WHAT DOES IT MEAN FOR LAWYERS TO UPHOLD THE RULE OF LAW?

A REPORT FOR THE LEGAL SERVICES BOARD

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SUMMARY OF REPORT

The Legal Services Board (LSB) and the nine frontline regulators of legal services are required by the Legal Services Act 2007 to promote the regulatory objective of supporting the constitutional principle of the rule of law.[1] Four of the nine frontline regulators translate this statutory obligation into express duties for the lawyers they regulate.[2]

In this report, we explore:

- what the rule of law means (and the debates surrounding its content),
- what the LSB and the frontline regulators say (or do not say) about the rule of law, and
- what lawyer conduct we think constitutes a commitment to the rule of law.

We then turn to examples in which lawyers have breached, or show potential to breach, that commitment to the rule of law.

Many of the examples that we explore involve divided loyalties: on one hand, obligations to a particular client; and, on the other, duties to the collective (to the court, to the administration of justice, to the wider public interest). The particular social role of lawyers requires them to act in the best interests of their clients and as agents of the rule of law. The first line of the Preamble to the Model Rules of Professional Conduct of the American Bar Association puts this well: 'A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.' Lawyers working in the public sector (for the government, or in courts, or for other public bodies) occupy important roles in formal networks of accountability that are essential to protecting the rule of law. Those who work in the private sector have equally important roles to play in more informal and sometimes less obvious networks of accountability and rule of law protection.

Various and differing political and theoretical claims are made on what the rule of law 'really' means. There is general agreement, however, that at the very least the rule of law means that laws should be made in ways prescribed by the relevant legal system, that no one should be above the law, and that everyone should have equal access to the law's protection. In this way, the rule of law offers a collective sense of trust and confidence in society.

Despite it also being generally agreed that lawyers are of critical importance to the rule of law, there are few accounts that explicitly dig deeper into *how* lawyers and their everyday practices are key to the rule of law. This Report starts to respond to that gap. We suggest and explore seven elements of a legal and professional commitment to uphold the rule of law; a mix of private (client-facing) and public (society-facing) aspects.

First, lawyers are a central part of the social system through which the rule of law is respected and law habitually attended to; lawyers act to make real and shore up that respect and habituation. In this

[1] See section 1(1)(b) for that objective, and sections 3 and 28 for the LSB's and frontline regulators' respective duties to promote it.

[2] Of the nine frontline legal services regulators, the Solicitors Regulation Authority, CILEx Regulation, the Intellectual Property Regulation Board, and the Master of the Faculties place express rule of law obligations (via professional principles, through Codes of Conduct etc) on the individual lawyers they regulate. Three other frontline legal services regulators - the Bar Standards Board, the Council of Licenced Conveyancers, and the Costs Lawyers Standards Board – embed, we suggest, individual lawyers' duties to the rule of law in more particularised requirements. The Institute of Chartered Accountants in England and Wales and the Association of Chartered Certified Accountants do not, as far as we can see, reference the rule of law in their regulations or codes. See further Section 1.1 and Appendix 1.

way, lawyers are a critical part of a social system that is supposed to deliver collective trust and confidence in legality.

Second, lawyers help to challenge inappropriate and arbitrary uses of power, by the state and also by others; supporting citizens with their legal rights and protecting them from state and other coercion.

Third, lawyers apply expertise to help clients understand and navigate the law. In this way, lawyers are agents of rule of law systems, not just because they advise clients on their rights but because they counsel their clients towards legality.

Fourth, actions that improperly frustrate third parties' access to justice and the just resolution of disputes are inconsistent with lawyers' rule of law related duties.

Fifth, the role for the lawyer as an agent of the rule of law is at least as strong beyond court-based dispute resolution. Away from court-based work, lawyers engage with and contribute to the rule of law in myriad ways: when drafting contracts; investigating misconduct; advising on compliance, and so on. This is so even though these legal arenas are often hidden from public view (because of confidentiality or legal privilege, or for other reasons) and without a third-party arbiter (a judge or similar) overseeing in any way the work that is done.

Sixth, the professional rules, codes of conduct and guidance of the frontline legal services regulators are infrastructure of the rule of law, telling us how lawyers should act, and when and how regulators can take enforcement action against those who do not comply. Similarly, in professional regulation and discipline cases, the courts have interpreted lawyers behaving with integrity, honesty, and independence from their clients (as well as from the state) as part of the rule of law.

Finally, the rule of law does not require that lawyers have no opinion on the content or application of the law. They are perfectly entitled to hold such opinions and to act on them. Indeed, their legal expertise may make them especially well-placed in formulating these views.

Precisely because, as we will show, the debate about the preferred meaning of the rule of law is not settled, we urge scepticism of claims that the rule of law demands any particular response to a regulatory issue or that it ascribes to lawyers freedom from restraint or scrutiny. A lawyer's behaviour is not necessarily consistent with the rule of law merely because a superficial claim can be made that they are exercising a right for a client. For example, that I have a right to bring a claim does not necessarily mean I have a right to bring a particular claim in a particular way. Other questions have to be asked and answered.

There is a narrow view of the rule of law which says that professional regulators may not inhibit the 'rights' of clients to access zealous advocacy, and there is a broader view which says that overly zealous advocacy jeopardises and sometimes breaches the rule of law. These debates are reflected in much discussion of NDAs and SLAPPs, for example.

What our analysis of ethical risks in this Report suggests is that lawyers are sometimes too inclined to engage in professionally questionable, and potentially even illegal, actions without fully reflecting on the legal rules and interests engaged. Equally, the examples that we discuss in Section 2 of this Report are not chosen as clear-cut, black-and-white examples of unlawfulness or professional misconduct. They are chosen as examples where there are legitimate questions that might be asked about professional conduct, and which are therefore legitimately the concern of regulators.

The examples in Section 2 suggest how reconciling the discretion exercised in lawyerly work with duties to the rule of law, even where lines demarcating legality are blurred, can be profoundly important to the health of our legal system and the lives influenced by law. They are situations where

professional judgement, applied independently and with integrity, is required; and sometimes appears not to have been present in the particular examples we surface. A view of the rule of law as solely concerned with a client's rights downplays the significance of this need for independence and integrity. The examples we raise often draw attention to the tension between an adversarial view (a client has a right to do or say whatever is not plainly forbidden by clear rules) and a contextual view (a client's rights are central but are restrained, and those restraints must be sensibly and not self-servingly interpreted). In professional terms, 'sensibly' means independently, and with integrity.

The examples we concentrate on tend to highlight deliberate exploitation of legal/factual uncertainty to improperly benefit the client; but other less deliberate behaviour may also give rise to rule of law problems. Substandard work which leads to the compromising of the client's or others' rights may give rise to rule of law concerns, be that professional negligence or inadequate professional services. A body of academic research on criminal defence services, for instance, has tended to suggest that poor defence practice compromises due process for criminal defendants. Competence as well as ethical problems are relevant to the rule of law.

The cases (both general and specific) that we discuss in this Report make it clear that the rule of law implications of legal professional work and ethics can be seen in a wide range of legal contexts and in relation to a wide range of sometimes problematic lawyer behaviours. In that sense, they are pervasive. What the examples also make clear is that rule of law arguments often require a (sometimes challenging) balancing to be done between a lawyer's (public facing) obligations (to the courts, to the administration of justice, to the wider public interest) and their (more private facing) obligations to their clients.

Stepping back from the particular cases that we discuss in Section 2, we suggest that lawyers might breach their legal and professional commitments to the rule of law in the following broad ways:

- **Discriminating against potential clients** or potential client groups in decisions about whether to represent them, where this prevents those clients or groups receiving suitable representation or being unable to know and act on their rights.

- **Representing likely wrongdoers with the effect of** knowingly or recklessly enabling and/or **being complicit** in their continued wrongdoing is inconsistent with the rule of law, where the wrongdoing that the lawyer is complicit in is criminal, and potentially where other illegality is enabled (because the lawyer is knowingly or recklessly enabling breaches of the law). An archetypical example is the mob lawyer, whose practice exclusively consists solely in representing members of a particular criminal organization. A more modern variant might be a lawyer repeatedly drafting non-disclosure agreements for a serially abusive client.[3]

- Managing decision-making and/or communications within the attorney client-relationship to generate plausible deniability for client wrong-doing (a form of **mutually assured irresponsibility**). An example of such conduct might entail in-house lawyers strategically keeping 'difficult' information about potential illegality away from directors in order to maintain the ability of those directors to deny knowledge of corporate wrongdoing.[4]

- **Misleading the court or others,** which may lead to the adjudication and negotiation of disputes or transactions in ways which waste judicial resources and/or organise legal rights on false factual or legal premises. Such actions might include over-polishing evidence, employing deceptive tactics, making false or improperly weak claims in legal documents or litigation, and/or stating an intention to issue legal proceedings when there is none; each of which may

[3] See the fuller discussion later on in this Report at pp. 22, 34-35.
[4] See the fuller discussion later on in this Report at pp. 41-43.

increase costs as well as dull the accuracy of determinations under law. A lawyer might, for example, distort misleadingly the interpretation or presentation of evidence arising in an investigation into the client's wrongdoing that they conduct or input into, or overtly misrepresent facts to a court in the context of litigation.[5]

- **Abusing or taking unfair advantage in pre-action and litigation action** through excessive conduct before and during litigation that improperly diminishes the capacity of opponents to exercise their rights, whether or not it is related to a legitimate claim. A powerful party might, to give one example, use litigation to harass or intimidate a journalist and thereby suppress reporting on its activities.[6]

- **The selection of inappropriate legal frames for defining relationships and problems,** such as 'independently' investigating claims against criminal or civil notions of conduct, in ways that advantage one party because the proceedings or legal arrangements lack objectivity, and independence, or in ways which are misleading or oppressive. Deliberately treating employees as arms-length commercial counterparties would be another example, where the lawyer is complicit in misleading, or takes unfair advantage of, those counterparties. Similar arguments would apply to asserting counterparties are bound by plainly unenforceable contractual terms.

- **Repeated silencing of claimants or similar.** NDAs for serial misconduct at work, for instance, give rise to escalating concerns about the rule of law as one set of legal rights (contracts of compromise that protect reputation) subvert another set (freedom from harassment or worse, and the ability to litigate with evidence from similarly affected, but silenced, victims). As examples of misconduct repeat, the lawyer may become complicit in that misconduct.

