IN SEARCH OF PUBLIC INTEREST LAWYERING - WHAT DOES IT TAKE TO GIVE PRACTICAL CONTENT TO BETTER PROFESSIONAL NORMS?

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A. Introduction

> …what does it say about the legal profession that you are all very clear on the Solicitors Regulation Authority's principle about acting in the best interests of each client, but you all seem so vague and have no idea what on earth is meant by upholding the rule of law and the proper administration of justice, acting with integrity, and behaving in a way that maintains the trust the public place in you and in the provision of legal services? Is it a reflection of the legal profession that one of those is very clear to you, and you seem to have no idea what any one of the other three means?[1]

In this chapter, we draw on Deborah Rhode's *In the Interests of Justice*, published twenty years ago, as a leading work on lawyers' ethics. Whilst many argued philosophically about professional norms,[2] Rhode took a more realist approach in this leading work. Ethics on the ground, rather than in the clouds, was her key concern.[3] We use three of Rhode's signature themes - ethics, the public interest, and women's rights – to explore the use of Non-Disclosure Agreements (NDAs) by lawyers in England & Wales as an example of the contextual application and (potential) practical instantiation of public interest ethics. Our introductory quotation comes from Philip Davies, Conservative English MP, and member of the House of Commons' Women and Equalities Committee (WESC), questioning a Magic Circle law firm partner in a 2018 Parliamentary inquiry into sexual harassment at work. It was a rare moment of public, political focus on an elite legal professional that thrust lawyers' ethics

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[1] Philip Davies MP, 'Question 193', 2018 House of Commons Women and Equalities Committee (WESC) Investigation into sexual harassment in the workplace (28 April 2018). See: https://www.philip-davies.org.uk/sexual-harassment-workplace <accessed 7 January 2020>

[2] For example: David Luban, *Lawyers and Justice : An Ethical Study* (Princeton University Press 1988); Stephen L Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities' [1986] American Bar Foundation Research Journal 24; William H Simon, *The Practice of Justice: A Theory of Legal Ethics* (Harvard University Press 1998).

[3] Brad Wendel, for example, cites *In the Interests of Justice* as a text which bridges the academic and practical realms. See: W Bradley Wendel, 'On International and Interdisciplinary Legal Ethics Scholarship' (2004) Legal Ethics110

into the limelight, and we use that Parliamentary inquiry, and NDAs more generally, to look at how lawyers' silencing of victims of sexual misconduct on behalf of their clients, in this case Harvey Weinstein, allows us to say something about zealous lawyering and the public interest-oriented nature of the legal profession in keeping with Rhode's ideas. We see how client-first professional logics instantiate and exacerbate power inequalities; how lawyers have prioritized ideas of contractual freedom, and claimed neutrality, whilst re-victimising the powerless. Rhode's work prefigures the problem, which includes judicial insouciance,[4] problematic regulation, and professional turf-wars.

As such, the story we narrate in this piece can be understood both as a philosophical battle between zealous advocates and professional citizens but also a profoundly contextual one. Independent regulation of solicitors in England & Wales,[5] and the threat of political intervention, has begun, perhaps, to turn that tide. We may be beginning to see the kind of recalibration of professionalism towards the public interest that Rhode was calling for. In particular, she speaks intriguingly, and we think presciently, of giving public interest more practical content. We use recent approaches to NDAs in England & Wales as a vehicle for showing both the ongoing salience of the problems Rhode spoke to twenty years ago but also the (partly) successful attempts to give more professional salience to the public interest.

B. Rhode's arguments in outline

To our minds, Rhode's central argument in this wide-ranging leading work is that, for structural and ideological reasons, the professions are flawed repositories of the public interest. Worthy in intent, lawyers (individually and collectively) are hamstrung by context. The size and competitive nature of legal service markets places commercial priorities over social obligation,[6] creating systems that are, 'far too complex, expensive, and open to abuse.'[7] The financial isolation of practice and professional status diminishes its values.[8] Expediency trumps moral independence.[9] Notions of professional zeal, borrowed from the specific context of criminal practice, diminish judgement.[10] The adversarial premises of such ethics are, Rhode argues, ill-suited to many practice contexts, not least transactional work. They are also ill-suited to the distribution of legal services: access to justice problems ensure the system is imbalanced against

[4] *Arcadia Group Limited and others v Telegraph Media Group Ltd* [2019] EWHC 223 (QB).
[5] There is a case for saying this regulatory independence is not yet total but that is beyond the scope of this paper.
[6] Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press 2003) 2.
[7] ibid 4.
[8] ibid 14.
[9] ibid 15.
[10] ibid 49–80.

ordinary people. The rich are more valued than the poor, and that imbalance is manifest not just in the inability of ordinary people to access legal services,[11] but in the content of ethical dilemmas themselves:[12]

> the clash between lawyers' responsibilities as officers of the court and advocates of client interests creates the most fundamental dilemmas of legal ethics. All too often, the bars resolve this conflict by permitting overrepresentation of those who can afford it and underrepresentation of everyone else.

Rhode's argument means that a profession not properly guarding the public interest is responsible for their clients' opponents accessing *in*justice. Ethical rules are, 'under demanding and under enforced.'[13] The profession is self-regarding and psychologically blind to the limits of its own position.[14] The health, safety, and financial well-being of opponents and third parties is compromised as a result.[15] Willing blindness can shade into sins of political intervention beyond cases as, Rhode claims, the profession will too often block the advance of public interests where the profession perceives that those interests conflict with their own.[16] 'No occupational group', as she puts it, 'however well-intentioned, can make unbiased assessments of the public interest on issues that place its own status and income directly at risk.'[17]

Rhode's resolutions of these problems cover three main points. The first is that lawyers should accept personal moral responsibility for the consequences of their professional acts, testing their own conduct against, 'consistent, disinterested, and generalizable foundations'; in particular, there should be, 'greater practical content for professional values'[18] that includes an obligation to pursue justice. This involves a recognition that moral objections can trump legal rights particularly where rights cause unnecessary harm or conflict with core values such as honesty, fairness, and good faith.[19] And, fidelity to the idea that zealous pursuit of the client's interests is paramount is contingent on context. Justice may demand placing less weight on the notion of client's interests first and last.[20] Rhode's second response is the equitable and adequate provision of access to legal services for all. The third is, '[P]ublic accountability professional for regulation.'[21] Some oversight of professional regulation is necessary, she says,

