal Ethics at the Initial Stage: A Model Curriculum* (London: Law Society), p. 24.

<sup>72</sup> Most authors agree that ‘professional moral character’ can only be built by making responses habitual; the conscious exercise of discretion during repeated ethical decision-making (W. Simon ‘Ethical Discretion in Lawyering’ 101:6 *Harvard Law Review* 1083, E.W. Myers ‘“Simple Truths” About Moral Education’ (1996) 45 *The American University Law Review* 823, J. Webb, ‘Inventing the Good: Prospectus for Clinical Education and the Teaching of Legal Ethics in England’, (1996) 30:3 *The Law Teacher* 270, D. Nicolson ‘Making lawyers moral? Ethical Codes and moral character’, (2005) 25:4 *Legal Studies* 601).

*be discussed. Donald Schon proposes a widely accepted model for one-to-one 'coaching' of reflection; seeing relationships between means, methods and results.*<sup>73</sup>

And whilst Economides and Rogers hope for: “more reflective learning ...a stronger commitment to values expected of lawyers upon qualification [and less] ...emphasis on technical skill and knowledge,”<sup>74</sup> significant proportions of our interviewees seem to be weaker than might be hoped on basic knowledge of the rules, the application of such knowledge *and* this reflective skill. The concern must be that the foundation laid during the BPTC/LPC, and the reinforcement of that foundation during pupillage/training contracts and post-qualification training is insufficiently robust or frequent to enable confident ethical practice amongst new advocates. That view appears to be supported by both the experts' assessments and the advocates' own reflections on ethical training. As Economides and Rogers note:

*The key to future professional development in the field of ethics (as well as other areas of modern practice) is to both strengthen and deepen channels of communication between trainers and practitioners in order to achieve a genuine 'praxis'.*<sup>75</sup>

*...In their book, *Sculpting the Learning Organisation* (1993) Watkins and Marsick argue that learning occurs at four interdependent levels: individual, team, organisation and society. Taking this into account, they identify the following six 'action imperatives' for the creation of a learning organisation:*

- *create continuous learning opportunities*
- *promote inquiry and dialogue*
- *encourage collaboration and team learning*
- *establish systems to capture and share learning*
- *empower people toward a collective vision*
- *connect the organisation with its environment*

---

<sup>73</sup> DA Schön, *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions* (London, Jossey-Bass Publishers, 1987) at 17, DA Schön, *The Reflective Practitioner: How Professionals Think in Action* (New York, Basic Books, 1983). For discussion regarding the initial stage see A Boon, 'Skills in the Initial Stage of Legal Education: Theory and Practice for Transformation' in J Webb and C Maughan (eds.), *Teaching Lawyers' Skills*, London, Butterworths 1996).

<sup>74</sup> Economides and Rogers n. 8, p. 32.

<sup>75</sup> *Ibid.*

*The workplace is an important site for holistic learning and developing the whole person, that is, 'rounded' individuals capable of making ethical and strategic judgments (Beckett, 2000; Becket and Hager, 2000)...*

As things stand, that hope does not appear to be fully realised for advocates.

-end-