- **Facilitating clients' so-called 'creative compliance' with the law,** in ways designed to 'get around' legal obstacles that are contrary to the clear purpose of the legal regime in question. What tips 'gaming the system' into questionable territory could include:

    - **Taking unfair advantage or misleadingly exploiting ambiguity in law or facts** to present a falsely compliant view of the regulated activity;

    - Applying **artificial constructs to defeat the clear purpose of legal rules;**

    - **Excessive zeal in challenging regulatory action;**

    - **Artificial and over-claiming of legal professional privilege** to shield damaging evidence from regulatory scrutiny**;** and

    - **the provision of 'comfort opinions'** (such as opinions designed purely as insurance against criticism which are partial, worthless, or flawed).

- **Acting in a way that displaces the trust in a regulated legal professional to uphold the rule of law** (such as some forms of dishonesty or some occasions of breaching confidentiality). For example, a lawyer might breach a client's confidentiality in unauthorised communications with public authorities, leak privileged information to the press, and 'plainly l[ie]' to the court.[7]

[5] See the fuller discussion later on in this Report at pp. 25-27, 32-34.
[6] See the fuller discussion later on in this Report at pp. 29-32.
[7] See the fuller discussion later on in this Report at p. 23.

Some may wish to push back; to argue that it is unfair of us to raise such a wide set of rule of law concerns relevant to legal services regulation. They would want a more precise definition of what the rule of law means in legal practice, and rules for determining when breaches occur. This would be a fair challenge, although in the main, and arguably entirely, such problems are covered by existing conduct rules and principles. Whether behaviour falling within these above-listed descriptions is actually improper depends on a judgement exercise, balancing the principles in the codes of conduct. Silencing a claimant with an NDA is not necessarily automatically improper; but if it is done in an improper way (in breach of the SRA Code or BSB Handbook and guidance, for instance) or for an improper motive (such that it perverts the course of justice), it then threatens the rule of law. That impropriety can only be established by the balanced application of the professional conduct rules and other law to the particular facts. Both case law and the professional rules make plain that integrity, independence, and honesty are central to the rule of law in these ways. Regulators and courts may want to be careful not to intervene prematurely, but the rule of law does not create a space for totally unregulated professional discretion, nor does it confine such regulation to the courts.

Any general claim that the rule of law supports lawyer/client freedom over regulatory intervention is based on a narrow and unsustainable view of the rule of law. Nonetheless, regulatory intervention in fine judgement cases where lawyers need to balance the rights of their clients and the public interest (including in the administration of justice) is difficult, and regulators are understandably circumspect. It is also important to recognise there are other ways in which regulators can recalibrate the exercise of professional judgement towards the rule of law. Examples of the Sarbanes-Oxley Act from the US and the Senior Managers Regime in the UK suggest how accountability regimes can reduce problematic risk-taking by lawyers and others without ex-post review of cases by regulators thought to be overly bureaucratic.

As we will repeat in this Report, lawyer honesty, integrity, and independence are integral to the rule of law. These values inhibit: misleading courts; the making of false claims about law; the exploitation of power in the name of law when it is inappropriate; the putting of powerful organisations beyond legality and legal scrutiny; and improper private ordering that prejudices rule of law values. Honesty, integrity, and independence are essential to facilitate good governance of the state, organisations, and individuals according to the rule of law, and can be supported by proportionate regulation.

An Overview of the Project

In May 2023, the Legal Services Board (LSB) commissioned a report exploring the professional ethical dilemmas relevant to the obligation in England & Wales on lawyers to uphold the rule of law in everyday practice. This Report responds to that tender and is part of a broader piece of 'PERL' work (on professional ethics, rule of law, and regulation) being undertaken by the LSB.

This is an important focus of the LSB. A commitment to the rule of law and good governance has underpinned the economic and social successes of various societies across the world for many hundreds of years.[8] As the Lord Chief Justice observed in 2022, 'Our commitment to the rule of law is an underappreciated national asset that underpins our economic activity, stability and social cohesion;'[9] framing the rule of law as a 'transnational global commodity which underpins a disproportionate quantity of the world's contracts and financial transactions.'[10]

This longstanding commitment to the rule of law – and the predictability and stability offered by that commitment – is claimed as a main reason why English law and the English courts are so fundamental to global business and the global legal services market.[11] Challenges to that commitment – including challenges from lawyers acting contrary to the rule of law – bring significant social and economic risks. More generally, as Brian Tamanaha puts it, 'A seminal function of the rule of law is to provide a general sense among the populace of a well-organized background structure for activities, and the sense that a measure of legal redress exists should things go wrong (notwithstanding a general lack of knowledge of the details of law).'[12] The rule of law, which the Legal Services Board has a statutory obligation to support,[13] offers a collective sense of security and trust in society. Lawyers are part of the 'development of the infrastructure of civil society, which stands as an important counterweight not only to state power but also to concentrated private power'.[14] As Lon Fuller said, the lawyer is 'an architect of social structure'.[15]

Our aim is to offer a realistic account of lawyers and the rule of law. This means getting into some of the theoretical debates about the foundations and premises of the rule of law; and then using those

[8] Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Profile 2013). Of course, there are also many notable and contemporary challenges, 'the pursuit of democracy without the rule of law'. Jens Meierhenrich and Martin Loughlin, 'Thinking about the Rule of Law' in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (CUP 2021) 18. On these challenges, see Martin Krygier, 'Democracy and the Rule of Law,' in Meierhenrich and Loughlin (eds), *The Cambridge Companion to the Rule of Law* (CUP 2021); Nicola Lacey 'Populism and the Rule of Law' Meierhenrich and Loughlin (eds), *The Cambridge Companion to the Rule of Law* (CUP 2021.

[9] Lord Burnett of Maldon, 'The Hidden Value of the Rule of Law and English Law: Blackstone Lecture 2022' (Oxford 11 Feb 2022) <https://www.judiciary.uk/wp-content/uploads/2022/02/Blackstone-Lecture-2022-final2-1.pdf> accessed 28 July 2023, 7.

[10] ibid 19.

[11] Bingham Centre and Hogan Lovells, *Risk and Return: Foreign Direct Investment and the Rule of Law*, (2015) <https://binghamcentre.biicl.org/documents/49_risk_and_return_fdi_and_the_rol_compressed.pdf> accessed 28 July 2023. See more generally: World Bank, World Development Report 2017: Governance and the Law (Washington: World Bank, 2017).

[12] Brian Z. Tamanaha, 'Functions of the Rule of Law' in Meierhenrich and Loughlin (eds), *The Cambridge Companion to the Rule of Law* (CUP 2021) 222.

[13] Legal Services Act 2007, s 1(1)(b).

[14] Sung Hui Kim, 'Reimagining the Lawyer's Duty to Uphold the Rule of Law' [2023] U. Ill. L. Rev. 781, 810.

[15] Lon L. Fuller, 'The Lawyer as an Architect of Social Structures' in Kenneth Winston ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Hart 2002) 269; see Kim (n 14) 810ff for a richer discussion of Fuller in this context. By contrast, lawyers sometimes 'serve as active enablers of backsliding by advancing legal reforms that have the effect of eroding democratic predicates of election integrity, free speech, and judicial independence'. See: Scott L. Cummings, 'Lawyers in Backsliding Democracy' (2024) California Law Review 101, 116.

debates to map and explore 'the concrete manifestations' and 'diverse applications' that show when and how the practices of lawyers engage rule of law questions.[16]

The Structure of this Report

Section 1 of this report sets out the debate on how to define the rule of law and looks at the possible meanings of the Legal Services Act 2007's regulatory objective of supporting the 'constitutional principle of rule of law' as it applies to the conduct of lawyers. We also look at how frontline legal services regulators have defined rule of law duties for individual lawyers.

Section 2 offers a series of detailed examples of how potential misconduct is relevant to the rule of law. The aim is to show how professional obligations, especially those of integrity and independence, are central to the administration of justice and the rule of law both within but also well beyond the courts.

Section 3 discusses what we know about the nine types of lawyer regulated by the nine frontline legal services regulators, and about the methodological and empirical issues in bottoming out the scale of lawyer conduct inconsistent with the constitutional principle of rule of law. While there is a volume of academic and other research on solicitors, this is uneven in coverage; and there is much less research on barristers, and very little indeed on the other regulated lawyers. Only a small subset of lawyer research engages with professional ethics issues and the sorts of questions we address in this Report.

Finally, Section 4 sets out the main drivers of lawyer conduct that fails to uphold the rule of law. Lawyer behaviour, and compliance with professional norms including the rule of law, is complex. Broadly speaking, there are three dimensions that likely underlie ethical risk:

- character (individuals and professional dispositions to regard something as ethical or unethical);
- context (incentives, infrastructure, and culture); and
- capacities (our knowledge of the applicable rules and the issues problems pose; how we recognise and reason our decisions).

Section 4 also speaks to the role of regulation, and of regulators, in giving life to the regulatory objectives in the Legal Services Act 2007. Holding lawyers and their regulated entities to account is complex, and different parts of the legal profession may require and/or respond to different approaches to enforcement and regulation. Whilst evidence supports the importance of regulatory attention (rules and guidance, monitoring, enforcement, and sanctioning) in reducing ethical risk, it is not enough on its own. Motivation to do 'good' (to be compliant) is also important, whether such comes from a place of moral conscience, a desire to be seen to be doing 'good', and/or a fear of sanctions, loss of business, reputation, etc.

Whilst it may be useful for the LSB and the frontline regulators to more definitively restate a broader, substantive conception of the rule of law - in particular to restate the importance of professional independence and integrity, sometimes in the face of client pressures - we do not feel that the LSB and the frontline regulators need to agree or disagree with any specific 'laundry list' of rule of law elements, but rather to proffer the simple and more general conclusion that Section 1 of this Report

[16] Judith Shklar, *Legalism* (Harvard UP 1964) 1. See further the discussion in this piece of academics who have similarly sought to 'foreground practices, not principles': Jens Meierhenrich, 'What the Rule of Law Is ... and Is Not' in Meierhenrich & Loughlin (eds), *The Cambridge Companion to the Rule of Law* (CUP 2021) 573ff.

comes to: that is, that the formalist conception of the rule of law is too narrow in the context of legal services and legal services regulation.

More important to the rule of law is its instantiation within the rules, guidance, and practices of regulators and the regulated communities. To our minds this means:

- continually developing the evidence base on risks posed by lawyer misconduct to the rule of law;
- to inform reflection and proportionate action on the rule-books, guidance, and operational strategies of regulators and legal service providers for promoting the rule of law informed by such work on risk;
- through an analysis which considers the problem at the level of the case, the individual lawyer, and the lawyer's relation to the organisation (be that a firm or chambers or, for in-house lawyers and others, a host organisation).