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[11] ibid 2.
[12] ibid 50
[13] ibid 11
[14] ibid 2–3.
[15] ibid 15
[16] ibid 8.
[17] ibid 16
[18] ibid 17
[19] ibid 17-18
[20] ibid 18
[21] ibid 19

to, 'permit more responsiveness to consumer concerns' and, 'more specific and more demanding standards.'[22] In making the case for these responses, Rhode blends together philosophy, psychology, and a sociology of the professions with a heavy sense of the practical importance of access to justice and ethical imbalances, urging Aristoltlean reflection over bright line answers to ethical dilemmas.[23]

In the Interests of Justice was not, of course, Rhode's first contribution on these matters. She had been thinking about, speaking to, and publishing on these topics for over twenty-five years. Nor of course was Rhode the only scholar interested in these things. But Rhode's book was, as Bill Simon described it, the 'most fully developed expression' of arguments to date about the American legal profession.[24] Austin Sarat commented that, 'few [works on the profession] are as relentless and powerful'.[25] It seems to us that this book has since become a leading work (cited over 600 times) partly because of the practical proposals for reform that Rhode advances (in response to each and every one of the issues she raises), partly because of the far-reaching ground the text covers (which means that the book appeals to those working on lawyers of various shapes and sizes, and/or on professional ethics and regulation, in various places), and partly because of how Rhode, as Bob Gordon puts it, offers a 'detached and diagnostic' account (and so this not a polemic which immediately aggravates its intended readership; no simple task given the forceful moral commitment the book also contains).[26] On this last point, when Rhode later reflected on her book she wrote that, "I have elsewhere been critical of legal academics who write only for each other on issues of public policy in a form that is off-putting to the public":[27] *In the Interests of Justice* was explicitly designed to be read by a broad audience and this further adds to its endurance.

This is also, we think, a leading work because of the intractable nature of the problems Rhode surveys. While Sarat pushed back against Rhode and suggested that '[t]he profession should be understood neither as sharing a set of essential attributes nor as being united as a singular tool used to quash the public interest',[28] what has been so interesting (read: so bleak and depressing) is the consistency with which other studies, spread over the last twenty years and concerned with lawyers doing a variety of different sorts of legal work and based

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[22] ibid 21
[23] ibid 71
[24] William H Simon, 'Introduction' (2002) 54 Stanford Law Review 1387, 1387.
[25] Austin Sarat, 'The Profession versus the Public Interest: Reflections on Two Reifications', (2002) 54 Stanford Law Review 1491, 1491.
[26] Robert W Gordon, 'Portrait of a Profession in Paralysis' (2002) 54 Stanford Law Review 1427, 1427
[27] Deborah Rhode, 'The Profession and the Public Interest' (2002) 54 Stanford Law Review 1501, 1510.
[28] Sarat (n 25) 1494.

in a variety of jurisdictions, have come to the same conclusions as Rhode.[29]

In what follows we explore some of Rhode's arguments and ideas using recent developments on NDAs in England & Wales for a number of reasons. One is that, in our jurisdiction, there has been a move towards significantly greater professional accountability. Regulation shifted in 2007 from the Law Society (now a representative body) to an independent regulator of the solicitor's profession (the Solicitors Regulation Authority, SRA). The SRA is attempting a greater focus on the public interest and a more professionally-reflective, less rule-based, approach to ethics problems.[30] The second reason is that employment law is one of those areas of law where representation is very clearly structurally imbalanced.[31] Far more lawyers represent employers than employees, and they do so under fewer resource constraints. It is both adversarial and imbalanced and where negotiation of NDAs usually takes place in a system of significant structural inequality. The third reason is more happenstance, but arises out of both those points, and that is the emergence of an apparently egregious example of zealous lawyering that happened to be exposed in a very public way. That leads us into the Zelda Perkins NDA with Harvey Weinstein and others.[32]

C. The Weinstein-Perkins NDA

Zelda Perkins left her job with Miramax in 1998, following allegations Harvey Weinstein had attempted to rape a colleague of hers and repeatedly sexually harassed her.[33] A solicitors' firm, Simons Muirhead and Burton (SMB) represented Perkins and her colleague in negotiations with Miramax and Weinstein (hosted and conducted by the magic circle law firm Allen & Overy). In her written submission to the 2018 UK House of Commons Women and

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[29] For a 'state of the nation' account on many of these studies, see: Richard Moorhead, 'Precarious professionalism: some empirical and behavioural perspectives on lawyers' (2014) 67 Current Legal Problems 447.

[30] For a discussion of the SRA's approach, see: Andrew Boon, 'Professionalism under the Legal Services Act 2007' (2010) 17 International Journal of the Legal Profession 195; and Sundeep Aulakh and Ian Kirkpatrick, 'Changing regulation and the future of the professional partnership: the case of the Legal Services Act, 2007 in England and Wales' (2016) 23 International Journal of the Legal Profession 277.

[31] See, for example: Hugh Collins and others (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018).

[32] One of us has written previously about NDAs. This chapter draws in part on those earlier pieces. See: Richard Moorhead, 'Professional Ethics and NDAs: Contracts as lies and abuse?' in Paul Davies and Magda Raczynska (eds) *Contents of Commercial Contracts: Terms Affecting Freedoms* (Hart Publishing 2020).

[33] In 2020, Weinstein was sentenced to 23 years in prison in the US for forcing oral sex on Miriam Haley and for third-degree rape on another (unnamed) woman. Multiple other criminal and civil claims are ongoing. Weinstein denies allegations of non-consensual sex or acts of retaliation against any women for refusing his advances.

Equalities Committee (WESC) investigation into sexual harassment in the workplace, Perkins said she felt that she had, 'no option' open to her other than settlement of her claim against Weinstein, which came with a NDA.[34] As well as compensation, Perkins sought undertakings that Weinstein would attend psychological therapy and that Miramax would institute policies to protect future complainants within the firm. Perkins describes the (two years post-qualification) junior lawyer who acted on her behalf as 'utterly out of their depth'[35] during a 'week of aggressive interrogation and negotiations' on the settlement,[36] with one session lasting from 5pm to 5am.

