

VALUE V. REASON: WHAT WE CAN LEARN FROM OUR COLLEAGUES  
“ACROSS THE POND:” A COMPARISON OF THE MODEL RULES OF  
PROFESSIONAL CONDUCT AND THE SOLICITORS REGULATION  
AUTHORITY CODE OF CONDUCT

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I. INTRODUCTION

Although there are some moderate structural and procedural differences between the British and American legal systems, the two share many core ethical principles. And though the ethical principles in these two systems are highly similar, the expression of those principles and the goals they are designed to achieve differ significantly. This article posits that the U.K. Solicitors Regulation Authority Code of Conduct, in general, better states the legal profession’s core ethical principles and is better designed to ensure the stated ethical outcomes of both systems.

Despite this fundamental similarity between the U.S. and U.K.’s legal ethics, an opposing misconception has evolved. The passage of the U.K.’s Legal Services Act in 2011<sup>1</sup> its recent full implementation allowing non-lawyer ownership in law firms, and the establishment of multi-disciplinary entities providing legal services in the U.K.<sup>2</sup> may have caused some to

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1. Important Law Update: The Legal Services Act 2007—6th October 2011, Mitchell Charlesworth (Oct. 7, 2011), <http://www.mitchellcharlesworth.co.uk/2011/10/7/important-law-update-the-legal-services-act-2007-6th-october-2011.aspx>.

2. *Financial Services Act 2012: A New UK Financial Regulatory Framework—All Change?*, GIBSON DUNN (Mar. 4, 2013), <http://www.gibsondunn.com/publications/Documents/FinancialServicesAct-2012-NewUKFinancialRegulatoryFramework.pdf>.

conclude that the differences are greater than the similarities. Evidence of this is seen from the reignited debate about whether adopting such alternative business structures in the U.S. would threaten the ethical fabric of our legal system.

However, the question of whether alternative business structures are beneficial and the ensuing debate as to whether they threaten the core ethical principles of the profession are not the subject of this paper. Rather, this paper aims to encourage a change in the way our core ethical principles are structured and stated and to serve as a foundation for that debate by providing two comparisons: (1) a comparison of each system's stated ethical values, and (2) a comparison of the measures implemented by each system to achieve adherence to these values.

Without this foundation, we risk missing a valuable analytical tool merely because we falsely assume that the American legal system's ethical values differ from those of our British colleagues—we assume it to be a comparison of apples to oranges. But generally, as suggested above, the differences are not found in the core ethical values but rather in the way these values are stated and implemented within each legal system. This comment's juxtaposed analysis of these two systems illustrates that the straightforward, clearly stated, mandatory outcomes of the Solicitor's Regulation Authority Code of Conduct<sup>3</sup> protect the values of the profession more effectively than the ABA Model Rules of Professional Conduct,<sup>4</sup> which require a complex synthesis of its rules to ascertain the desired outcomes.

Part II compares how each legal system translates these shared ethical principles into the rules that bind practitioners. In particular, part II is divided into subsections, which compare the treatment each legal system gives to each ethical principle or topic:

- A. Overview and Scope Provisions*
- B. Financial Matters and Attorney-Client Relationship*
- C. Equality and Diversity*
- D. Conflicts of Interest: Between Attorney & Clients and Between Clients*
- E. Conflicts of Interest: Between Clients and the Justice System*
- F. Attorneys Acting as Escrow Agents*
- G. Law Firm Management*

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3. SRA CODE OF CONDUCT (2011), available at <http://www.sra.org.uk/solicitors/handbook/code/content.page>.

4. MODEL RULES OF PROF'L CONDUCT (2009), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html).

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*H. Duties to Regulators**I. Relationships with Third Parties***II. STRUCTURAL DIFFERENCES BETWEEN THE MODEL RULES OF PROFESSIONAL CONDUCT AND THE SOLICITORS REGULATION AUTHORITY CODE OF CONDUCT**

The Model Rules of Professional Conduct (Model Rules or Rules), first adopted in 1983 and regularly updated since then,<sup>5</sup> are comprised of fifty-six substantive, mandatory rules, and one voluntary rule.<sup>6</sup> Together they form a system for governing the ethical conduct of American attorneys. Although each state determines its own ethical rules, there is enough uniformity among the states that using the Model Rules to represent the overall American ethical standard is both fair and convenient.

The actual *rules* of the Model Rules are binding and should be differentiated from the non-binding *comments*. The substance of each rule embodies both the mandatory and permissive standards of the core ethical principle it addresses. The non-binding comments following each rule “explain[] and illustrate[] the meaning and purpose of the Rule[s].”<sup>7</sup> The comments sometimes articulate the public policy and legal principles underlying each rule, and other times they offer guidance on how to reconcile the competing interests that all ethics issues involve.