The rule of law is foundational to a healthy society and lawyers foundational to that health. Lawyer independence and integrity in striking the balances that a healthy society needs are both foundational to that too.

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Report Table of Contents

SECTION 1 – THE RULE OF LAW AND LEGAL PRACTICE

1.1 The Rule of Law and Legal Services Regulation

The Legal Services Act 2007 (LSA) sets out the regulatory scheme for legal services in England & Wales. It brought in a system of governance with the LSB as a regulator of regulators, under which sit nine 'approved' or frontline regulators. Each frontline regulator has responsibility for regulating one or more 'reserved legal activities'; forms of legal work which only certain bodies or persons can carry out.[17]

Section 1(1)(b) of the LSA sets out that one of the 'regulatory objectives' is 'supporting the constitutional principle of the rule of law'.[18] This is one of only two references to the rule of law in the Act, and where the second is not relevant for our purposes with this Report.[19] The Act does not directly define what the rule of law is,[20] nor whether the phrase 'the constitutional principle of the rule of law' is meant to signal some particular form or understanding of the 'rule of law'.[21] Section 1(3) of the LSA sets out five 'professional principles'. These do not specifically reference the rule of law.

The LSB and the frontline regulators are required by the LSA to act, 'so far as is reasonably practicable', in a way 'which is compatible with the regulatory objectives' and 'most appropriate for the purpose of meeting those objectives'.[22] The LSB can, where appropriate in the circumstances, also set targets for the frontline regulators, or require those regulators to set targets for themselves, or even directly mandate changes from the frontline regulators, where something the regulator has done or not done 'has had, or is likely to have, an adverse impact on one or more of the regulatory objectives'.[23]

In 2017, the LSB referenced, in a discussion on the regulatory objectives, the following set of eight rule of law components identified by Lord Bingham,[24] noting that, 'Whilst this is just one version it gives a good sense of some essential components of the rule of law that could be taken into account when considering potential impacts.'[25]

> (1) The law must be accessible and so far as possible intelligible, clear and predictable.
>
> (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

[17] Legal Services Act 2007, ss 12-13.
[18] ibid s 1(1)(b).
[19] Being an exception to a provision on the disclosure of restricted information. See ibid s 168(3)(f).
[20] This definitional omission is not uncommon. The 'rule of law' as a phrase is seen in various parcels of legislation without further explanation or definition. Including in the Constitutional Reform Act 2005.
[21] It is likely that the use of 'constitutional' here is simply a nod to the Constitutional Reform Act 2005 and the same wording used in section 1(a) of that Act. In the 2022 Blackstone Lecture, the Lord Chief Justice noted that the Constitutional Reform Act 2005, 'states that it [the rule of law] is an existing constitutional principle, without defining what exactly it means. The courts have yet to be called upon to offer a definition or determine any of its components.': see Lord Burnett of Maldon (n 9) 1.
[22] Section 3(2)(a) for the LSB and Section 28(2)(a) for the frontline regulators. Legal Services Act 2007, ss 3, 28.
[23] ibid ss 31(2)(a)-(b). Failure to comply might then lead to a series of escalating interventions. ibid ss 32, 41. This includes, in Section 45, the ultimate power for the LSB to cancel the designation of a frontline regulator as an 'approved' regulator.
[24] The LSB references the eight rule of law elements as coming from Bingham Centre for the Rule of Law, which in turn reference Lord Bingham's extra judicial work on the rule of law, including his 2011 book. See Bingham Centre for the Rule of Law, 'Our Vision' <https://binghamcentre.biicl.org/our-vision?cookiesset=1&ts=1692787179> accessed 23 August 2023 (quoting Tom Bingham, *The Rule of Law* (Penguin 2011)).
[25] Legal Services Board, 'The Regulatory Objectives' (2017) <https://www.legalservicesboard.org.uk/about_us/Regulatory_Objectives.pdf> accessed 28 July 2023, 6.

(3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

(4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.

(5) The law must afford adequate protection of fundamental human rights.

(6) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.

(7) The adjudicative procedures provided by the state should be fair.

(8) The rule of law requires compliance by the state with its obligations in international law as in national law.[26]

We come back to these elements in the following section, which looks at competing definitions and framings of the rule of law and which allow a broader focus beyond the courts and relations between the individual and the state, important as both are.

Of the nine frontline legal services regulators, four place express rule of law obligations (via professional principles, through Codes of Conduct etc) on the individual lawyers they regulate: the Solicitors Regulation Authority; CILEx Regulation; the Intellectual Property Regulation Board; and the Master of the Faculties.[27] These four also offer some (limited) guidance on what they each think the rule of law means.

We interpret three other frontline legal services regulators - the Bar Standards Board, the Council of Licenced Conveyancers, and the Costs Lawyers Standards Board - as embedding individual lawyers' duties to the rule of law in more particularised requirements; for example, in duties of independence and candour to courts and counterparties. The Institute of Chartered Accountants in England and Wales and the Association of Chartered Certified Accountants do not include specific rule of law obligations on those they regulate. It may be that these two regulators see the rule of law as an implicit aspect of other enumerated professional principles or duties.[28] Appendix 1 sets out, in detail, how each of the nine frontline regulators includes, directly and/or indirectly, the rule of law in their professional codes, handbooks (etc), and guidance documents.

1.2 Defining The Rule of Law

While there is common agreement that the rule of law is a good thing and generally to be promoted, there is no agreed definition of what 'the rule of law' actually means,[29] either in general or in relation

[26] These are largely mirrored in the 'Rule of Law Checklist' produced by Council of Europe's Venice Commission. See: European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, Study No. 711/2013, (2016) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e> accessed 23 August 2023.
[27] Andrew Boon notes how a principle on the 'rule of law' was introduced by the Law Society Council as part of the Solicitors Code of Conduct 2007 (having not been previously included). See Andrew Boon, *Lawyers and the Rule of Law* (Hart 2022) 276; Andrew Boon, 'The legal professions' new handbooks: narratives, standards and values' (2016) 19 Legal Ethics 207.
[28] The BSB, for example, references the rule of law in the very first paragraph of its Handbook. See See Bar Standards Board, BSB Handbook (version 4.6, 2020) <https://www.barstandardsboard.org.uk/the-bsb-handbook.html> accessed 28 July 2023, at A1.1.
[29] Lord Bingham credits A. V. Dicey with coining the expression 'the rule of law' even though 'he did not invent the idea lying behind it'. Bingham (n 24).

to legal services. Instead, the meaning of the 'rule of law' is an 'essentially contested concept',[30] with ongoing nuanced debates about what it is (or might be), and what it does or might require among legal academics, judges, and government officials. The current Attorney General recently described the rule of law as 'one of the most elusive constitutional principles'.[31]

Understanding something of these debates is both necessary and useful if we are to consider what the rule of law means as a regulatory objective for practising lawyers and their regulators. At the same time, this is a research report written for a legal services regulator and not an academic monograph.[32] What follows next offers some detail; further detail can be found in Appendix 2.

Descriptions of the rule of law tend to be either formal or substantive; the relative breadth generally determined by how much the person doing the definition-work thinks the rule of law can or should add to a 'good' political system (in addition to other 'companion' concepts like democracy, dignity, and so on).[33] Formal descriptions of the rule of law tend to 'identify the formal features that a legal system must possess if law is to be able to function as law.'[34] These would include 'the generality, clarity, publicity, stability and prospectivity of the norms that govern a society',[35] as well as 'the processes by which these norms are administered, and the institutions - like courts and an independent judiciary - that their administration requires'.[36]

Laws may be 'bad' or unjust and yet still part of formal rule of law systems and accounts. Imagine a country where laws were democratically made and published, applied generally to everyone, and adjudicated upon by an independent judiciary. Imagine also that that country's laws permitted discrimination on the basis of religion. Would you say that was a country where the rule of law was alive and well? For many preferencing a formal account, the answer would be 'yes'.

A more topical example might be to think of a country in which laws were democratically made and published, were applied generally to everyone, and were adjudicated upon by an independent judiciary, but in which the government decided that it could, because of Parliamentary sovereignty, pick and choose which international law obligations (that it had signed up to) the government would, in practice, actually abide by.

More substantive accounts of the rule of law tend to start from the premise that it is not possible to exclude political or social ideals from an account of the rule of law in the way that formal accounts attempt to do. These substantive accounts say that the rule of law must include certain virtues or values (liberty, justice, human dignity etc) and/or a sense of rights to underpin and give substance to the rule of law. Substantive accounts often blend together formal legality (legal clarity, prospectivity etc), democracy, and the protection of rights (individual and sometimes also more collective, social welfare rights).[37] These substantive accounts of the rule of law are concerned with the content of the

[30] Jeremy Waldron, 'The Rule of Law as an Essentially Contested Concept' in Meierhenrich & Loughlin (eds), *The Cambridge Companion to the Rule of Law* (CUP 2021).
[31] Attorney General's Office, 'Attorney General delivers speech on the Rule of Law'(10 July 2023) <https://www.gov.uk/government/news/attorney-general-delivers-speech-on-the-rule-of-law> accessed 29 July 2023.
[32] Those looking further to explore the possible meanings of the rule of law are thus encouraged to engage with the footnotes and the citations they contain.
[33] Kristen Rundle, *Revisiting the Rule of Law* (CUP 2022) 29.
[34] Jeff King, 'The Rule of Law' in Richard Bellamy and Jeff King (eds), *The Cambridge Handbook of Constitutional Theory* (CUP forthcoming), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4487306> accessed 23 August 2023.
[35] Jeremy Waldron, 'Rule of Law,' Stanford Encyclopedia of Philosophy (2016) <https://plato.stanford.edu/entries/rule-of-law/> accessed 29 July 2023; see also Lon L Fuller, *The Morality of Law* (Yale UP 1964).
[36] Waldron, 'Rule of Law,' (ibid).
[37] For a fuller discussion, see Brian Z. Tamanaha, *On The Rule of Law: History, Politics, Theory* (CUP 2004) ch 8.

law as well as the ways in which the law has been made and is applied: reflecting on a rule of *good* law.