> Enormous amounts of pressure were put on us and our representatives which, considering we were the victims of the situation, was inappropriate, intimidating and frightening.[37]

During the settlement negotiations, concessions were offered in return for the names of other people Perkins and her colleague had spoken to about their allegations. The apparent implication being these people would be approached for their silence too. Perkins says she, 'agreed to enter into the [NDA] contract because of the important obligations Mr. Weinstein agreed to uphold which should have stopped his behaviour and safeguarded future employees.'[38] Remarkably, Perkins was not allowed to keep a copy of the NDA after signing it.

Most of what we know about this matter comes from Perkin's evidence to Parliament in 2018, plus a small excerpt of the NDA itself. Of crucial significance is Clause 6(a) of the NDA. It requires Perkins to keep any information she has confidential unless she has, 'the prior written consent of Harvey Weinstein or Bob Weinstein'. Even then, disclosure is expressly prohibited,

> except to any entity if required by legal process ... but you will first, in the case of any civil legal process and where reasonably practicable in the case of any criminal legal process, give not less than forty eight (48) hours prior written notice to the Company through Mark Mansell at Allen & Overy before making any such disclosure and if any disclosure is made you will use all reasonable endeavours to limit the scope of the disclosure as far as possible.

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[34] Zelda Perkins, 'Written submission from Zelda Perkins (SHW0052)' (March 2018) available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/written/80725.html <accessed 7 January 2021>

[35] ibid

[36] ibid

[37] ibid

[38] ibid

> You agree to provide reasonable assistance to the Company and its legal advisers if it elects to contest such legal process. In the event that the Company does not contest such legal process or the challenge is not successful, you may make disclosure to your legal advisors (who must first agree in writing to execute a confidentiality agreement in a form satisfactory to the Company in the form of paragraph 6) but you will use all reasonable endeavours to limit the scope of the disclosure to your legal advisors as far as possible.

Under this clause, written consent is needed to make *any* disclosures voluntarily. Disclosure must only be given in legal proceedings if Perkins is *required* to do so. Any attempt to compel Perkins through legal process has to be *notified* to Miramax. Any disclosure has to be *as limited in scope as possible* (presumably in discussion with Miramax and/or Weinstein, or Perkins would be required to guess for herself what is possible). Prior to that, Clause 6(a) sets out that Perkins must provide any assistance asked for in Miramax's contesting her being so compelled. Notably, notification and contestation should take place *prior* to her seeking legal advice. Finally, any legal advice on the agreement she receives must be given under an NDA approved by Miramax.

The dominant, likely impact of Clause 6(a) is to effectively preclude Perkins from cooperating voluntarily with either civil or criminal processes. Even if compelled, that cooperation is inhibited and the agreement buys time, and opportunities for intervention, for Miramax/Weinstein in the process. It provides an opportunity for a suspect to be involved in guarding the evidence of a witness. The opportunities to apply pressure to Perkins are also clear. Unfortunately, it is not implausible that leading lawyers would engage, or be perceived as being engaged, in such pressure. Indeed, Allen & Overy (the firm acting for Weinstein on this particular NDA) has in a different case been so implicated.[39]

Mark Mansell, the partner at Allen & Overy responsible for this NDA, gave evidence to the 2018 Parliamentary inquiry as well. Although he cited client confidentiality and declined to comment on its contents, he did speak in general terms about contracts like that signed by Perkins and sometimes about the Perkins-Weinstein NDA itself. He indicated that it was 'extremely rare' to not give the subjects of NDA a copy.[40] He also hinted at an explanation for the onerous nature of that particular agreement, saying NDAs may be more

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[39] A serious bribery trial was adjourned at significant cost because of allegations that A&O lawyers had pressured prosecution witnesses in the week leading up to a trial. See: Caroline Binham, 'Two Allen & Overy Lawyers at Risk of Probe over Dahdaleh Case' *Financial Times* (26 March 2014) available at: https://www.ft.com/content/b0e47460-b4dd-11e3-af92-00144feabdc0 <accessed 7 January 2021>.

[40] WESC, 'Sexual harassment in the workplace' (Fifth Report of Session 2017–19, 18 July 2018) para 123.

extensive where high- profile public figures have particular sensitivities around reputation. He also conceded that, 'it would not be either reasonable or lawful to prevent somebody from participating in a criminal process'.[41] As we have seen, the agreement seems plainly intended to influence whether, when, and how any such participation takes place, but Mansell suggests that a clause could legitimately be used to prevent certain kinds of confidential information being given to the police: 'information being disclosed that is not necessary for that process, [such that] the individual who is seeking to protect those interests has an opportunity to be involved.'[42] He thus defends the idea that Weinstein and Miramax could control, up to a point, the information getting to the police, and without any restriction anyone else, including other alleged victims of Weinstein's conduct. So for instance, Perkins would have been unable to help other women who had experienced Weinstein's conduct in civil cases should she have been approached, unless she was given permission.

D. NDAs and Professional Ethics

Ethical concerns about this NDA relate to the manner of its negotiation and to the substance of its purported obligations. One major limb of concern is relevant to, but goes beyond, professional ethics: whether such agreements (and in particular clauses like Clause 6(a)) could amount to the criminal offence of perverting the course of justice. Suffice to say here there was a real risk the agreement could amount to that.[43] Beyond that, the main ethical issues are: (i) whether professional obligations are breached by putting unenforceable clauses into contracts; and, (ii) whether the rule of law, and obligations as to integrity, honesty, and independence, mean that lawyers may be seen as taking unfair advantage of vulnerable women through NDAs. These are broad issues with which Rhode was also concerned some twenty years ago and, in what follows, we take up Rhode's challenge and consider how such professional principles can be given practical content.

