



The problem of integrity

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Integrity is beginning to look like the indispensable quality that we could all do without.

The obligation to act with integrity is one of those *irresistible* conduct rules. It stands alongside other big principles such as treating clients fairly, honesty, apple pie and so on. They're irresistible in the sense that no one can argue they ought not to apply to everything that a professional does (or at least it's difficult to argue against them without experiencing that sinking feeling that no-one else is prepared to listen to you...!).

The problem with irresistible, big principle rules is that they often fail the 'yardstick test'. It goes as follows: a good conduct rule ought to allow a regulated person to measure his or her proposed actions against the rule in order to anticipate whether or not those actions will be compliant. For example, a conduct rule that says a solicitor can only place his or her "...professional nameplate outside premises at which [s/he] actually works" is a good rule by this yardstick test (although an unnecessary one by other standards – the quote is from the 1974 Law Society Guide to Professional Conduct of Solicitors). Big principle rules tend to fail the yardstick test because they invoke abstract, difficult-to-define concepts, usually involving highly disputable matters such as fairness (or probity, honesty, trustworthiness, and so on).

The standard justification for the use of big principle rules is of course the elephant test. An abstract concept like honesty is more often defined by recognition than description, or so it goes. "Where it applies as an element of a criminal charge, dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterised more by recognition when encountered than by definition. Dishonesty is not a matter of law, but a jury question of fact and standards." See *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67 at 49.

Personally, I've always been sceptical of the "you-know-it-when-you-see-it" approach. Consider the rock hyrax for example – cute, small and fluffy but also the closest evolutionary relative of an elephant.

More seriously though, can one adequately define integrity? Ease of definition leads to recognition. It's certainly an ordinary, recognisable word, albeit with a multiple dictionary definitions. Take a pick from any of: law-abiding; trustworthy; upright and honest; achieving a higher moral standard; all-round good egg; and so on. The relevant definitions tend to converge on something like this: 'a consistent adherence to a higher moral standard'. That still begs questions like, 'Higher than what?', and 'Which standard?'

In the regulatory context these ambiguities of definition are important. If a regulated person is to be accused of failing to act with integrity, then this should *really* mean something; at the very least it ought to denote a failure to comply with an identifiable standard.

One approach is for the integrity standard to mean obedience to all the other rules and professional obligations. Unfortunately, this tends towards circularity and redundancy. On this theory, a failure to comply with a specific conduct rule invariably involves a failure of integrity as well. "Integrity" then becomes the unnecessary rule, the one rule that demands compliance with all the other rules.

Perhaps a more satisfactory approach is to use “integrity” as an indicator of the seriousness of a breach of another rule. A given rule might be breached with a lack of integrity where, for example, the act is done in the knowledge that it is a breach or with a view to achieving some improper purpose. On this theory, ‘integrity’ is more of a signifier than anything else. This still doesn’t cure the redundancy aspect however: regulators and tribunals ought to be able to identify whether a rule has been breached in a more or less serious manner. They don’t need a lack of integrity label in order to do so.

The next possible regulatory interpretation is that integrity is to be treated as equivalent to honesty. There are two problems with that approach however. The first is that as a matter of commonplace use of language, acting with integrity is simply not the same thing as acting with honesty: the former invokes obedience to some kind of moral standard that includes honesty but goes further. The second problem is that the Court of Appeal has said that integrity “...involves more than mere honesty” (see *Wingate v SRA* [2018] EWCA Civ 366 at 100).

Perhaps a dissection of *Wingate* can assist in pinning down this integrity concept? Lord Justice Jackson said this of it: “Integrity connotes adherence to the ethical standards of one’s own profession” (at 100). I question how helpful this is. If “ethical standards” simply means all the conduct rules then the redundancy problem re-emerges (see above). If it means something narrower than *all* the rules, then which are the “ethical” ones? I rather doubt it would be a useful exercise to distinguish the ethical from the unethical in the SRA Code of Conduct!

Wingate provides other clues however. Lord Justice Jackson gave the following as an example of integrity: “To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.” (at 100).

These are problematic examples. It is unclear what sort of ethical duty a solicitor might owe to the other side in negotiations, beyond that of honesty. A *Hedley Byrne* duty not to misstate is rarely owed to an opposing party. There’s a legal framework for actionable misrepresentations of course, but that doesn’t feel like it invokes ethical responsibilities. Any deliberate misstatement tends to shade rapidly into dishonesty. Why then

invoke some intermediate and indeterminate requirement of integrity in addition to these existing legal boundaries? As for scrupulous accuracy when speaking to the court, it has long been true that a solicitor and barrister owe special duties to the court. They are not limited to speaking with accuracy however: they can include a duty to volunteer information as well. Their origin lies in the degree of trust that the court must be able to repose in those who appear before it (in order that justice can function efficiently). One doesn’t need to invoke integrity as the basis for that class of rule.