While differences in the definition and content of the rule of law abound, there are also common elements shared across participants in the debate, as well as in broader public understandings. These include the broad idea that those in power should work within, and be accountable to, a framework of law (instead of in an ad hoc space of capriciousness); and that citizens should respect a society governed by law and abide by its laws where properly made. There is consensus that the rule of law means that laws should be made in accordance with the ways prescribed by the relevant legal system, that no one should be above the law, and that everyone should have access to the law's protection. Yet The Law Society noted in research it undertook on public understandings of the rule of law that it is notions of fair play and legality which are ascendant:

> [T]he public very clearly sees the law in terms of 'the rules of the game'. What matters to the public is not the principle, but the fact of the law being adhered to at all times. Everyone has a duty to follow the rules, and the public expects these rules to be properly applied to everyone.[38]

This is a different emphasis to traditional lawyerly and political definitions of the rule of law. It suggests the public emphasises legality, adherence to the law by all, as central to social cohesion.[39]

The fact that the rule of law is an 'essentially contested concept' does not mean that it lacks value: instead, the argument and debate about the rule of law helps us to better understand 'the area of value that the contested concept marks out'.[40] The debate sets out what we are arguing over. This is because the rule of law 'is the concept of a solution to a problem' - namely, the problem of what a good society looks like - and 'we are unsure how to solve [the problem]; and rival conceptions are rival proposals for solving it or proposals for doing the best we can, given that the problem is insoluble.'[41]

Our hope is that the above framing of different takes on the rule of law, coupled with the further detail in Appendix 2, will help provide a foundation for the discussion in the following section – on the role of lawyers in relation to the rule of law – and for how legal services regulators (the LSB and the frontline regulators) reflect on how to give life to their rule of law LSA regulatory objective. This is not a report addressed to academics interested in further theorising the rule of law. It is a report for a regulator which wishes to consider how best to regulate professional ethics with a particular eye on the relationship between professional conduct and the rule of law.

As we noted above, the LSB has already suggested that Lord Bingham's 8 elements give a 'good sense' of what might be included in the rule of law. Whilst more emphasis could be placed on adherence to the law and the ways in which the rule of law manifests beyond the court room, we think it is not necessary for the LSB to put any further stall in proffering one or another preferred version or definition; not least because Parliament chose to also not proffer a definition in either the Legal Services Act or the Constitutional Reform Act 2005. Suggesting, as the LSB has already done, that some form of more substantive framing of the rule of law makes more sense than a more formal framing works for present purposes. And, as we will come on to show, the courts have clearly interpreted, in cases on professional regulation and discipline, that lawyers behaving with integrity, honesty, and

[38] I Stephanie Boyce, 'Rule of Law' or 'rules of the Law'? Public Perceptions of the Law and What It Means for Those Who Uphold It' (Gray's Inn, London, 15 February 2022) <https://www.lawsociety.org.uk/topics/human-rights/the-rule-of-law-what-does-it-really-mean> accessed 23 August 2023, 6-7.
[39] See also Hadfield, Meierhenrich and Weingast, discussed more fully below.
[40] Waldron, 'The Rule of Law as an Essentially Contested Concept' (n 30) 134.
[41] ibid 133.

independence from their clients (as well as from the state) is part of the rule of law.[42] As a matter of law, then, the courts accept and indeed have propounded the view that the rule of law has the integrity and independence of its agents as core ideas.

1.3 How The Rule of Law Applies to Legal Practice

The rule of law debate is no less contested and no less nuanced when we seek to apply it to legal practice. Nonetheless, there is a consensus that lawyers are central to the rule of law, [43] that an individual lawyer's behaviour can be consistent or inconsistent with the rule of law, and that certain specific lawyer actions support, while others erode, the rule of law. This subsection will address those areas of consensus.

We treat as axiomatic that 'The legal profession … is located at the crux of the rule of law;'[44] as lawyers and the profession are crucial to, 'constructing the complex of norms, institutions, specialized staffs, and cultural dispositions that make up … the Rule of Law'.[45] In its 2022 Rule of Law Report, the European Commission framed lawyers as 'key actors', noting that, 'Lawyers and their professional associations play a fundamental role in strengthening the rule of law and ensuring the protection of fundamental rights, including the right of a fair trial'.[46]

Despite this general, high-level agreement about lawyers' importance, there are few accounts that explicitly dig deeper into *how* lawyers and their everyday practices are key to the rule of law.[47] Such work tends to be confined to 'legal institutions' and the rule of law (including on judges and judicial independence),[48] or lawyers and international development (seeing lawyers as agents helping build

[42] See the discussion of ***Lumsdon*** below and associated text.

[43] See, for example, the framing by the UNHRC Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, in his April 2022 Report 'Protection of lawyers against undue interference in the free and independent exercise of the legal profession' A/HRC/50/36 <https://www.ohchr.org/en/documents/thematic-reports/ahrc5036-protection-lawyers-against-undue-interference-free-and> accessed 30 July 2023.

[44] Tamanaha, *On The Rule of Law* (n 37) 59.

[45] Robert W. Gordon, 'The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections' (2010) 11 Theoretical Inquiries in Law 441, 445.

[46] European Commission, 2022 Rule of Law Report <https://eur-lex.europa.eu/resource.html?uri=cellar:2e95c008-037b-11ed-acce-01aa75ed71a1.0001.02/DOC_1&format=PDF > accessed 30 July 2023, 10.

[47] As Brian Tamanaha has written, 'Though seldom given detailed attention by legal theorists, all liberal accounts of the rule of law presuppose the presence of a robust legal tradition.' See Tamanaha, *On the Rule of Law* (n 37) 58. For the few detailed accounts, see Boon, *Lawyers and the Rule of Law* (n 27); Kim (n 14); Adama Dieng, 'Role of judges and lawyers in defending the rule of law' (1997) 21 Fordham Intl L J 550. Among those interested in professional ethics, Bob Gordon and Brad Wendel have both written thoughtfully and directly on lawyers and the rule of law. See Gordon, 'Role of Lawyers' (n 45) 445; W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton UP 2010); W. Bradley Wendel, 'The Rule of Law and Legal-Process Reasons in Attorney Advising' (2019) 99 BU L Rev 107.

[48] Judicial independence is, for example, a common measure in studies which seek some form of rule of law quantification. See Mila Versteeg and Tom Ginsburg, 'Measuring the rule of law: a comparison of indicators' (2017) 42 L & Soc Inquiry 100. The independence of the legal profession also gets some treatment on the topic of the independence of legal institutions and the rule of law. See, e.g., David Edward, 'The Significance of Independent Legal Professions for the Rule of Law' in Bundesministerium für Justiz der Republik Österreich (ed), *Die Bedeutung der freien Rechtsberufe im Integrierten Europa* (Manz 1999) 67-75, 143-150, 219-226; The Law Society of England and Wales, 'UN Basic Principles on the Role of Lawyers report' <https://www.lawsociety.org.uk/Topics/Research/UN-basic-principles-on-the-role-of-lawyers> accessed 23 August 2023.

capacity in 'rule of law projects' and develop legal systems),[49] or on lawyers and (access to) justice.[50] Lawyers are often peripheral players, if mentioned at all, in many accounts of the rule of law; their roles and functions under-theorised and largely absent from the rule of law literature. This is perhaps unsurprising given the philosophical and political interests of many of those who write about the rule of law. As such, while 'there is a relatively clear and shared norm that underwrites the work and privileged position of lawyers in most societies—it is a commitment to the Rule of Law,'[51] what behaviours actually *constitute* a professional commitment to the rule of law is open to debate.

One might characterise the response of some lawyers to the debates on NDAs and SLAPPs, for instance, as them thinking that compliance with the formal legality aspects of the rule of law amounts to the full extent of their rule of law obligations. As we hope we will make evident in this section, that must be wrong. As Sung Hui Kim has written, 'If the duty to uphold the rule of law basically requires lawyers not to break the law and not to help their clients break the law, then the duty adds almost nothing to the lawyer's existing professional obligations'.[52] Additionally, such a narrow understanding is inconsistent with a reading that attributes internal coherence to the Legal Services Act, as it would render the LSA's regulatory objective of 'supporting the constitutional principle of the rule of law' unnecessary given the concurrent objective of 'promoting and maintaining adherence to the professional principles.'[53]

In what follows we suggest seven elements that we feel are part of a legal and professional commitment on lawyers to uphold the rule of law; a mix of private (client-facing) and public (society-facing) aspects. In the subsequent section of this Report, we then move from these general elements to a series of detailed, real-world case studies that we hope will give some practical purchase.

1.3.1 Lawyers and Respect for The Rule of Law

First, and as products of the rule of law, lawyers help to 'build the specifically-legal institutions and culture of the Rule of Law'.[54] They are a necessary part of a social system through which law is respected and habitually resorted to, and where lawyers act to make real and shore up that respect and that habituation.[55] This is closely linked with professional independence; with lawyers needing detachment from their clients so that, where necessary, lawyers - as living, active agents of the rule of law - can and should sometimes challenge what their clients seek to do.[56]

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[49] This work largely sees lawyers as emissaries of the rule of law in the context of democratic state-building, instead of focusing on lawyers' roles per se in relation to the rule of law. Here, see for example: Yves Dezalay and Bryant Garth, 'Law, Lawyers and Social Capital: "Rule of Law" Versus Relational Capitalism' (1997) 6 Soc & L Studies 109; Gillian K. Hadfield, 'Don't Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies' (2007) 56 DePaul L Rev 401. There is, equally, work which looks at the role of lawyers in less democratic regimes. See, eg, Maciej Kisilowski, 'The middlemen: The legal profession, the rule of law, and authoritarian regimes' (2015) 40 L & Soc Inquiry 700; Alex Batesmith and Jake Stevens, 'In the Absence of the Rule of Law: Everyday Lawyering, Dignity and Resistance in Myanmar's "Disciplined Democracy"' (2019) 28 Soc & L Studies 573.

[50] See Christine Parker, *Just Lawyers: Regulation and Access to Justice* (OUP 1999); Deborah L. Rhode, 'Access to Justice: A Roadmap for Reform' (2000) 69 Fordham L Rev 1227; Deborah L. Rhode, *Access to Justice* (OUP 2004).

[51] Allan C. Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age* (CUP 2015) 16.

[52] Kim (n 14) 785.

[53] Legal Services Act 2007, s 1(1). The LSA's eight regulatory objectives are distinct, but several are indisputably overlapping—to take an example other than the two mentioned in the text, it is obvious that, in some instances, conduct that 'increas[es] public understanding of the citizen's legal rights and duties' may simultaneously 'improv[e] access to justice' or 'protect[] the interests of consumers' or 'protect[] and promot[e] the public interest'. ibid. Therefore, it is not possible to narrow into formalist terms the statute's reference to 'rule of law' by negative implication.