As one can sense from the Philip Davies MP quotation at the beginning of this chapter, the guts of the Perkins-Weinstein NDA matter were put to the lawyers in front of the WESC. Recall Rhode's arguments about expediency, and the lack of practical traction in professional rules, and then consider this response to the WESC from Gareth Brahams, the (then) Chair of the Employment Lawyers Association, to the general ethical dilemmas the Perkins-Weinstein NDA matter presented:

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[41] Response to Question 101 from Philip Davies MP. See: https://www.philip-davies.org.uk/sexual-harassment-workplace <accessed 30 December 2020>

[42] Ibid, Response to Question 102.

[43] We do not discuss this issue in depth here, but have reflected on it elsewhere. See: Moorhead (n 32).

> Gareth Brahams: Can I say, in response to that, that it is a nuanced thing? Our issue that we have as solicitors is that our obligation is to act in the best interests of clients.
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> WESC Chair: You are officers of the court.
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> Gareth Brahams: Of course, that is subject to our professional obligations. If your professional obligations are not clear, your obligation is to act in the best interests of your clients until such a point as you are breaching your professional obligations. In fact, you would be breaching another professional obligation if you were not doing that. Where you get these difficult issues—Suzanne is right—you need very clear guidance as to what your position should be.

As we will see, if this an attempt to state the professional rules it is incorrect, although Mr Brahams may have misspoken; giving evidence before a Parliamentary Select Committee is stressful. But our own multiple, empirical studies on lawyers' ethics with practising lawyers suggests that it is the kind of error that is made with some regularity.[44] His lack of understanding of his own rules, and his blaming the problem on the need for better guidance, is a sign of the expediency problem and the elevation of zealous pursuit of clients' interests above the public interest; the acme of Rhode's concerns. One might also have thought it an alarmingly casual response to the obvious problems posed by NDAs and the concerns a well-briefed lawyer appearing before a Select Committee would be expected to give. Perhaps this was what Rhode describes as the profession being, 'disturbingly passive and pessimistic in the face of its own problems."[45] Or perhaps it was complacency. Recall too Rhode's complaints about professional rules and those rules lacking traction. One of the mandatory professional principles for all solicitors is that they must protect the rule of law and the administration of justice.[46] This principle might fall into Rhode's category of something too vague, or (advancing Rhode's suggestions for reform) it might be an example of the broader principles on which a non-bright-line

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[44] Richard Moorhead and Victoria Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' (2015) 42 Journal of Law and Society 387; Steven Vaughan and Emma Oakley, 'Gorilla exceptions' and the ethically apathetic corporate lawyer' (2016) 19 Legal Ethics 50;Richard Moorhead, Steven Vaughan and Cristina Godhino, *In-House Lawyers' Ethics: Institutional Logics, Legal Risk and the Tournament of Lawyers* (Hart 2018); Emma Oakley and Steven Vaughan, 'In dependence: the paradox of professional independence and taking seriously the vulnerabilities of lawyers in large corporate law firms' (2019) 46 Journal of Law and Society 83.

[45] Rhode (n 6) 13.

[46] Principle 1 of the SRA Principles. See: https://www.sra.org.uk/solicitors/standards-regulations/principles/ <accessed 7 January 2021>.

contextual judgment about ethicality could be founded.

We turn now to the egregious practices we introduced above. One of us has written elsewhere about what is wrong with these NDAs,[47] so let us try and shortly state the arguments about professional principles and rules germane to the problem. The point is not so much whether one agrees with the analysis that follows, but that the arguments we run can be made, and that we would expect competent and professionally ethical lawyers to be aware of them.

Solicitors have an obligation not to deceive or knowingly or recklessly mislead the court,[48] and to not be complicit in another person's deceiving or misleading of the court.[49] One example of this is, 'constructing facts supporting your client's case or drafting any documents relating to any proceedings containing: (a) any contention which you do not consider to be properly arguable'.[50] The rules on misleading were drafted with courts in mind but it is widely accepted that solicitors should not knowingly or recklessly mislead people more generally because of their duty to act with integrity. As the Court of Appeal recently opined:

> [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.[51]

Our argument here is that Clause 6(a) of the Perkins-Weinstein NDA is both unlawful and/or unenforceable, and risks misleading Perkins either during the negotiation or afterwards. In contending that the enforceability of such a clause is properly arguable simply through its inclusion, a solicitor is seeking to create a belief in something which is deliberately misleading. Scrupulousness would demand that it is not included. This is not an argument which typically appeals to lawyers, who instead see putting potentially unenforceable clauses into contracts as part of the rules of the game. They would likely say they make no

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47 Moorhead (n 32).

48 SRA, Code of Conduct, (Version 21, November 2018) O(5.1). For readers unfamiliar with the solicitors' scheme, 'O' stands for 'outcomes'. Outcomes are synonymous with rules. The Code of Conduct and SRA Handbook were in place at the time of the 2018 Parliamentary Inquiry. They have since been replaced (in November 2019) with the SRA's 'Standards and Regulations' (the 'StaRs') which are largely similar for our purposes – see Rule 1.4 of the StaRs, for example. At the time of the Perkins-Weinstein NDA, The Solicitors' Practice Rules 1990 required solicitors to comply with the Law Society's Code for Advocacy, which prohibited solicitors from deceiving or knowingly or recklessly misleading the court. This is the rule that was repeated in the SRA Code of Conduct.

49 SRA Code of Conduct (Version 21, November 2018) O (5.2).

50 Ibid, IB (5.7). 'IB' stands for 'Indicative Behaviours'. These are non-exhaustive examples of things which are *probably* rule breaches.

51 *Wingate & Evans v The Solicitors Regulation Authority* [2018] EWCA Civ 366.

claim about the enforceability of any clause and so have not misled anyone about it. Or they might say that enforceability is the concern of Perkins' lawyers, not of them. Notice, in passing, however, the way in which the agreement makes the testing of enforceability much less likely (inhibiting advice for instance and preventing Perkins reading the clause because she was not allowed a copy).

The mandatory duty on solicitors to act with integrity is strengthened by another SRA rule which prohibits taking 'unfair advantage' of clients or third parties.[52] The SRA indicated, in their 2011 Handbook (in operation until November 2019), that demanding anything that is not legally recoverable is likely to be taking advantage.[53] We would suggest that demanding unenforceable promises in an NDA is akin to claiming something that is not legally recoverable, and so taking unfair advantage.