The Solicitors Regulation Authority Code of Conduct (SRA Code or Code) was first created in 2011 with its most recent version, Version 10, adopted on July 1, 2014.<sup>8</sup> The SRA Code consists of ten mandatory principles.<sup>9</sup> In addition to these principles, there are stated outcomes and interpretations that are mandatory as well.<sup>10</sup> The SRA Code also contains examples of “Indicative Behaviours” and notes, which, although not binding, “help . . . to decide whether an outcome has been achieved in compliance with the Principles.”<sup>11</sup>

*A. Overview and Scope Provisions*

The differences between the SRA Code and the Model Rules are apparent even from their respective introductory sections. Compare the

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5. MODEL RULES Preface.
  6. *See generally* MODEL RULES Preface.
  7. MODEL RULES Preamble and Scope cmt. 21.
  8. SRA CODE Overview.
  9. *Id.* at The Principles.
  10. *See id.* at ch. 1.
  11. *Id.* at Introduction, Non-Mandatory Provisions.

following selected excerpts from the Model Rules' *Preamble and Scope* with those selected from the SRA Code's *Overview*.

Model Rules:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.<sup>12</sup>

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.<sup>13</sup>

The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.<sup>14</sup>

SRA Code:

Outcomes-focused regulation concentrates on providing positive outcomes which when achieved will benefit and protect clients and the public<sup>15</sup>. . . . Where two or more Principles come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice.<sup>16</sup>

The Model Rules assume that a lawyer's duty to the public will be fulfilled if the lawyer adheres to the rules. Thus, the Model Rules imply that the written rules alone provide the lawyer with what she needs to achieve the American system's core ethical values.<sup>17</sup> In contrast, the SRA Code assumes that its ten principles alone may not provide sufficient guidance. Rather, the Code offers the solicitor a *prevailing* principle that he

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12. MODEL RULES Preamble and Scope cmt. 14.

13. MODEL RULES Preamble and Scope cmt. 13.

14. MODEL RULES Preamble and Scope cmt. 12.

15. SRA CODE Overview.

16. SRA CODE The Principles.

17. See MODEL RULES Preamble and Scope, § 13 ("Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.").

must apply when a conflict arises between two principles: follow the principle which has the best outcome for the public.<sup>18</sup>

The difference in scope between the Code and the Model Rules also contributes to this discussion. The Code, in addition to regulating individual solicitors, explicitly regulates firms of any kind that provide legal services,<sup>19</sup> whereas the Model Rules remain couched in language governing only individual lawyers.<sup>20</sup> This limits the culpability of the organizational structure. Additionally, many of the Model Rules clearly limit the legal organization's ethical duties by denoting that a "lawyer" shall do something, as opposed to mandating a law firm do it.

In contrast to the British legal system, disciplinary action against a firm is rare in the U.S. system.<sup>21</sup> Instead, the Model Rules regulate only individual attorneys, and any disciplinary action against such an attorney must be brought by an individual state.<sup>22</sup> The ability to discipline law firms as a whole deters unethical conduct. It holds managing partners responsible for the ethical culture of the firm and avoids the difficulty of pinpointing blame on one or a small number of people for conduct engaged in by a group.<sup>23</sup>

The U.K. structure for communicating its ethical standards is also more helpful to the public. For example, the Solicitors Regulation Authority website contains a page dedicated to informing consumers that firms must be reauthorized by the SRA every year in order to continue providing legal services.<sup>24</sup> It also features a search engine that allows consumers to check the status of all solicitors and regulated legal services providers.<sup>25</sup>

The U.S. public would especially benefit from this unified list of disciplined firms and attorneys. Without such a unified list, the American consumer faces a unique problem since U.S. attorneys are permitted to practice in more than one state. Thus, under the current system, the American consumer must investigate the individual lists of different states to determine whether any particular attorney is in good standing.

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18. SRA CODE The Principles.

19. INTRODUCTION TO THE SRA HANDBOOK Additional Information para. 2 (2013), available at <http://www.sra.org.uk/solicitors/handbook/intro/content.page>.

20. See MODEL RULES R. 1.0(c) (defining firm or law firm as a "lawyer or lawyers in a law partnership").

21. Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 5-9 (2002), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1900&context=facpub>.

22. Note, *Collective Sanctions and Large Law Firm Discipline*, 118 Harv. L. Rev. 2336 (2005).

23. See *id.* at 2356.

24. *Check a Solicitor's Record*, SOLICITORS REGULATION AUTH., <http://www.sra.org.uk/consumers/solicitor-check.page>.