[54] Gordon, 'Role of Lawyers' (n 45) 448.

[55] Hadfield, 'Don't Forget the Lawyers' (n 49) 403.

[56] On professional independence, see 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 J L & Soc 83.

To be effective, the rule of law must be operationalised by lawyers and thus, 'integrated into the complex, decentralized choices made by millions of individuals and entities.'[57] Lawyers are part of a system of how rules are understood, respected, abided by, and enforced. Many lawyers (acting with independence in the interests of justice) can and do counsel their clients towards legality;[58] whereas others see their role as encouraging creative compliance by their clients,[59] or worse.[60]

Lawyers acting as agents of the rule of law also means that targeting lawyers for the legitimate legal work they do for their clients may diminish the rule of law.[61] There is a difference between expressing legitimate concerns about lawyer conduct and baseless targeting of lawyers for doing their job, as recent examples in immigration suggest.[62] As the UN Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, has recently commented, 'targeting [lawyers] violates the rights of lawyers, but also affects the rights of other individuals to a fair trial and to the broad range of human rights meant to be protected by rule of law and a functioning judicial system'.[63]

1.3.2 Lawyers Challenging the State

Second, lawyers help to challenge inappropriate and arbitrary uses of power by the state; supporting citizens with their legal rights and protecting them from state coercion. As Brian Tamanaha has written, 'What keeps government officials within legal limits – in addition to their personal commitment to abide law – are functioning bureaucratic legal institutions (prosecutorial, judicial) widely disbursed at various levels and settings of government, along with a vigilant civil society that demands officials abide law.'[64] This is part of the second element of professional independence; the independence of lawyers from the state (or other accretions of power) and from state interference.

Of course, many lawyers work for the state itself and they too are subject to rule of law duties. These duties are implicated where government lawyers have a role in creating law, either through a role in legislative processes or in the downstream interpretation and application of law. Given the open, contested nature of the rule of law, lawyers in these roles operate in a grey area when they create or interpret law in ways that would undermine the individual's sphere of freedom relative to the state,

[57] Hadfield, 'Don't Forget the Lawyers' (n 49) 405.
[58] Adair Morse, Wei Wang, and Serena Wu, 'Executive lawyers: Gatekeepers or strategic officers?' (2016) 59 J L & Econ 847.
[59] Christine E. Parker, Robert Eli Rosen, and Vibeke Lehmann Nielsen, 'The two faces of lawyers: Professional ethics and business compliance with regulation' (2009) 22 Geo. J. Legal Ethics 201.
[60] Here, see Scott L. Cummings' work (n 15) on legal challenges to the 2020 US presidential election and on the lawyers who are actively involved in democratic backsliding, 'recruited to legitimize extraordinary legal measures by developing theories and strategies to mobilize law against the rule of law.'
[61] There are many instances of this. See, for example: Eduardo Reyes, 'Endangered lawyers: Climate of intimidation 're-emerging' in Northern Ireland' (*The Law Gazette*, 24 Jan 2018) <https://www.lawgazette.co.uk/news/endangered-lawyers-climate-of-intimidation-re-emerging-in-northern-ireland/5064500.article> accessed 23 August 2023; Mark Townsend, 'Top ministers urged Priti Patel to stop attacks on "activist lawyers"' *The Guardian* (18 Oct 2020) <https://www.theguardian.com/politics/2020/oct/18/top-ministers-urged-priti-patel-to-stop-attacks-on-activist-lawyers> accessed 23 August 2023; Richard Simmons, 'Neuberger: attacks on judges undermine rule of law' (*The Lawyer*, 16 Feb 2017) <https://www.thelawyer.com/neuberger-attacks-judges-undermine-rule-law/> accessed 23 August 2023.
[62] Contrast Neil Rose, 'SRA Shuts down Three Immigrations Firms Caught in Daily Mail Sting' (*Legal Futures*, 31 July 2023) <https://www.legalfutures.co.uk/latest-news/sra-shuts-down-three-immigrations-firms-caught-in-daily-mail-sting> accessed 4 October 2023 and; 'Law Society and Bar Council Joint Statement on Jacqueline McKenzie' <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/law-society-and-bar-council-joint-statement-on-jacqueline-mckenzie> accessed 4 October 2023.
[63] UNGA, 'Reimagining justice: confronting contemporary challenges to the independence of judges and lawyers: Report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite' (2023) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/066/58/PDF/G2306658.pdf?OpenElement> accessed 30 July 2023, 14.
[64] Tamanaha, 'Functions of the Rule of Law' (n 12) 227.

for example, by reducing the law's clarity,[65] or by creating law based on morally unjustifiable forms of discrimination or that burden fundamental human rights.[66]

1.3.3 Lawyers as Legal Counsellors

Third, it is consistent with their rule of law duties for lawyers to apply expertise to help clients understand and navigate the law. In this way, lawyers are agents of rule of law systems not because they advise but because they counsel their clients towards legality, there being a need for those:

> … who communicate the rules through advice to private clients and governments and enable them to organize their businesses and structure their transactions and comply with regulations and tax laws and constitutional limitations; and who can negotiate and if necessary litigate with the state and other private parties when their claims of rights are impaired or disputed. Legal regulations and procedures are complicated and rapidly changing; so that sophisticated, experienced agents who know their way around the rule-systems and the courts are generally essential to effective representation within and operation of the system.[67]

A formal understanding of the rule of law sees lawyers as simply advising on the law as drafted; guided by ideas of legal certainty and legality.[68] This is one thing when the law is settled and clear, but another when the law is ambiguous or unsettled, or where there are soft norms or international laws not translated into local 'rules'. The challenge here is that 'the *business* of lawyers is to interpret the rules - which, however clear in formulation, always have gaps, ambiguities and conflicts - in ways that favor their clients.'[69] Yet where there is space for competing interpretations of the law, lawyers also have a role to play as products and agents of the rule of law:

> [J]ust as the client needs to trust the lawyer to draft an enforceable will, society needs to trust the legal profession to be faithful to the law, in both letter and spirit and not to abuse its capacity to play with rules in ways which undermine regulatory objectives or otherwise actively facilitate a client's unlawful actions or probably unlawful actions.[70]

Lawyers shoring up client autonomy (helping clients exercise their rights and entitlements) is not always a value-free exercise, as the examples we offer in the following section make clear. The lawyer is often more than a walking and talking encyclopedia on the law; their value (to their clients and to society) being more than just as a repository of knowledge about the (easily understood) content and application of certain (clear) rules. A danger here is that lawyers may move beyond legitimate interpretation of ambiguity to illegitimate exploitation of it.

1.3.4 Lawyers and the Public Administration of Justice

Fourth, actions that frustrate third parties' access to justice and the resolution of disputes are inconsistent with lawyers' rule of law related duties. Lawyers help with the bringing and resolution of

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[65] See, e.g. Richard Godden, 'Rule of law is under threat from regulations' (*The Lawyer*, 16 Nov 2016) <https://www.thelawyer.com/rule-of-law-is-under-threat-from-regulations/> accessed 15 August 2023.

[66] See Section 1.2.

[67] Gordon, 'Role of Lawyers' (n 45) 448.

[68] It also, we think, places too much emphasis on only one aspect of lawyer independence (protecting a client from unlawful interference from the state) and not enough on independence requiring lawyers to say to their clients 'Thus far shall you go and no further'. See Oakley and Vaughan, 'In dependence' (n 56).

[69] Gordon, 'Role of Lawyers' (n 45) 451-52. Our emphasis.

[70] David Kershaw and Richard Moorhead, 'Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession' (2013) 76 MLR 26, 47.

disputes, allowing claims to be resolved by judges and the system of precedent based on such judgments to evolve. These are core elements of the rule of law in common law systems. This means that forms of lawyering which seek to frustrate the ability of an opponent to have their dispute adjudicated will push back against the rule of law.

We know that, 'clients who can afford to pay for [legal services] can rapidly exhaust adversaries who cannot; and thus turn the legal system into a device for evading the very rules it is designed to enforce or, worse, into a medium for extortion and oppression of the weak by the strong.'[71] Economic strength can destabilise the integrity of the justice system (and so also the rule of law),[72] and we see this made tangible in various forms of lawfare (where lawyers abuse rules of court to unfairly damage an opponent).[73] A narrow rule of law definition would see this sort of conduct as being dealt with by the courts and the procedural rules on dispute resolution, which exist to inhibit such behaviour, as well as professional conduct rules. A wider view would point to the inadequacies of this approach. Courts can be reluctant to look into the conduct of parties and, in any event, much behaviour takes place beyond the courts and before their involvement. Softer forms of regulation such as training programmes on dealing with vulnerable witnesses, for example, can also have roles to play.

1.3.5 Lawyers and the Private Administration of Justice

Fifth, a lawyer's duties related to the rule of law also apply *outside* of court. The rule of law is not just about court-based lawyering: 'what the lawyer does in the privacy of the office may be seen as part of the public administration of justice because law is made and applied through lawyer counselling and planning and often this "private" law has public impacts as great as any ruling of a high court'.[74] Law is applied and legal meaning is advanced in drafting, transactions, investigations, and through the giving of legal advice as much as in dispute resolution.[75]

In legal arenas which are hidden from public view and without a third-party arbiter (a judge or similar), the role for the lawyer as an agent of the rule of law is at least as strong as in court-based dispute resolution. Some might even argue that the lack of a third-party arbiter, and the shield from scrutiny provided by confidentiality or legal privilege, *increases* the need for the lawyers involved to be reflective of their special roles as agents of the rule of law. Client counselling has the potential to shore up or to threaten the 'stability, intelligibility and equal administration of the law – important rule of law values'.[76] Lawyers who manipulate uncertainty through client counselling away from a reasonable interpretation of the law risk eroding 'public faith in the impartial administration of laws and, in turn, law's legitimacy'.[77] The application of law, and legality itself, becomes discretionary for those able to access and exploit such lawyering.