There is a judgement to be made when deciding what 'taking advantage' could require to fall foul of the rules. Practitioners understandably struggle with their ethical obligations when acting against an unrepresented party, worrying about an inherent unfairness to their client if they are seen to be helping their opponent. They are likely to find doubly problematic the risk of being seen to be 'soft-pedalling' with a represented opponent. The A&O–SMB negotiation of the Perkins-Weinstein NDA is a case in point. Mark Mansell suggested his professional ethics were not impugned because

> any situation like that, where you have an individual who is legally advised, there is a negotiation, seeking to reconcile the interests of the two parties. I think, in doing that, I am compliant with my obligations.[54]

We do not agree. Proving unfair advantage may be harder but not impossible in such circumstances; a solicitor is not relieved of responsibility by dint of a represented opponent.[55] Asking for an unenforceable clause to be included is highly likely to be unfair if one accepts that it is misleading, or that it seeks to make a legal claim which has no substance; and this is particularly so where the agreement inhibits the taking of advice after the NDA is signed. More so again in cases, like this one, where the subject of the NDA does not even have a copy of the agreement. The unfairness of the clause must take account of its expected and foreseeable impacts after the agreement is executed.

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[52] SRA Code of Conduct (Version 21, November 2019) O(11.1); and now Rule 1.2 of the StaRs.

[53] SRA Code of Conduct (Version 21, November 2019) IB(11.8).

[54] Response to Question 118 of Philip Davies MP. See: https://www.philip-davies.org.uk/sexual-harassment-workplace <accessed 30 December 2020>

[55] We note here that a November 2020 update to the SRA's guidance on the use of NDAs makes it clear that the obligation not to take advantage of an opposing party applies equally whether that party is represented or not. See: https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/ <accessed 30 December 2020>

a. Professional minimalism

Under a professionally minimalistic model only *unarguably* illegal acts are restrained and the client gets all the benefit of uncertainty; a mere risk of perverting the course of justice is sanctified as legitimate by dint of private bargaining and representation. Advantage can be taken because Perkins' lawyer did not stop it. And so on. Such ethical apathy legitimates decisions about, and therefore distances responsibility for, unsavoury tactics which are often shielded by client confidentiality and legal professional privilege. The client can say *"I was acting on advice";* and the lawyer can say *"I was only following instructions."* This is clearly part of Mr Mansell's defence before the Parliamentary committee.

There are, of course, a number of reasons for giving clients the benefit of uncertainty. First, and importantly, it prevents lawyers from having to apply legal uncertainty against their own clients, bolstering loyalty and preventing the compromise of arguable rights. It is also usually in lawyers' commercial interests to align as fully as they can with clients. As Rhode frames it, 'In effect, an attorney's obligation is to defend, not judge, the client. Under this standard [zealous advocacy] view, good ethics and good business are in happy coincidence.'[56] If lawyers neglect their clients' interests, there is also the risk of being sued; whereas if they neglect the public interest in the administration of justice, the risk of sanction is lower. Indeed, it is rare for this neglect to be revealed; because lawyer and client interests are usually aligned, confidentiality protects the lawyer and the client from scrutiny - something which also bothered Rhode - and enforcement is rare. This particular case only came to light because Perkins decided to expose Weinstein's agreement. Similarly, ethical and tactical dilemmas, and the psychological burdens of practising law, are simplified considerably when it is only if there is a clear breach of law or professional ethics that lawyers must restrain the imperative to act in their clients' interests.

Commercial framing and psychological biases suggest lawyers will overdo the extent that they are influenced by the client's interests.[57] Lawyers also see themselves as formally bound to accept their clients' instructions on how to handle a case. This is mistaken. Their professional principles require that they act with independence, for instance.[58] Nor are lawyers absolved of responsibility for their decisions on the basis that they were just following the clients' instructions. Responsibility and judgement are axiomatic to professionalism, and that judgement requires a rounded consideration of all the relevant professional rules and principles, not just the clients' best interests. So lawyers have to decide for themselves whether deploying a tactic in a settlement discussion is misleading or taking unfair advantage or not. In the case of *Farooqui*, our most

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[56] Rhode (n 6) 15

[57] Andrew M Perlman, 'A Behavioral Theory of Legal Ethics' (2015) 90 Indiana Law Journal 1639.

[58] Principle 3 of the SRA Principles. On this, see: Oakley and Vaughan (n 44)

senior judge emphasized individual responsibility for professional actions:

> the client does not conduct the case. The advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the client, or when the advocate is a barrister, the solicitor 'instructs' him.[59]

What we suggest is shown here is that law and ethical principles require a more nuanced approach of the kind Rhode was arguing for, but that lawyers have been ignoring the obligations which would require they take a more nuanced view.

Where employment lawyers include clauses in NDAs which are, or are suspected to be, void, they do so, as we understand it, to deter behaviour which they have, in law, no right to deter or, to take us into more difficult territory, where they suspect but do not know they have no such right. To our minds, where clauses are included which are known to be void the situation is straightforward. If those clauses are claiming or implying a right to do something in an agreement that lawyers know to be void, then those lawyers risk misleading anyone subject to or interested in that agreement: it breaches their obligation of integrity and a solicitor's obligation not to take unfair advantage of third parties under the SRA's rules.[60]

A more difficult situation to judge is where a clause is included in an agreement in the knowledge that it may or may not void. Here is an example of a situation where one would probably need to rely on professional judgement as to whether they are taking unfair advantage, with a solicitor properly balancing their multiple professional principles. It requires a contextual judgement. If one simply says it is a situation of doubt and that the client comes first, there is no judgement. There is a closing of minds.