As for the other instances of solicitor integrity failings given by Lord Justice Jackson: “A sole practice giving the appearance of being a partnership and deliberately flouting the conduct rules”. It is questionable what can be gleaned from his exemplar case of *Emeana* for current purposes (see *SRA v Emeana* [2013] EWHC 2130 (Admin)). The breaches were serious in that case, and showed a persistent flouting of the rules. Integrity was there considered as a proxy for seriousness, as is evident from the judgment of the Divisional Court and the Solicitors Disciplinary Tribunal. The other examples given by Lord Justice Jackson also enter the domain of deliberate wrongdoing (eg “Recklessly, but not dishonestly, allowing a court to be misled”, “Subordinating the interests of the clients to the solicitors’ own financial interests” etc).

It is of course useful to have these examples, especially when selected by as eminent a judge as Sir Rupert Jackson. One still has to stitch them together so as to discern the whole cloth of ‘integrity’, but that’s the common law for you.

However, the problem with defining integrity was not put to rest in *Wingate*. In the case of *Adetoye v SRA* [2019] EWHC 707 (Admin), Mr Justice Mostyn made a fascinating decision on the seriousness of a finding of lack of integrity.

I hope I do proper justice to his reasoning as follows: (1) integrity involves obeying higher moral standards than those applicable to the general public; (2) integrity encompasses honesty (but is not limited to it); (3) it must follow that a lack of integrity is more serious than “common-or-garden dishonesty” in this “hierarchy of turpitude”. However, and as Mr Justice Mostyn pointed out, dishonesty attracts the near-automatic sanction of striking-off, whereas a lack of integrity does not. He squared that particular circle by concluding that acting without integrity involved “greater moral turpitude than mere dishonesty” and, where a lack of integrity is proved, the usual starting-point for sanction

must be suspension unless the case can be described as “very unusual and venial”.

With all due respect, Mr Justice Mostyn’s reasoning is difficult to follow. The key part of it is his conclusion that a lack of integrity must be worse than dishonesty because integrity encompasses, and exceeds, mere honesty, and is therefore higher on the scale of seriousness. This doesn’t follow, in my view. Acting with integrity involves obedience to a collection of rules, the “ethical standards” of the profession, as Lord Justice Jackson put it. No one could plausibly suggest that those rules are all equal in importance. The obligation to be honest is one of the most important, but there could be other failures of integrity (eg a lack of courtesy to the court) that will probably be seen as less serious. Mr Justice Mostyn’s approach is therefore inconsistent with *Wingate* because it requires that integrity is a unitary concept, rather than a mixed one. If integrity is a single standard encompassing honesty then of course it is a higher standard, but if it is a collection of standards of varying nature including honesty, then it is meaningless to call it a higher one.

The *Adetoye* case is therefore fascinating for a reason other than the Judge’s analysis. It demonstrates that the concept of integrity, as interpreted in *Wingate*, must be an amalgam, a meta-rule if you like. Acting with integrity involves “adherence to the ethical standards” of the profession. It contains multitudes.

This has significant implications for regulators, especially in the domain of formulating allegations. If acting without integrity means a failure to comply with the ethical standards of the profession then it follows that the specific, disobeyed standards must be capable of identification when someone is accused of misconduct. Regulators should therefore formulate allegations involving a lack of integrity as follows: “...and in so doing, acted in breach of Outcome ABC and, in the circumstances, also acted in breach of Principle 2.”

This also raises another issue. If integrity means adherence to professional ethical standards, and those standards are codified (as in the SRA Code of Conduct), can one properly make an allegation of misconduct that *solely* comprises a breach of the duty to act with integrity? In my view, the answer is ‘Yes’, but only in narrow circumstances. Principle 2 (“act with integrity”) is definitely needed for allegations involving dishonesty as there is no specific rule that requires a solicitor act honestly. I would however question whether it should ever be used outside that context. Other than honesty, is there some residual class of ethical behaviour that comes within the scope of integrity and

is not encoded in the SRA Code? Perhaps there is, but I think there are risks in a regulator seeking to invoke that class when formulating allegations. It vests far too much discretion in a regulator as it effectively involves the regulator saying that in its judgment the behaviour is unethical but without being able to point to a specific rule that covers the point. I suggest a standalone allegation of breach of Principle 2 (without dishonesty) should be a rare thing.

This takes me back to the opening line of this article. I described integrity as the “indispensable quality”. I am sure that it is. The thing that separates a professional from everyone else is, in the words of AV Dicey (in 1867), that a professional “sacrifices a certain amount of individual liberty in order to ensure certain professional objects. In a trade or business the conduct of each individual is avowedly regulated by the general duty of honesty in regard to his own interest.” By becoming a professional, one commits to upholding higher standards than those applying to the public or to ordinary business-people. “Integrity” is an excellent label to describe that collection of standards, especially given that they vary from profession to profession. But the word is of very limited use in the contentious and narrower domains of compliance, regulatory enforcement and disciplinary proceedings. Integrity cannot be equated with honesty as it is a wider concept; it is unnecessary as a signifier of seriousness as decision-makers such as the Solicitors Regulation Authority and the Solicitors Disciplinary Tribunal are well-equipped to identify and grade the seriousness of non-compliance; and, finally, its use as a residual catch-all duty, when no other rule fits, is dubious and vests too much discretion in the regulator. In these more precise domains of compliance and enforcement, it is word we can definitely do without.

I should also add that the views in this article are only mine, and are not the views of any other organisation, including RPC.

Any comments or queries?

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