1.3.6 The Rule of Law Shaping Lawyer Conduct

Sixth, each of the frontline legal services regulators sets out a series of professional principles, rules, and/or duties. These - part of what is sometimes called 'the law of lawyering' - are high-level

[71] Robert W. Gordon, 'Corporate Law Practice as a Public Calling' (1990) 49 Md L Rev 49 255, 259.
[72] On which, see Parker, *Just Lawyers* (n 50).
[73] On which, see: Siri Gloppen and Asuncion Lera St. Clair, 'Climate Change Lawfare' (2012) 79 Social Res 899; Anna-Maria Marshall and Susan M. Sterett, 'Legal Mobilization and Climate Change: The Role of Law in Wicked Problems' (2019) 9 Oñati Socio-legal Series 267.
[74] Alvin Esau, 'What Should We Teach? Three Approaches to Professional Responsibility' in Donald E. Buckingham and others (eds), *Legal Ethics in Canada: Theory and Practice* (Harcourt Brace 1996) 178—as quoted in Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 Monash U L Rev 49, 61.
[75] Hon Sir Gerard Brennan AC KBE, 'The Role of the Legal Profession in the Rule of Law' (Speech at Supreme Court, Brisbane, 31 August 2007) <https://nswbar.asn.au/circulars/brennan.pdf> accessed 23 August 2023.
[76] Kim (n 14) 816.
[77] ibid

statements about what it means to be a regulated legal professional; the 'fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold', as the SRA puts it.[78] Each set of professional principles/duties of the nine frontline legal services regulators speaks to the multiple private and public-facing obligations of the relevant regulated lawyers: obligations owed to the court, to the wider public, to clients, the need to act with independence and integrity (and so on). The rule of law made tangible in professional codes sees lawyers as part of the administration of justice - needing to act with independence and integrity - as well as vehicles for how their clients know about and enforce their rights.

These professional principles/duties connect to the rule of law in at least two ways. First, they are part of the procedural aspects of formal accounts of the rule of law,[79] telling us how lawyers (who have important institutional roles to play in rule of law systems) should act, and when and how regulators can take enforcement action against those who do not comply. Second, as described above, four of the nine frontline regulators include express obligations (i.e. specific legal commitments on lawyers and/or their regulated bodies) in relation to the rule of law; and the other five regulators arguably include more or less implicit recognition of the rule of law in the particularised obligations they set out (to the court and the administration of justice, a need to act with independence etc).[80] Supporting and acting consistently with the rule of law is not just an abstract, theoretical ideal for practising lawyers; it is a legal requirement.

1.3.7 Lawyers and the Content of the Law

Seventh, the rule of law does not require that lawyers have no opinion on the content or application of the law. They are perfectly entitled to hold such opinions and to act on them. Indeed, their legal expertise may make them especially well-placed in formulating these views. Lawyers can, and many do, think about and act on issues of substantive justice as well as procedural justice and formal legalism (discussed above). Think here of the many examples of lawyers being involved in law reform and pushing for legislative change.[81] A lawyer saying, 'After careful consideration, I have taken the view that X is a bad law, that it should be changed, and that I will actively advocate for its change' is perfectly consistent with the rule of law.

A lawyer who instead says 'After careful consideration, I have taken the view that X is a bad law and I am not going to follow it' is more problematic,[82] though the most substantive versions of the rule of law (those which seek to give serious weight to individual and collective rights, and to substantive equality) might in some circumstances prompt lawyers to engage in civil protest and non-compliance with rules they genuinely feel are unjust or otherwise significantly problematic.[83] Laying claim to a preferred substantive version of the rule of law as a justification for certain forms of disobedient conduct does not, however, mean that the conduct would be without consequences (legal, professional, and so on).

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[78] See Solicitors Regulation Authority, SRA Principles (2018) <https://www.sra.org.uk/solicitors/standards-regulations/principles/> accessed 26 July 2023.

[79] On which, see: Jeremy Waldron, 'The rule of law and the importance of procedure' (2011) 50 Nomos 3, 17; Jeremy Waldron, 'Thoughtfulness and the Rule of Law' (2011) 18 British Academy Rev 1.

[80] See Section 1.1.

[81] James E. Moliterno, 'The Lawyer as Catalyst of Social Change' (2008) 77 Fordham L. Rev 1559.

[82] Minow, Martha, 'Breaking the Law: Lawyers and Clients in Struggles for Social Change' (1990) 52 U. Pitt. L. Rev. 723.

[83] For a discussion on these issues, see: Judith A. McMorrow, 'Civil Disobedience and the Lawyer's Obligation to the Law' (1991) 48 Wash. & Lee L. Rev. 139; Matthew R. Hall, 'Guilty but civilly disobedient: Reconciling Civil Disobedience and the Rule of Law' (2006) 28 Cardozo L. Rev. 2083. See also, Bar Standards Board (2023) Guidance on the regulation of non-professional conduct, September 2023, <https://www.barstandardsboard.org.uk/uploads/assets/e803d194-972c-43b4-84bf162568cee383/60838a0a-904d-4a15-92af9e236b2ed1a2/Guidance-on-the-regulation-of-non-professional-conduct-September-2023.pdf> accessed 4 October 2023.

SECTION 2 – HOW RULE OF LAW-RELATED DUTIES MIGHT BE BREACHED IN PRACTICE

In this section, we discuss how ethical problems that manifest in practice may relate to the rule of law in some of the many guises outlined in the previous section. Each of the subsections addresses areas where lawyers may experience tensions simultaneously fulfilling specific duties to particular clients and duties related to the rule of law.

The examples that follow typically do not involve clear-cut, black-and-white unlawfulness of the kind that would be captured by even the most narrow definition of the rule of law. They are offered as examples of cases where professional regulators or others with legal power (the courts or prosecutors) might properly investigate and, depending on the more particular circumstances to be investigated, find or not find a breach of professional rules or other law. The examples are designed to illustrate the multiple ways in which professional misconduct can, and sometimes probably does, impact on the rule of law, and the resulting importance of effective professional regulation of these areas.

We do not, of course, suggest how such areas should be regulated. To some degree, they are already (through the codes, handbooks, guidance etc of the frontline regulators). What we are doing is providing examples of how a lawyer's work can implicate duties to the rule of law and can be profoundly important to the health of our legal system and to the lives influenced by law. In other words, our analysis may assist with, but could not be the sole basis for, a judgement on the efficacy and proportionality of regulatory interventions in this area.

2.1 Taking on Clients and the Non-identification Principle

The rule of law is often prayed in aid as a reason for allowing lawyers to take on clients without that decision being criticised. There are good reasons for so arguing (linked to access to justice, the right to a fair trial, and so on), but the arguments can be stretched too far.

The Bar's cab rank rule, and prohibitions in many legal professions on discrimination among potential clients, are associated with notions of neutrality (a lawyer does not judge a client's cause) and non-identification (a lawyer is not associated with, and therefore not accountable for, the client's cause). Such notions are particularly apposite for lawyers whose clients come having (allegedly) committed an act for which the lawyer then faces criticism. There is obvious sense in not generally associating criminal defence lawyers with the criminal acts of those they defend, for instance.

We note, but do not need to rehearse, debates about the value of the cab rank rule,[84] other than to say that the notion of non-identification, and perhaps neutrality, makes less sense when the lawyer works with the client to advance a cause the lawyer already identifies themself as believing in and which motivates their choice of clients. After all, if one identifies with a cause, one can clearly be criticised for doing so, and cannot hide behind the prophylactic of lawyerly neutrality.

Ideas of neutrality and non-identification properly help deflect criticism of lawyers simply for doing their job. Such criticisms are frequently said to threaten the rule of law:

[84] On which, see John Flood 'Traditions, symbols, and the challenges of researching the legal profession: the case of the cab rank rule and the Bar's responses' (2022) 29 Intl J L Profession 3; John Flood and Morten Hviid, 'The Cab Rank Rule' (Report for the Legal Services Board, 2013).

> [P]oliticians should not castigate judges for finding that the law does not fit with their political objectives, or conflate lawyers' actions on behalf of their clients with support for the political views and motivations of those clients.[85]

The UN's basic principles on the role of lawyers provide some support:

> Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.
>
> . . . .
>
> Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions. [86]

Nevertheless, rule of law arguments can also be made that lawyers cannot simply relinquish any judgement in the act of taking on a client. When a lawyer knowingly or recklessly enables or becomes complicit in client misconduct, then non-identification with the client is beside the point; their own misconduct/complicity renders them open to criticism. We discuss examples below when we talk about lawyers drafting inappropriate non-disclosure agreements (NDAs) for serial offenders. There are also cases where lawyers can become properly identified with the client's actions because the client's actions are in whole or in part the responsibility of the lawyer. The lawyers are not, in these situations, simply 'acting on instructions'. In particular, according to the Court of Appeal,[87] an advocate is formally responsible for the case strategy and properly identified with its excesses. If a lawyer takes on a client knowing that a strategy is improper, providing a worthless opinion on an unlawful tax product for instance, then taking on the client is not protected by rule of law arguments.

There is also the potential for freedom from identification to become the basis of a lazy argument for freedom from criticism.[88] Freedom from identification does not preclude properly criticising lawyers for inappropriate lawyering, nor does it prevent criticism of lawyers on other bases.[89] Such freedom does not always mean that lawyers should not be called to give account for why they chose (where they had a choice) to represent any particular client.

Similarly, there are reasons to doubt the idea that non-identification is always essential to the rule of law if one thinks about client representation at a broader level. There may be a point where representation of certain unethical actors strays into the grey area of implicitly condoning or even advancing clients' unethical behaviour: if I decide to do criminal defence work and specialise solely in defending mobsters and no one else, my act has a different moral quality to someone who does criminal defence and with a practice open to all accused of crime. Similar arguments are currently raging about lawyers acting for the extractive industries, asylum seekers, Russian Oligarchs, and so

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[85] Boyce (n 38).

[86] United Nations Office of the High Commissioner, Basic Principles on the Role of Lawyers (7 September 1990) <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers> accessed 20 July 2023.

[87] See above and accompanying text.

[88] In the context of lawyers taking on clients who plan to (legally) harm the environment, see: Steven Vaughan, 'Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms' (2023) 20 CLP 1.

[89] W. Bradley Wendel, *Canceling Lawyers: Case Studies of Accountability, Toleration, and Regret* (OUP 2023).

on.[90] The arguments are different if I decide to represent (say) mobsters because no one else will, or because they are the best payers. Equally, the quality of my actions might be evaluated on a different basis over time: an evaluation of the first NDA I draft for an executive accused of sexual misconduct and the fifth NDA I draft for that person likely differs.