Rhode's book is much concerned with such contextual judgements, arguing for an approach of principled and reflective ethicality. This leaves room for dispute over any 'right' outcome in moral decisions, but also suggests that, 'Some positions are more coherent, free of bias or self-interest, and supported by reliable evidence. Lawyers can, and should, act on the basis of their own principled convictions, even when they recognise that others in good faith hold different views'.[61] Rhode sets out that lawyers, 'make decisions as advocates in the same way that morally reflective individuals make any ethical decision'.[62] This is not, however, a subjective free-for-all, as 'lawyers' conduct should be justifiable under consistent, disinterested, and generalizable principles.'[63] Rhode

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[59] *R v Farooqi* [2013] EWCA Crim 1649.
[60] SRA Code of Conduct (Version 21, November 2019) O(11.1).
[61] Rhode (n 6) 58
[62] ibid 67.
[63] Ibid.

argues that lawyers 'need to consider the social context of their choices'.[64] She remind lawyers that their moral agency should be directed to ensuring justice is genuinely done. Rhode suggests that, 'The advantage of the contextual framework proposed here is not that it promises bright line answers but, rather, that is promotes ethically reflective analysis and commitments.'[65]

From the preceding we can say that Rhode's contextual lens is wide and challenging. Some of her arguments might be more tractable with lawyers and their regulators than others, but some of the regulators in England & Wales, at least, have recently begun to see a need for more judgement and less apathy. We turn now to the SRA's attempt to strengthen the public interest limb of their professional frameworks. The SRA says specifically about NDAs, for instance:

> There will always be complex situations where maintaining the correct balance between duties is not simple and all matters must of course be decided on the facts. It is important for solicitors to recognise their wider duties and not to rationalise misconduct on the mistaken basis that their only duty is to their client.[66]

The regulatory challenge the SRA faces is in promoting this ethical reflection such that individual lawyers do this in a good faith way. It would be easy, for instance, for well-informed and trained lawyers to rationalise client-first mentalities. How does a regulatory system seek to move lawyers towards a more reflective and balanced approach than we have seen from the lawyers discussed above? How far have Rhode's prescriptions (including that 'public interests [should] play a more central role' in professional regulation) been emphasized and has Rhode's specific call some practical content for professional values been prescient?[67] We turn now to those matters.

E. The Regulatory Context

The SRA rulebook for solicitors contains some of the kind of practical content that Rhode suggests as desirable in her book.[68] There are, for example, a series of high-level, pervasive principles which apply to all solicitors at all times. They cover a wide range of matters, including the rule of law, acting in the client's best interests, acting with integrity and independence and so on. The clients' interests are *not* overriding. Mandatory principles that solicitors should not permit their independence to be compromised and to act with integrity lay

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[64] Ibid.
[65] ibid 71.
[66] SRA, 'Balancing Duties in Litigation' (November 2018, first issued in 2015). See: https://www.sra.org.uk/globalassets/documents/solicitors/freedom-in-practice/balancing-duties-in-litigation.pdf?version=49922b <accessed 7 January 2021>.
[67] Rhode (n 6) 92
[68] As we have discussed above, this rulebook has evolved over time (see n 48).

the groundwork for professional judgement in particular cases to be exercised in a detached fashion in accordance with communal standards of competence and ethicality. As a consequence, the principles are designed to ensure lawyers simultaneously served the wider public interest, as well as that of their clients, according with Rhode's suggestion that, 'Professional conduct implicates public values, and they should figure more prominently in the formulation and enforcement of professional standards.'[69]

The 'public interest' is also much represented in the SRA's rulebook, being a regulatory objective under s1(1)(a) of the Legal Services Act 2007 (LSA). The 'public interest', and in particular the public interest in the proper administration of justice, is emphasized as pivotal to balancing the professional principles. It is the public interest in the proper administration of justice which is to take precedence when trying to resolve conflicts between those professional principles (such as a conflict between, on the one hand, protecting the rule of law and the administration of justice and, on the other, the client's best interests).[70] Neither the LSA, nor the SRA Handbook, where the term was used 261 times, defined the 'public interest'.[71] This lack of guidance means solicitors must delineate the contours of the concept for themselves. Or, putting this in Rhode's language, the practical utility of the rulebook content is somewhat lacking. Asking practising lawyers to problematize what the 'public interest' requires may be genuinely challenging because, as Maria Lee warns in a different context, there is, 'the difficulty (even impossibility) of defining public or collective interests in the abstract, or of distinguishing public from private, collective from individual, in any neutral or universal way.'[72]

This general regulatory architecture aside, it is when we get into the detail of the response of the SRA to the 2018 Parliamentary inquiry that we see the regulator having a keener eye for the practical content necessary to have an impact on NDA practice. As the leader of the (relatively) new regulatory legal services regime, the SRA's actions contrasted interestingly with the leaders of the *ancien regime,* the Law Society illuminating further, we think, Rhode's concerns with the self-interested nature of the profession.

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[69] Rhode (n 6) 211

[70] SRA Handbook (Version 21, November 2019) para 2.2. The same is also true of the operation of the Principles in the current Standards and Regulations. See https://www.sra.org.uk/solicitors/standards-regulations/principles/ <accessed 7 January 2021>.

[71] The newer SRA Standards and Regulations are shorter, but still contain 20 references to the 'public interest' (again, without any definition provided). The term appears 612 times on the SRA's website.

[72] Maria Lee, 'The public interest in private nuisance: collectives and communities in tort' (2015) 74 *The Cambridge Law Journal* 329.

F. The Battle of the Guidance

The SRA acted quickly to tackle the problems first emerging with NDAs in sexual harassment cases, issuing a 2018 Warning Notice on '*Use of non-disclosure agreements (NDAs)*'.[73] This Notice concentrated on the use of the NDA to inhibit notification to, 'the SRA or other regulators or law enforcement agencies of conduct which might otherwise be reportable.'[74] This partly reflected a concern that firms were using NDAs to stifle sexual harassment within the profession, bit also more broadly. In particular using, 'NDAs as a means of improperly threatening litigation or other adverse consequences, or otherwise exerting inappropriate influence over people not to make disclosures which are protected by statute, or reportable to regulators or law enforcement agencies.'[75]

The SRA gave clear warnings that 'NDAs would be improperly used if you sought to' prevent, impede or deter,' such reporting or cooperation with a criminal investigation. 'Unsustainable' threats of defamation proceedings are similarly subject to criticism. The SRA also warned against preventing, 'someone who has entered into an NDA from keeping or receiving a copy' and says, 'You will also need to ensure that the NDA does not include clauses known to be unenforceable.' This might actually be quite narrow in effect, as clauses *known* to be unenforceable would generally be rather few and far between.