25. See *id.*

*B. Financial Matters and Attorney-Client Relationship*

Both the U.K. and U.S. legal systems regulate the fees solicitors and attorneys may charge clients. Both systems also discuss how attorneys and solicitors must handle potential client claims against them, but each one chooses a different method for protecting clients in these matters. Section One of the Code requires solicitors to achieve the following selected outcomes:

1.1 you treat your clients fairly;

1.8 clients have the benefit of your compulsory professional indemnity insurance and you do not exclude or attempt to exclude liability below the minimum level of cover required by the SRA Indemnity Insurance Rules;

1.16 you inform current clients if you discover any act or omission which could give rise to a claim by them against you.<sup>26</sup>

The first clear difference is that the Code requires all solicitors to carry professional indemnity insurance, a provision that is strictly and consistently enforced.<sup>27</sup> The Model Rules, on the other hand, do not require such a practice. In the U.S., only Oregon requires attorneys to carry malpractice insurance.<sup>28</sup> Yet even that provision is not contained within the Oregon Rules of Professional Conduct, but rather within a separate Oregon statute. A minority of states, however, requires attorneys to disclose to their clients whether or not the attorney carries professional liability insurance.<sup>29</sup> While this does further the core ethical principle of protecting the public, it falls short of the standard set by the SRA. Furthermore, the SRA Code prohibits solicitors from attempting to exclude liability below the minimum level of coverage. This is directly opposite of Model Rule 1.8(h) which allows an attorney to ask a client to waive liability altogether.

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26. SRA CODE ch. 1, O.

27. See *Adesemowo v. Solicitors Regulation Auth.*, [2013] EWHC (QB) 158 (finding the solicitors to be in breach of the SRA rules for not having paid their indemnity insurance for two years); see also *Solicitors Regulation Auth. v. Spence*, [2012] EWHC (Admin) (punishing the solicitor for not having liability insurance and being dishonest by misleading that he did in fact have insurance).

28. ABA Comm. on Client Prot., *State Implementation of ABA Model Court Rule on Insurance Disclosure*, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chart\\_implementation\\_of\\_mcrd.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrd.authcheckdam.pdf) (updated Oct. 16, 2014).

29. State by State, Mandatory Malpractice Disclosure Gathers Steam, 28 BAR LEADER no. 4 at 6 (2004), available at [http://www.americanbar.org/publications/bar\\_leader/2003\\_04/2804/malpractice.html](http://www.americanbar.org/publications/bar_leader/2003_04/2804/malpractice.html).

A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability . . . unless the client is independently represented in making the agreement; or

(2) settle a claim . . . for such liability with an unrepresented client . . . unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.<sup>30</sup>

Another noteworthy difference concerning the client-attorney relationship is the way each system's respective rules treat fee setting. Model Rule 1.5 states that all fees and expenses charged to a client must be "reasonable."<sup>31</sup> This reasonableness requirement is then supplemented by a list of eight non-exclusive factors that should be considered when determining whether a particular fee is reasonable.<sup>32</sup> None of these factors contain a "values" statement—i.e., that the fee should be fair to the client at all times. One of the factors specifically states that the amount involved in the matter and the results obtained can be used in setting a fee.<sup>33</sup> Further, there is no guidance as to whether one factor should be given more weight than other factors when determining the fee. The risk then becomes that a lawyer could use this factor in reaching a fee that is "reasonable" under the Rules but not actually "fair" to the client because this factor is given greater weight. For example, an attorney could be approached by two separate clients, each seeking review of proposed divorce settlements their reached on their own with their spouses. One client is well-to-do and the other is not. The attorney, knowing of a recent change in the law impacting tax liability in divorce situations, urges both clients to change a key identical provision in the proposed settlements, thus saving them both money. Although the attorney spent the same amount of time on each client's matter and did no other work on either client's matter, the attorney could charge the client of moderate means more to satisfy the well-to-do client. This is hardly a fair treatment of both clients, yet is justified under the "results obtained" prong.

Another factor allows attorneys to take into account "the nature and length of the professional relationship with the client[.]"<sup>34</sup> Neither the

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30. MODEL RULES R. 1.8(h).

31. *See* MODEL RULES R. 1.5.