One might debate whether such client onboarding choices are open to regulatory scrutiny or whether any such regulation (through sanctions regimes or otherwise) raises rule of law concerns; but the non-identification principle does not seem to us to exclude all moral criticism, or regulatory choices, around representation as long as this does not, for example, amount to (borrowing from the UN above) lawyer intimidation or improper interference. Regulation may, of course, very properly be engaged where the issue of client choice engages the potential for complicity in wrongful or illegal behaviour.

While complicity with a client's cause may lead a lawyer into conflict with the rule of law, the same can be true with under-identification, perhaps most egregiously where it leads lawyers to compromise their role interposed between individual and the state. There is a body of research about the extent to which lawyers can fail to defend their client's interests, often for economic but also for ethical and competence reasons.[91] An extreme example is provided by Dechert solicitor Neil Gerrard's representation of Eurasian Natural Resources Corporation (ENRC).[92] According to the High Court, he engaged in unauthorised communications with Serious Fraud Office (SFO) officials, leaked privileged information to officials and the press, and secretly facilitated an ENRC's whistleblower's exchanges with the SFO.[93] Through 'kick-start[ing]' SFO interest in his client's activities, Gerrard ran Dechert's estimated fee of £400,000 up to £13.5 million.[94] But the situation is slightly more complex than over-billing. Professional independence requires that lawyers leading internal investigations critically evaluate attempts to keep their remits too narrow.[95] And in the ENRC context, the court acknowledged that Gerrard's expanded investigation in fact turned up wrongdoing,[96] and that some might have even believed, 'somewhat perversely . . . that some ultimate interest of ENRC' or 'the greater good' might be best served by Gerrard's unethical actions.[97]

2.2. Confidentiality and Privilege

The confidentiality of lawyer-client communications (and its protection through privilege) is also an archetypal rule of law right. The policy justification has both a thinner version (clients need confidentiality to be confident they can make a clean breast of their story) and a thicker, more comprehensive version (that the purpose of such a right enabling a clean breast of things is that it

[90] See Neil Rose, 'Lawyers' eco-declaration sparks cab-rank rule row' (*LegalFutures*, 24 March 2023) <https://www.legalfutures.co.uk/latest-news/lawyers-eco-declaration-sparks-cab-rank-rule-row> accessed 16 August 2023; Neil Rose, ' Home Office "monitoring" immigration lawyers for regulatory breaches' (*LegalFutures*, 22 February 2023) <https://www.legalfutures.co.uk/latest-news/home-office-monitoring-immigration-lawyers-for-regulatory-breaches> accessed 16 August 2023; George Parker and William Wallis, ' UK justice secretary hits out at lawyers "parading their politics"' *Financial Times* (8 August 2023).

[91] By way of example Mike McConville and others, *Standing Accused, The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994); Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon 1987); Daniel Newman, 'Still Standing Accused: Addressing the Gap between Work and Talk in Firms of Criminal Defence Lawyers' (2012) 19 Intl J L Profession 3.

[92] *Eurasian Natural Resources Corporation Limited v. Dechert LLP*, [2022] EWHC 1138 (Comm).

[93] ibid [499],[486], [629], [284] [432-33] [1405] [1463], [242], [255].

[94] ibid [1225], [458], [739], [1071], [266].

[95] See, e.g., Richard Moorhead, 'Hackgate: Where were the lawyers?' (*Lawyer Watch*, 10 July 2011) <https://lawyerwatch.wordpress.com/2011/07/10/hackgate-where-were-the-lawyers/> accessed 15 August 2023.

[96] See *Eurasian Natural Resources Corporation* (n 92) [1102].

[97] ibid [499], [784].

enables the lawyer to properly counsel clients towards legality).[98] As Lady Hale commented in *Three Rivers*, 'It is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct.'[99]

Violation of confidentiality can be casual (JK Rowling's attempt to write crime novels under a pen-name was violated by gossip at a dinner party emanating from her lawyer, for example) or self-interested (such as in the apparently extraordinary handling of ENRC negotiations with the SFO by Neil Gerrard in the Dechert case).[100] The sometimes uncomfortable balance to be struck between public interest and privilege rights is seen in the case of Stephen Chittenden's agreeing to formally leave the profession post-retirement, after he breached the confidentiality of his client to help convict a man who likely would have otherwise gone unpunished for murder.[101] The law, and so the rule of law, protects lawyer-client confidentiality through legal professional privilege as a fundamental right not to be balanced against the public interest.[102]

Nonetheless, some tensions between confidentiality and the rule-of-law complicate this picture. There is no confidentiality in an iniquity, and so privilege does not adhere in cases of iniquity. So, for instance, where clients, with or without their lawyers' knowledge, use legal advice to perpetrate a fraud, the confidentiality falls away. Or where a client relies on the partial disclosure of privileged advice, privilege may fall away. The use, or abuse, of privilege to deliberately conceal or restrict access to damaging information is a live problem which poses challenges to the administration of justice and the rule of law. The regulatory approaches here have drawn criticism.[103] There are also tensions with whistleblowing frameworks; and terrorist and money laundering obligations. All of these show that confidentiality and privilege are important, but not untrammeled, aspects of the rule of law.

2.3 Agents of the Client, but Guardians of the Rule of Law, within the Court Process

Lawyers as litigators and advocates administer justice along with courts and judges and lawmakers. The proper operation of litigation and courts is an essential element of the rule of law. Lawyers bring and defend claims for their clients; deploying expertise to advance certain arguments and not others; offering certain evidence and not other evidence; and advising on, and taking responsibility for, litigation strategy.[104] But '[l]awyers conducting litigation owe a divided loyalty', as Lord Hoffman framed it:[105] they owe duties in litigation contexts to their client, to third parties, and to the courts.

Throughout this sub-section, one must keep in mind that although discussions tend to be lopsided towards addressing those parties *pursuing* litigation, the same tensions apply to *defence* tactics. For example, *R (Citizens UK)* v *Secretary of State for the Home Department* might be described as a case

[98] See the full discussion on these issues in Chapter 8 ('Legality') of Boon, *Lawyers and the Rule of Law* (n 27). We might want to take some time to reflect on whether a lawyer counselling a client towards legality actually has much to do with a client's liberty, given their existing obligations to conform with the law.
[99] *Three Rivers District Council v. Governor and Company of the Bank of England*, [2004] UKHL 48 [61] (Lady Hale).
[100] *Eurasian Natural Resources Corporation* (n 92).
[101] Neil Rose, 'Solicitor Who Admitted Breaching Confidentiality to Help Convict Murderer Agrees to Leave Profession' (*Legal Futures*, 29 June 2017) <https://www.legalfutures.co.uk/latest-news/solicitor-admitted-breaching-confidentiality-help-convict-murderer-agrees-leave-profession> accessed 24 August 2023.
[102] *R. v Derby Magistrates' Court Ex p. B* [1996] A.C. 487.
[103] Iain Miller and Charlotte Judd, 'Client Confidentiality—to Disclose or Not Disclose?' (*New Law Journal*) <https://www.newlawjournal.co.uk/content/client-confidentiality-to-disclose-or-not-disclose-> accessed 19 October 2023; Johnstone, Graeme, 'Regulating Silence-Buying' (*Lawyer Watch*, 15 August 2023) <https://lawyer watch.wordpress.com/2023/08/15/regulating-silence-buying/> accessed 19 August 2023.
[104] *R v Farooqi*, [2013] EWCA Crim 1649.
[105] *Arthur J.S Hall and Co. v. Simons*, [2000] UKHL 38 (20 July 2000); see also Solicitors Regulation Authority, 'A guide to the application of Principle 1' (25 November 2019) <https://www.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy /enforcement-practice/guide-application-principle-1/> accessed 17 August 2023.

of blanket denials and false assertions being made by the lawyers defending the Home Office in possible breach of their duties of candour.[106]

There are a number of examples and much detail in this sub-section. This is perhaps part a reflection of the fact that lawyers' obligations to the rule of law are potentially challenged significantly in these contexts (the courts being a key institution of the rule of law), but also perhaps a reflection that because many of these cases and examples are or have become public, we simply know more about them.

2.3.1 The Rule of Law, Truth, and the Excesses of Adversarialism

Court processes, and so litigation, are run on a particular version of truth-seeking based on an adversarial model.

The courts need to decide cases on the law as it stands. If their opponent fails to do so, lawyers are required to bring relevant law to the court's attention even when it harms their own case.[107] Ordinarily, a civil litigant is not obliged to mention in court facts that help their opponent.[108] The rules are less exacting in relation to drawing unhelpful facts to the attention of the courts or to a lawyer's opponents: it is not required unless a duty of candour or a prosecutor's obligation applies.[109] Nonetheless, a failure to mention a damaging fact does not mean that one can mislead. A lawyer's duties not to mislead the courts or others (including opponents) mean that, in Lord Justice Jackson's words:

> Integrity . . . involves more than mere honesty. . . . [And a regulated lawyer] 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.[110]

As Andrew Boon has noted, 'Because of the importance of lawyers in maintaining legality a high premium [is] placed on integrity.'[111] Managing the evidence and narrative of a case is a central skill of lawyers, but it is one that if overdone can imperil the proper application of law. There are a number of cases where lawyers have, either in covering up errors or in advancing artificial versions of their client's stories, sought to defend or advance legal claims on a false basis.[112]

Polishing evidence is a subtler phenomenon also deprecated by courts, along with other concerns such as witness statements being written by lawyers or in lawyers' words in ways which fit the case but not the underlying evidence, rather than being the lay witness's evidence; as well as the use of witness statements to make arguments rather than to provide evidence, and misuses of evidence by omission and failures to correct obvious misunderstandings.[113]

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[106] *R (Citizens UK)* v *Secretary of State for the Home Department* [2018] EWCA Civ 1812 [168]-[172].
[107] For a discussion, see: *Weir v Hildson* [2017] EWHC 983 (Ch).
[108] They may be required to disclose evidence of such facts.
[109] Lawyers, particularly those acting for public authorities, participating in ex parte hearings and judicial reviews, as well as prosecutors in criminal cases, and pursuing in contempt charges quasi-prosecutorial roles, are subject to more demanding duties to information harmful to their case than are lawyers in ordinary civil and tribunal litigation generally. See *R (Citizens UK)* (n 108) [106]; *Navigator Equities* v *Deripaska* [2020] EWHC 1798 (Comm) [80], [161].
[110] *Wingate and Evans v SRA* [2018] EWCA Civ 366.
[111] Boon, *Lawyers and the Rule of Law* (n 27) 189.
[112] See, for example, *Shaw v Logue*, [2014] EWHC 5 (Admin); *Boreh v Republic of Djibouti and others*, [2015] EWHC 769 (Comm); *Brett v Solicitors Regulation Authority*, [2014] EWHC 2974 (Admin).
[113] See, e.g., *Berezovsky v Abramovich*, [2012] EWHC 2463 (Comm) [92]; *Bates v Post Office Ltd (No 6: Horizon Issues),* [2019] EWHC 3408 (QB); Richard Moorhead, Karen Nokes, and Rebecca Helm, 'Issues arising in the Conduct of the Bates