With this SRA guidance, we see then an attempt at greater clarity (the giving of practical content to professional norms) which is both helpful, even if it might be said to not go far enough to tackle the entirety of the mischief posed by such agreements. More generally, the SRA show a concern both for what NDAs *stipulate* and the *impression* they give to the parties to those NDAs. The SRA also discusses NDAs in its recent guidance on 'Balancing Duties in Litigation',[76] saying:

> solicitors must make sure that they do not draw up clauses that go beyond what is necessary to settle the claim… and solicitors must not seek to prevent anyone from …co-operating with …other [non-criminal] legal processes, including influencing the evidence they give.

Here the SRA is broadening from its original concerns about inhibiting criminal and regulatory investigations to dealing with the problems posed for civil cases by NDAs not covered in the original guidance. The SRA also emphasizes the consequences of solicitors getting this wrong:

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[73] Solicitors Regulation Authority, 'Warning Notice on Use of Non-Disclosure Agreements (NDAs)' (12 March 2018).
[74] ibid.
[75] ibid.
[76] SRA (n 66).

> A solicitor may face disciplinary action if they: are complicit in unreasonable pressure to take unfair advantage of a victim or an unrepresented person on the other side; [and/or], are effectively complicit in seeking to conceal criminal activity… Such conduct might also involve serious criminal offences. Attempts to discourage or limit disclosure of evidence to criminal or civil processes can amount to perverting the course of justice.

In contrast, the Law Society issued guidance via a Practice Note, two months after the SRA guidance, in January 2019.[77] This was an interesting decision in and of itself. The regulator had spoken, so why would the Law Society (the representative body of the profession, still smarting, it seems fair to us to say, from the loss of its regulatory fiat) issue such guidance?[78] The question is especially pertinent as The Law Society guidance in some tension with the SRA's Warning Notice, apparently more concerned about asserting the legitimacy of NDAs than dealing effectively with the risks. So, for example, The Law Society emphasises the legitimate role NDAs have in protecting reputation; the SRA more cautiously recognises that protection of reputation might *sometimes* be a legitimate objective of an NDA. The Law Society guidance also says that NDAs can be used where potentially serious concerns have been investigated and a fair process has been followed 'regardless of whether or not the allegations are substantiated.' In this way The Law Society might be taken as arguing that substantiated allegations of potentially serious wrongdoing can nonetheless be subject to obligations of confidentiality to protect reputation. In saying that, '[b]locking the reporting of information that is relevant to regulating a sector is likely to be unacceptable to regulators,' The Law Society contrasts with the SRA which indicates that such conduct *is* unacceptable. Nor do they warn of the potential consequences of getting this wrong. The Law Society does not consider at all the possibility that it might be a criminal offence or professional misconduct to block such information.

On ensuring NDAs are understood (or intelligible) The Law Society only goes as far as saying that, 'It is good practice to give anyone signing an NDA clause time to consider the implications of the proposed agreement, including giving them sufficient time and opportunity to obtain independent legal advice.' There is no suggestion that the drafting lawyer needs to make their confidentiality clauses clear and intelligible to those expected to be governed by them. This is in spite of the risk that drafting opaque clauses may have the effect of overplaying the extent of confidentiality obligation and so may involve taking

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[77] See: https://www.lawsociety.org.uk/en/topics/employment/non-disclosure-agreements-and-confidentiality-clauses-in-an-employment-law-context <accessed 7 January 2021>.

[78] Until the regulatory settlement of the Legal Services Act 2007, The Law Society was both the representative body for and regulatory body of solicitors and their law firms. The LSA gave the regulatory remit to the SRA. This was, and continues to this day to be, a sore matter for The Law Society.

unfair advantage of or misleading their opponents. We are confident from our discussions with employment lawyers that this kind of obfuscation is a reasonably common practice deliberately *designed* to strengthen the hand of those benefiting from such agreements.

Zelda Perkins' evidence to the WESC indicates how NDAs are interpreted as more onerous than they are by those who sign them. She worried, for instance, that breaching the NDA might land her in jail. Those researching the justice system are familiar with lay participants in civil and family justice assuming that they are at risk of prison when they are not.[79] Similarly, as well as bearing in mind the vulnerability of such individuals to power imbalances, it must also be remembered how difficult it can be for many to engage with complicated legal language.

The Law Society's Practice Note on NDAs is a disappointing document that, rather than showing ethical leadership in the field, seeks to maximise the flexibility of their members to use NDAs for one client group. Solicitors inclined to 'stretch the envelope' on NDAs can pray in aid their own representative body's Practice Note as evidence of expert opinion. It is consistent with an approach, much discussed in Rhode's book, which seeks to represent the interest of some of its members (employment lawyers) and the dominant client group (employers) in doing what they, and some of their clients, find most conducive to their interests. Consideration of the public interest is most politely described as muted. Whilst the Practice Note reminds solicitors of the SRA's Warning Notice, the former also runs the risk of diluting or confusing the messages in the SRA's guidance.[80] It is a sign of what could have been expected if 'the profession' had been left to regulate itself: a particular view of the profession's interest being put before the interests of the public, and a view not uncontroversial within the profession itself. To borrow Rhode's phrasing, The Law Society's Practice Note is a good example of a system which, 'overvalues lawyers' and client's interests at the expense of the public's'.[81]

G. Final Thoughts

Rhode argued that the public interest has played too little part in the regulation and individual decision making of the (US) legal profession. The

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[79] See, for example, Richard Moorhead, Mark Sefton and Lesley Scanlan, 'Just Satisfaction? What Drives Public and Participant Satisfaction with Courts and Tribunals What Drives Public and Participant Satisfaction With' (Ministry of Justice 2008) 40ff and on the lay confusion of civil and criminal courts.

[80] It is worth noting that the actual normative force of The Law Society 'guidance' is unclear (and likely to be low), but the Society obviously thinks such guidance has some force or practical purchase (otherwise why would they publish it?)

[81] Rhode (n 6) 82.