32. MODEL RULES R. 1.5(a).

33. MODEL RULES R. 1.5(a)(4).

34. MODEL RULES R. 1.5(a)(6).

comments nor the rule provide any guidance as to how this factor should be applied. May an attorney charge a client more because the client is a long-standing client? Or a new client? Or charge less? The answer appears to be “yes” on all counts. It is completely within the discretion of the attorney to charge more or less to a client, based solely on how long the attorney has known the client, as long as the total fee is reasonable.<sup>35</sup> A “factor” that can be applied in such seemingly disparate ways is not a very meaningful “factor.”

Yet another point of divergence is found in the way the U.S. and U.K. standards handle potential malpractice claims against the attorney. The SRA Code provides explicit guidance for situations where a malpractice claim may cause the client’s interests to become adverse to those of the solicitor.<sup>36</sup> In addition to requiring solicitors to inform clients of their right to complain (and of the procedure for doing so) at the beginning of the representation,<sup>37</sup> solicitors must also inform current clients of any possible claim against the attorney.<sup>38</sup> In marked contrast, the same situation under the Model Rules requires the attorney to analyze two different rules to determine whether the duty to inform a client has arisen. First, under Model Rule 1.7, a lawyer must determine whether:

[T]here is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer.<sup>39</sup>

Second, under Model Rule 1.4, the attorney must then decide whether the potential claim falls into one of the categories which require some form of disclosure to the client:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required by these Rules;

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter; . . . .

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35. MODEL RULES R. 1.5.

36. See SRA CODE ch. 1.

37. SRA CODE ch. 1, O(1.10).

38. SRA CODE ch. 1, O(1.16).

39. MODEL RULES R. 1.7(a)(2).



(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.<sup>40</sup>

Read together, these rules *suggest* that an attorney should notify a client of potential claims which any client may have against the attorney. The wording in Rule 1.7, stating that a conflict of interest arises when the lawyer's personal interests may *materially* interfere with her ability to represent the client,<sup>41</sup> leaves too much wiggle room. This ambiguity provides the opportunity for the attorney to see what he or she wants to see when faced with an ethical conundrum. Consequently, the suggestive quality and lack of clarity within the Rules creates a risk that U.S. attorneys will not accept the *suggestion*, but will instead rationalize away any potential risks to their clients. Stated differently, attorneys may convince themselves that a potential claim does not create a *significant* risk of impairing the attorney's representation when, in reality, the likely risk of impairment *is* indeed significant.<sup>42</sup>

Additionally, and perhaps as a fair representative summary, while the Model Rules require complex reasoning to ascertain proper attorney-client standards, the Code's language leads with a powerfully stated outcome that solicitors are required to treat clients fairly.<sup>43</sup> Although intended to apply generally to all solicitor-client interactions, it is especially relevant to financial dealings with them. This written outcome is a statement of values—not reason—and is echoed in another section of the Code.

### C. Equality and Diversity

The SRA Code explicitly requires solicitors to provide services to clients in a way that respects diversity.<sup>44</sup> It also requires solicitors to approach recruitment and employment in a manner that encourages equality of opportunity and respect for diversity.<sup>45</sup> When a U.K. court finds a solicitor civilly liable for discriminating against a person, that solicitor may also be subject to professional discipline for the same conduct.

Although the Model Rules mandate respect for third persons, they have a significantly narrower scope and do not have the same anti-discrimination

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40. MODEL RULES R. 1.4.

41. MODEL RULES R. 1.7(a)(2).

42. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 384 (1994), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/ethics\\_opinions/aba\\_formal\\_ethics\\_opinions\\_index\\_by\\_issue\\_dates.html](http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/aba_formal_ethics_opinions_index_by_issue_dates.html) (last visited Jan. 30, 2014).

43. SRA CODE ch. 1, O(1.1).

44. *Id.* at ch. 2, O(2.2).

45. See *id.* at ch. 2, Outcomes.

objective as the SRA Code.<sup>46</sup> Unlike the SRA Code, a U.S. attorney who is held civilly liable for discrimination faces little risk of professional discipline for the same conduct. Thus, while Model Rule 8.4 prescribes professional discipline for fraudulent behavior or criminal violations which “reflect[] adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects[]”<sup>47</sup> the SRA Code clearly signals that U.K. solicitors are expected to uphold, at all times, the *entire* law they have sworn allegiance to in return for the privilege of practicing it.<sup>48</sup>

*D. Conflicts of Interest: Between Attorney & Clients and Between Clients*

The SRA Code and the Model Rules differ significantly on conflicts-of-interest issues. Under the SRA Code, the principle governing conflicts states that a solicitor can “never act” where there is a conflict or a significant risk of conflict between the solicitor and the client.<sup>49</sup> A conflict between a solicitor and a client is found when the solicitor’s “ability as an individual, or that of anyone within [her] firm, to act in the best interests of the client(s), is impaired by:

- (a) any financial interest;
- (b) a personal relationship;
- (c) the appointment of [the solicitor], or a member of [her] firm or family, to public office;
- (d) commercial relationships; or
- (e) [her] employment[.]<sup>50</sup>

In contrast, the Model Rules contain only a general prohibition against representing a client if there is a significant risk that the lawyer’s personal interests will materially interfere with the representation.<sup>51</sup> For example, the SRA Code specifically states that if one solicitor in a firm cannot act on behalf of a client because of a personal relationship—for instance because the solicitor began a sexual relationship with a person shortly before that person became a client of the firm, another solicitor in the firm cannot act on behalf of the client if the first solicitor’s ability to represent the client is

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46. MODEL RULES R. 4.4(a) (“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”).

47. MODEL RULES R. 8.4.

48. See SRA CODE ch. 2.

49. SRA CODE ch. 3.

50. *Id.* at ch. 3, O(3.2) (alteration in original).

51. MODEL RULES R. 1.7(a)(2).

impaired<sup>52</sup>—as the case may be when the client is the lover of the solicitor’s supervising attorney. (It is very difficult to tell clients what they do not want to hear—i.e., pay up, take the plea, or get your act together—under the best of circumstances, much more so when the client you are advising candidly is the lover of your boss.) However, Model Rule 1.8(k) specifically exempts conflicts of interest arising from a sexual relationship from being imputed to other attorneys in the firm,<sup>53</sup> thus clearly allowing subordinate attorneys to be placed in the situation above, to be saved only by the junior attorney self-identifying a conflict of interest under 1.7(a) by indicating that his or her ability to represent the client is “impaired.” Given human nature, this is unlikely to happen and awkward at best.

This general prohibition against conflicts of interest is evidenced by Model Rule 1.7.<sup>54</sup> It is noteworthy for this discussion that Model Rule 1.7 contains a procedure whereby a personal conflict, which *does* pose a significant risk of materially limiting the lawyer’s ability to represent a client, may be waived once the following four factors are satisfied:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.<sup>55</sup>

To sharpen the distinction between the SRA Code and the Model Rules on these conflict-of-interest issues, consider the following example: the Code indicates that a solicitor may have violated the governing principle if she sells to or buys from or lends to or borrows from a client in a personal capacity, unless the client was independently represented.<sup>56</sup> The Rules, on the other hand, specifically allow attorneys to enter into a business

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52. SRA CODE ch. 3, O(3.2).

53. MODEL RULES R. 1.8(k). While lawyers are associated in a firm, a prohibition in foregoing paragraphs (a) through (i) applies only to any one of them shall apply to all of them. Note: the prohibition against sexual relations with clients is contained in subsection (j) of the rule.

54. See MODEL RULES R. 1.7.

55. MODEL RULES R. 1.7(b).

56. SRA CODE ch. 3, IB(3.8)–(3.9).

transaction (like the ones aforementioned) with an unrepresented client, provided the client was simply advised in writing of the desirability of seeking, and was given an opportunity to seek, the advice from independent legal counsel, in addition to several other requirements.<sup>57</sup>

In the U.K. *Oakley v. Law Society* case, a solicitor lent money to his future father-in-law through a company that the solicitor controlled or was a director.<sup>58</sup> When the relationship between the solicitor and his fiancée collapsed, the fiancée's father contested his obligation to pay. The Law Society held that the future father-in-law was a client of the solicitor and that the solicitor should not have proceeded absent the client being independently represented.<sup>59</sup> In contrast, a U.S attorney would have been permitted to proceed as long as the client was advised in writing of the desirability of obtaining independent counsel and given the time to obtain counsel, and the terms of the transaction were fair and reasonable.<sup>60</sup> It is easy to see how the more restrictive U.K. standard protects clients who often operate on feelings of trust and affection for their lawyers when entering into business transactions, which may leave them vulnerable vis-à-vis the lawyer.

To be fair, one of the requirements of 1.8(a) constitutes a rare instance where the Rules utilize "values" language. The Rules require that any business transaction entered into with a client must be based on "fair" terms.<sup>61</sup> Unlike the Code, however, no examples are provided of what constitutes fair and unfair terms. Consequently, the American attorney is left to interpret this value statement on his or her own at a moment in time when the attorney is personally invested in the outcome of the transaction.