Zelda Perkins case provides a lens through which we can view the past - the actions of Weinstein's lawyers 20 plus years ago - and also the current position. We see an independent regulator (the SRA) trying much harder than its self-regulatory antecedent (The Law Society) to take the issue of the public interest more seriously. And, importantly, we also see significant attempts, in line with Rhode's call to arms, to give the public interest 'greater practical content.'[82] Stepping away from NDAs, this move towards the public interest has been predominantly seen in the SRA's promotion of competition and consumerist ideas about legal services (i.e. the public interest is served in there being a healthy market for legal services), but on ethics/conduct regulation the SRA has also started to move more seriously into the questioning of professional mores that client-first lawyering trumps or is equivalent with the proper administration of justice.[83] And the SRA has sought to do so by reference both to defensible, disinterested, generalizable principles and greater 'practical content'.

We might take Rhode's concern about the bar's passivity on the public interest further, and suggest a degree of antipathy in some sections of the solicitors' profession to the public interest, where such interest conflicts with their own interests and those of their clients. In The Law Society's guidance, we see the collective promotion of the dominant client group as a legitimate focus for professional mobilisation. The Law Society's NDA response was contested within the Society itself, and beyond, by practitioners in the field but not publicly. As an active participant in the NDA debate, one of us has been struck by the extent to which solicitors felt constrained from voicing public concern about NDAs generally, and The Law Society's position in particular, for fear of offending clients specifically and professional norms of collegiality more generally. This tends to support Rhode's claims about structural and economic factors influencing professionalism. The tentacles of these factors run deep; The Law Society presented a Practice Note, notionally as best practice, that was controversial, inadequate, and in tension with the guidance published by the regulator.

Although we have not discussed it in the body of this piece, Rhode's advocacy of the counselling model (that lawyers should robustly consult their client on the ethical limitations of their action, whilst continuing to provide legal support for them) is, we think, suggested to be flawed by these events: there is little evidence that Mr Mansell was interested in, or undertook, the sort of counselling Rhode sets out as desirable. And if The Law Society's response shows us anything about lawyer-client relations in this area what chance is there of a counselling model actually operating in practice? Mr Mansell, in his

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[82] Rhode (n 6) 17.

[83] The SRA, for example, commissioned research into the professional principle of independence following concerns that large law firms were being 'captured' by their clients. See: https://www.sra.org.uk/sra/how-we-work/reports/independence-report/ <accessed 7 January 2021>.

Parliamentary evidence, indicates he *could have* counselled against certain actions actually taken in the Weinstein case, but not that he *did*. Whether he cannot say this because it is confidential or because it did not happen, we may never know. If he did, it did not work (unless he restrained something worse). More likely he (or perhaps Miramax's lawyer) acted as a conceptive ideologist covering up the malfeasance of his client.[84] If Mr Mansell had wanted to stop the NDA's more egregious tendencies, analysis of the relevant law and professional conduct rules suggest a substantial basis for him to have raised professional objections to the strategy. Our suspicion, although of course we do not know, is that a client-first mentality, a professionally minimalistic notion of ethics, meant it was simply not considered. Rhode's, 'real question is not "by what right" do lawyers "impose" their moral views but by what right should they evade a fundamental moral responsibility of all individuals to accept accountability for the consequences of their actions.'[85] Our own work across a number of projects suggests, that solicitors evade Rhode's moral responsibility because they just do not consider it.

That this debate could take place at all is, however, heartening. One reason is the SRA's initiative and independence; and another is the threat of regulatory intervention from politicians. As Rhode notes, 'The avoidance of ethical responsibility is ultimately corrosive for lawyers, clients, and the legal framework on which they depend'.[86] Both the WESC investigation in Parliament and a threat of legislation to restrict NDAs were a reminder perhaps that, 'Over the long run, a single-minded pursuit of clients' individual self-interests is likely to prove self-defeating for clients as a group'.[87] The quotation at the beginning of this chapter is an indication to the profession that they need, if they are held to account, to be able to speak plausibly in public interest terms. Mr Braham's response to the Parliamentary inquiry is an indication of how badly they can fail. Mr Mansell is now being prosecuted before the SDT for alleged professional arising out of the case.[88]

The NDA example we have used also prompts a reflection on the extent to which (and through what mechanisms) we can achieve Rhode's call to give practical content to professional values. In thinking about the Perkins case, we see, within the criminal law and professional codes, an interplay of general principles and specific rules. Note too how in guidance some things are more easily just spelt out as frowned upon: the refusal to give copies of the agreement, for example. But we think it would be naïve to say this is principally about the

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[84] Maureen Cain, 'The General Practice Lawyer and the Client: Towards a Radical Conception,' (1979) 7(4) International Journal of the Sociology of Law 331.
[85] Rhode (n 6) 57.
[86] ibid 64.
[87] ibid 66.
[88] See: https://www.lawgazette.co.uk/news/weinstein-nda-hearing-will-be-in-private-tribunal-confirms/5106728.article <accessed 30 December 2020>.

nature of rules. Those rules are important but probably best seen as part of the bargain being negotiated between the professional stakeholders in the regulatory system about how to define the public interest. What is as important is that the primary, but not only, force influencing those rules is an *independent* regulator willing to enforce those rules. The SRA may be better placed than, say, The Law Society, to make the necessary judgments and trade-offs in thinking about which rules are best placed to represent the public interest, and particularly the public interest in the administration of justice. Independence of regulation and decisions about enforcement are crucial to changing the intellectual infrastructure of professionalism.

In developing Rhode's concerns about the structural impediments to public interest professionalism in this chapter, we hope the reader can see some of the techniques through which loosening those impediments have been attempted in England & Wales. The professional-commercial complex which encourages 'client-first', and a studied silence on problems their clients would prefer them not to talk about, instantiates and exacerbates power inequalities between employer and employee, men and women, and diminishes the traction of ideas about justice and public interest where they are crucially needed.[89] What we have shown is how an independent legal services regulator, armed with a principled logic (focused on the public interest) and a renewed energy put into the technologies of regulation (through principles, rules, and guidance). has worked within a political economy that includes Parliament, a 'trades union' professional association, and a sense of public outrage at the acts that the MeToo movement brought into plain view, to develop practical content in the public interest, or a version of it.

[89] These are, of course, concerns on which Rhode has been writing for the last twenty years.