In addition to these conflict of interest issues, the SRA Code and the Model Rules also differ on conflict identification requirements. While the SRA Code contains a mandatory principle that requires solicitors to implement *effective* systems and controls to identify and assess potential conflicts of interest,<sup>62</sup> the Model Rules do not. Comment 3 to Model Rule 1.7 simply states that a lawyer should adopt reasonable procedures to determine and identify conflicts of interest,<sup>63</sup> but it contains no express mandate to act. However, it should be noted that a failure to make reasonable efforts to determine and identify conflicts of interest would likely violate the competence requirement of Model Rule 1.1, which would

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57. MODEL RULES R. 1.8(a).

58. *Oakley v. Law Soc'y*, [2009] EWHC (QB) 676, CO/7703/2007 High Court of Justice Queen's Bench Division Divisional Court (2009).

59. *Oakley*, at par. 4, 11, 23.

60. MODEL RULES R. 1.8(a).

61. MODEL RULES R. 1.8(a).

62. SRA CODE ch. 3, O(3.1).

63. MODEL RULES R. 1.7 cmt. 3.

subject the attorney to professional discipline.<sup>64</sup> Thus, Chapter 3 of the SRA Code again contains a straightforward and clear statement of mandatory outcomes that are more protective of clients than the Model Rules. In contrast, multiple Model Rules must be read in conjunction with each other in order to ascertain the desired outcome for individual clients and the public.

*E. Conflicts of Interest: Between Clients and the Justice System*

The intersection where a client's interests conflict with the interests of the justice system is one situation where the Model Rules contain a better standard than the SRA Code. The SRA Code mandatory outcome (5.5) states that clients must be informed of circumstances where the solicitor's duty to the court outweighs her obligation to the client.<sup>65</sup> This clear mandate narrowly targets issues arising when the solicitor's duties *to the court* trump the client's interest. Whereas, the ABA Model Rule 1.4 states the following: "A lawyer shall . . . consult with the client about *any* relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."<sup>66</sup> The Model Rule is broader and requires the attorney to inform the client of any instance where the lawyer's duties to serve justice outweigh the client's interests—not just those involving the court. The SRA Code does, however, contain an Indicative Behaviour that the Model Rules would be wise to adopt in its comments. IB(5.3) states that a solicitor has complied with the mandatory principles if she ensures "child witness evidence is kept securely and not released to clients or third parties[.]"<sup>67</sup>

This Indicative Behaviour is related to an ongoing debate among family law practitioners about whether lawyers involved in a custody dispute ought to interview the children concerning their preference on the matter in the presence of the lawyer's parent-client. The argument is that such action is coercive and does not achieve a fair process. The Code's mandate against revealing the child's desired custody preference protects the child and supports a fairer process. Thus, although the scope of the SRA Code's principle falls short, the clearly stated application within the related Indicative Behaviour is quite redeeming and instructive.

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64. MODEL RULES R. 1.1.

65. SRA CODE ch. 5, O(5.5).

66. MODEL RULES R. 1.4(a)(5) (emphasis added).

67. SRA CODE ch. 5, IB(5.3).

*F. Attorneys Acting as Escrow Agents*

The SRA Code prohibits solicitors from utilizing client trust accounts when acting as pure escrow agents. Thus, solicitors are limited in their ability to act as an escrow agent to instances where the attorney represents the client in an underlying legal transaction.<sup>68</sup> The purpose of the restriction is to avoid client accounts from being used for money laundering purposes.<sup>69</sup>

The Model Rules contain no similar restriction. Rule 1.15 requires that funds of third parties must be kept in a client trust account only if the funds are connected with client representation.<sup>70</sup> Under the Model Rules, there is no prohibition on depositing third-party funds in the lawyer's client-trust account should he wish to do so.<sup>71</sup>

As an example, in *Patel v. Solicitor Regulation Authority*, a solicitor who acted as an escrow agent for the sale of automobiles between two parties utilized a client-trust account for the transactions.<sup>72</sup> The solicitor confirmed the receipt of funds to the investors, and when the vehicles were sold, the solicitor distributed the profits.<sup>73</sup> The solicitor also checked the invoices, purchase orders, and other documentation to ensure that the funds were properly released.<sup>74</sup> Although the transactions were legitimate and did not constitute money laundering, the solicitor was determined to have violated the Solicitors' Accounts Rules and was fined accordingly.<sup>75</sup> Even though U.S attorneys are warned of the perils of acting as escrow agents for their clients,<sup>76</sup> they are not prohibited from utilizing a client trust account in such circumstances.<sup>77</sup>

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68. SRA ACCOUNTS RULES R. 14.5 (2014) ("You must not provide banking facilities through a client account. Payments into, and transfers or withdrawals from, a *client account* must be in respect of instructions relating to an underlying transaction (and the funds arising therefrom) or to a service forming part of *your* normal regulated activities." (emphasis added)).

69. SRA ACCOUNTS RULES R. 14.5, guidance note (v).

70. MODEL RULES R. 1.15(a).

71. *Id.*

72. *Patel v. Solicitor Regulation Auth.*, [2012] EWHC (Admin) 3373, CO/7111/2011, High Court of Justice Queen's Bench Division Divisional Court, 29/11/12, available at <http://www.bailii.org/ew/cases/EWHC/Admin/2012/3373.html>.

73. *Patel*, at par. 4.

74. *Id.*

75. *Id.* at par. 11.

76. Mike Hoover, *Attorney as Escrow Agent*, BENCH & BAR OF MINN. (Oct. 1981), <http://lprb.mncourts.gov/articles/Articles/Attorney%20as%20Escrow%20Agent.pdf> (last visited Jan. 30, 2014).

77. Ellen R. Peck, *Duties To Third Parties*, CAL. BAR J. (Feb. 2007), <http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=83603&categoryId=83541&month=2&year=2007>.

Although the SRA Code of Conduct and Accounts Rules set forth a much more restrictive standard for solicitors acting as escrow agents and utilizing client trust accounts than the Model Rules, it does not, in this instance, necessarily result in a clearer and more protective standard of conduct. Model Rule 8.4(b) prohibits an attorney from engaging in a criminal act—such as money laundering—which is sufficiently clear.<sup>78</sup> Interestingly, the argument can be made in this situation that the SRA Code and the Rules inhibit the choice of citizens who might prefer that a solicitor act as an escrow agent, even if the citizen is not a client of the solicitor.

### *G. Law Firm Management*

Both the SRA Code and the Model Rules contain provisions, if not in the rules themselves, in the comments and Indicative Behaviours, which ensure that competency and confidentiality are preserved when an attorney outsources legal services.<sup>79</sup> Neither system prevents attorneys from hiring outside entities to perform legal work for clients, as doing so may make the representation more affordable and efficient for the client, but both systems prevent the lawyer from shifting responsibility for the client to the outside service provider.<sup>80</sup>

Indicative Behaviour 7.40 states that a solicitor should make arrangements for the continuation of the firm in the event of the solicitor's absence or disability.<sup>81</sup> Many states in the U.S. are also moving to adopt similar encouragements to ensure continuity of service for clients.<sup>82</sup>

### *H. Duties to Regulators*

Two interesting differences between the SRA Code and the Model Rules involve the duty (or lack thereof) to report misconduct, financial difficulty, or both. Under the SRA Code, a solicitor must “notify the SRA promptly of any material changes to relevant information about [the solicitor] including serious financial difficulty, action taken against [the solicitor] . . . and serious failure to comply with or achieve the Principles, rules, outcomes and other requirements of the Handbook.”<sup>83</sup> In contrast, the Model Rules require attorneys to only report an attorney who has violated

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78. MODEL RULES R. 8.4(b) (“It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness [to practice law. ]”).

79. SRA CODE ch. 7, O(7.10); MODEL RULES R. 1.1 cmt. 6–7.

80. SRA CODE ch. 7, O(7.10); MODEL RULES R. 1.1, cmt. 6–7.

81. SRA CODE ch. 7, IB(7.40).

82. *Sample Contract Appointing a Successor Attorney is Approved*, CAL. BAR J. (Oct. 2010), <http://www.calbarjournal.com/October2010/TopHeadlines/TH5.aspx>.

83. SRA CODE ch. 10, O(10.3).

the Rules in a way that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.<sup>84</sup>

Thus, although both regulatory schemes require attorneys/solicitors to report serious misconduct by any attorney, the SRA Code is much broader. The SRA Code requires the solicitor to report serious misconduct by an employee of the firm as well, as exemplified in *Hazelhurst v. Solicitors Regulation Authority*, where the firm self-reported theft from the firm's client account committed by an employee over a three-year period.<sup>85</sup> Similarly, the SRA Code requires solicitors to self-report any serious financial difficulty the solicitor or the solicitor's firm may be experiencing,<sup>86</sup> whereas the Model Rules have no similar provision.

### *I. Relationships with Third Parties*

Both the U.K. and American legal systems recognize that attorneys often deal with non-client third parties, and both systems impose certain obligations when dealing with third parties. The SRA Code concludes with a chapter entitled: "You and others: . . . Relations with third parties[.]"<sup>87</sup> The chapter's first mandatory outcome requires solicitors to refrain from taking "unfair advantage of third parties in either [their] professional or personal capacity[.]"<sup>88</sup> The Model Rules' counterpart contains an entire section that governs a lawyer's transactions with persons other than clients.<sup>89</sup> These several rules, when read together, require attorneys to deal fairly with third parties.<sup>90</sup> However, this mandate is limited to situations somehow connected to a lawyer's representation of a client.<sup>91</sup> The only Model Rule that regulates an attorney's private conduct with third parties is Rule 8.4, which deems it misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]"<sup>92</sup>

So for example, attorneys in the United States who act in their own private capacity are not prohibited from forcing an unfair bargain in a sales transaction, of say a house or car, with a third party, as long as the bargain

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84. MODEL RULES R. 8.3(a).

85. *Hazelhurst v. Solicitors Regulation Auth.*, [2011] EWHC (Admin) 462 at par. 2, available at [http://www.hailshamchambers.com/downloads/hazelhurst--others-v-sra-judgment-approved-\(2\).pdf](http://www.hailshamchambers.com/downloads/hazelhurst--others-v-sra-judgment-approved-(2).pdf) (stating that the solicitor firm self-reported to the SRA that an employee stole money from its client money account and that because the solicitors repaid the money and had not acted dishonestly, their initial fine imposed was replaced on review with a reprimand).

86. SRA CODE, generally ch. 7-9.

87. SRA CODE ch. 4.

88. *Id.* at ch. 11, O(11.1).

89. MODEL RULES R. 4.1-4.2, 4.4.

90. MODEL RULES R. 4.1-4.2, 4.4.

91. MODEL RULES R. 4.1-4.2, 4.4.

92. MODEL RULES R. 8.4(c).



was not dishonest, fraudulent or involved deceit or misrepresentation. A solicitor, however, is clearly prohibited from taking unfair advantage of third parties in a private contract and would be subject to professional licensure ramifications for doing so.

Thus, there are two deficiencies with the Model Rules' treatment of third party relationships: (1) as previously noted, the Model Rules require a complex synthesis to ascertain the intended outcomes, and (2) they are too narrow in scope to adequately protect third parties in their dealings with lawyers. Once again, the SRA Code standard is broader (and clearer) and more protective than the Model Rules since it requires solicitors to deal fairly with all people in all situations.

### III. CONCLUSION

As every attorney and solicitor knows all too well, there is a difference between "ethics" and "morals." Sometimes legal ethics rules require attorneys to do things that are morally distasteful. A most disturbing example is the requirement to keep in confidence a murderer's confession despite the knowing that an innocent person was convicted and incarcerated for the murder the client committed.<sup>93</sup>

Despite the fact that the public does not understand these morally counter-intuitive duties, these duties often serve to advance very important principles. The public is not likely to view certain principles as "ethical" according to a colloquial understanding of the word. Nonetheless, both the U.K.'s and the U.S.'s professional ethics regulatory systems do indeed aim to protect the public. And rightly so, it is the public's interest that should receive the utmost priority. In the midst of this delicate balance of competing interests that involve all ethical issues, it is incumbent on the legal community to construct rules that best uphold the interests of the public it serves.

As such, a regulatory system which states the values and outcomes that its rules are designed to achieve is superior to a system of technical rules based on logic and reason. Rules that incorporate these stated values and outcomes would provide clearer and more thorough guidelines for attorneys navigating the gritty realities of legal practice.

As a very bright and talented attorney once said to the author personally: "The danger with smart people is that we can come up with a logical argument to justify anything." But, it is far more difficult to justify behavior that may be logical but violates clearly agreed upon values.

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<sup>93</sup> *A Killer's 26-Year-Old Secret may Set Inmate Free*, NBC NEWS.COM (Apr. 12, 2008, 6:02 PM), <http://www.nbcnews.com/id/24083675/>.

## AUTHOR'S POSTSCRIPT

This article was written prior to a five-week stay in England where I had the great benefit of talking with several leaders of the English legal profession about outcome-based regulation and alternative business structures, among other interesting topics.

Two commentators shared with me their impressions that there has been a little unease among practitioners about outcome-based regulation, i.e., that the "rules" gave a rather black and white certainty that was comforting to practitioners. My understanding is that practitioners are seeking ethics opinions and guidance from ethics counsel prior to undertaking a certain course of action or transaction to ensure it comports with the stated outcome of the regulation.

Despite any discomfort and uncertainty practitioners may face at this juncture, I believe it can only be a good dynamic when lawyers are assessing their contemplated actions beforehand and trying to weigh them vis-à-vis a stated value. I trust that, as with any new law or system of rules, sufficient clarity will develop over time, and practitioners will gain a sense of confidence and comfort with outcome-based regulation.