A closely related phenomenon is evidentiary gamesmanship, when, for tactical advantage, lawyers interpret disclosure orders unduly narrowly or conversely extremely broadly, potentially resulting in what the Court of Appeal described in the context of patent litigation as the 'real vice' of 'massive overdisclosure', bringing the 'risk that the really important documents will get overlooked.'[114]

The tendency of some lawyers and their clients to present facts as they would like them to be seen, rather than as they are, reached an apotheosis in the Post Office litigation with, as Fraser J's pithy encapsulation put it, the Post Office's case being run on the basis that 'the earth is flat'.[115] This pithy phrase covered a range of problems: pleading a case in a misleading way; relying on evidence as a form of public relations rather than accurately describing what was actually happening in the Post Office; as well as relying on evidence that was wrong, evidence that was inconsistent with the underlying documentation, and evidence that was misleading.[116] The Post Office's defence of the Bates case was criticised in excoriating terms by the judge, with the suggestion that the Post Office and its lawyers had attempted to frustrate, rather than promote, the administration of justice.[117] The SRA and BSB have noted an increase in reports of lawyers misleading the courts.[118]

The problem is, of course, not confined to courts. The Hillsborough Inquiry, supposedly run on inquisitorial and therefore non-adversarial lines, saw a lawyer for the South Yorkshire Police's insurer advising amendments and influencing police witnesses' statements in ways that 'minimised the risk that evidence being put in by officers could be used effectively against the force and senior officers in later proceedings.'[119]

Determining when a lawyer may have misled them may be difficult for judges to evaluate without going beyond what they need to do to decide cases, as well as lifting privilege. There is every likelihood that misleading, polishing, or other problems with evidence are under-reported by the judiciary. Even where they are suspicious, judges are likely to be cautious, and to take differing views, when considering whether lawyers have engaged in this conduct, even when raising it tactfully.[120]

Litigation,' Evidence Based Justice Lab: Post Office Scandal Project, Working Paper 1 (2 Aug 2021) 12-15; *Boreh* (n 114) [16]-[21]; *Shaw* (n 112); *Brett* (n 112).

[114] See *Nichia Corp v Argos Ltd* [2007] EWCA Civ 741 [47]; see also Julie Exton, 'The long and short of disclosure' (*Law Society Gazette*, 19 June 2008) <https://www.lawgazette.co.uk/law/the-long-and-short-of-disclosure-/46898.article> accessed 14 Aug 2023.

[115] *Bates* (n 113) [929]; see also Richard Moorhead, 'The Post Office "where were the lawyers?" post' (*Lawyer Watch*, 23 April 2023) <https://lawyerwatch.wordpress.com/2021/04/23/the-post-office-where-were-the-lawyers-post/> accessed 23 August 2023.

[116] See Moorhead, Nokes, and Helm, 'Issues arising in the Conduct of the Bates Litigation' (n 113) for further details.

[117] *Bates* (n 113) [929]; Moorhead, 'The Post Office "where were the lawyers?" post' (n 115).

[118] Solicitors Regulation Authority, 'Balancing duties in litigation' (2018) <https://www.sra.org.uk/sra/research-publications/balancing-duties-litigation/> accessed 23 August 2023 and BSB Regulatory Decision-Making Annual Report 2021/22, p. 22 <https://www.barstandardsboard.org.uk/uploads/assets/66643ea0-de86-48d5-8cb9d3f777371609/Regulatory-Decision-Making-Annual-Report-2021-22.pdf> accessed 4 October 2023

[119] Eleanor Barlow, 'Hillsborough inquests: Solicitor accused of attempting to pervert the course of justice and four other things we learnt,' *Liverpool Echo* (29 April 2015) <https://www.liverpoolecho.co.uk/news/liverpool-news/hillsborough-inquests-solicitor-accused-attempting-9148541> accessed July 31, 2023; Hillsborough Independent Panel, *The Report of the Hillsborough Independent Panel* (2012) < https://www.gov.uk/government/publications/the-report-of-the-hillsborough-independent-panel> accessed 23 August 2023, 22-24; *R v Metcalf*, [2021] EW Misc 8 (CC) [23]-[37]. As of June 2022, the SRA's investigation of the lawyers' conduct remained open. John Hyde, 'Hillsborough investigation still open, says SRA' (*Law Society Gazette*, 20 June 2022) <https://www.lawgazette.co.uk/news/hillsborough-investigation-still-open-says-sra/5112834.article> accessed 31 July 2023.

[120] See the *Citizens UK* case for examples of different judges taking different views of failures to disclose relevant information in breach of their duty of candour in those cases, *R (Citizens UK)* (n 106); and the contrasting views of the High Court and Court of Appeal in: (i) *Navigator Equities* (n 109) [154]-[157] (finding claimant's contempt charge 'vexatious' and an abuse of process, founded on 'evidence . . . in material respects misleading or not the whole truth, or both of those together' and finding lawyer's judgement 'clouded' and her obliviousness to the client's animus as neither 'objective [n]or

All such tactics increase the risk of cases being wrongly decided or settled, and may also increase the costs, and decrease the accessibility of courts. As such, they harm the rule of law.

2.3.2 Making Unfounded Claims

Although the rule of law clearly protects the rights of individuals to bring legitimate claims or to run legitimate defences, the rule of law may be threatened where court processes, or the threat of court, are misused.

Beyond tactical manouevres of the kind criticised in the Post Office cases (discussed above), the abuse of law may also be seen in the making of unfounded claims or defences in courts. Inappropriate claims as to what the law says are sometimes made, and the power and cost of legal processes invoked improperly. Ancillary benefits, other than the resolution of the claim itself, may be sought (such as embarrassing or harming the reputation of opponents or their associates).[121]

The courts can recognise abuse of process and may strike out or stay proceedings as a result. But they are reluctant to do so (see the discussion of *Amersi* below).

As well as being generally responsible for the strategy before courts,[122] lawyers may: (i) implicate themselves by making claims or defences irreconcilable with the evidence; (ii) allege dishonesty or impropriety without any apparent foundation in the documentary evidence for those allegations; (iii) develop cases based on artificial constructs; and (iv) court publicity for unfounded or misleading allegations they make on their client's behalf. For example, in the *Bates* litigation, lawyers for the Post Office advanced a case that was in the judge's words, 'directly contrary to the evidence' and pursued baseless counter-claims for fraud against the claimants.[123] Another such example is provided by the *Excalibur Ventures* litigation, where a judge condemned parts of the cases as, 'essentially speculative and opportunistic', with 'no sound foundation in fact or law'.[124] In Peter Cruddas's libel suit against *The Sunday Times*, the High Court found the defendant's defence of truth 'offensive' where it was pursued by attempting to cast doubt on Cruddas's honesty without factual basis.[125] All such tactics increase the likelihood of court error (or settlement on unfounded bases), impinge on the rights of opponents to have a fair trial, and waste judicial resources. Even claims well-founded in part may be invoked for ulterior motives.[126] Where there is an impermissible collateral purpose it is an abuse of process (and so threatens the rule of law); the courts appear willing to state this rule, but are more reluctant to consider whether it has been breached.[127]

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reliable') and (ii) *Navigator Equities Ltd v Deripaska,* [2021] EWCA Civ 1799 [90], [96]-[101], [110] (allowing the appeal of the High Court's abuse holding on the grounds that the contempt charge followed from a 'properly arguable' version of underlying facts, and that the applicant's subjective motivation was not a basis for finding abuse of process).

[121] For examples where courts have expressed concerns, *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2013] EWHC 4278 (Comm); *Amersi v Leslie* [2023] EWHC 1368 (KB). It should be noted that in connection with the Excalibur Ventures proceedings, the SRA ultimately found no issues of regulatory concern around the conduct of the litigation (but did find concerns around fee agreements). See Neil Rose, 'Tribunal's "Surprise" That Clifford Chance Was Not Charged with Lack of Integrity over Excalibur Case' (*Legal Futures*, 2 January 2018) <https://www.legalfutures.co.uk/latest-news/tribunals-surprise-clifford-chance-not-charged-lack-integrity-excalibur-case> accessed 13 July 2023.

[122] *Farooqi* (n 104) [107]-[108].

[123] Moorhead, Nokes, and Helm, 'Issues arising in the Conduct of the Bates Litigation' (n 113) 12-15.

[124] *Excalibur Ventures LLC* (n 121) [8-9]. [12], [31], [49].

[125] *Cruddas v Calvert* [2013] EWHC 2298 (QB) [301]; see Richard Moorhead, 'On the Offensive: Cruddas v the Sunday Times' (*Lawyer Watch*, 31 July 2013) <https://lawyerwatch.wordpress.com/2013/07/31/on-the-offensive-cruddas-v-the-sunday-times/> accessed 14 August 2023.

[126] The *Amersi* case is one such example of the courts recognising this possibility.

[127] For a recent example of a court willing to strike out a case but being unwilling to opine on whether such abuse had occurred see, *Amersi* (n 121).

Of course, a great deal depends on the extent to which such claims are meritless, or improperly motivated, and how satisfied a lawyer needs to be of merits before they can proceed. Problems originate from how the lawyer sees their role as simply allowing the client's 'right' to make any arguable claim (however weak the evidence) without properly considering the restraints on such a right; a crucial tension between formal and substantive conceptions of the rule of law – a point to which we return. Equally, what a judge later regards as without foundation may have been a point the lawyer genuinely and properly regarded as a good point.

As noted above, judges restrain their action for evidential reasons, because they are unable to lift privilege and look behind its veil. Judges are also often sensitive to the problem of hindsight bias, even when making criticisms, as well as being sensitive to the need for lawyers to reflect a client's wishes in bringing a claim, when describing excesses as being, 'no doubt upon instructions.'[128] While explicitly noting this judicial sensitivity, the SRA has nevertheless made it clear that, 'Solicitors are responsible for the strategy on their client's case and cannot disclaim responsibility on the basis of acting on instructions.'[129] This accords with the Court of Appeal's decision on the responsibility of advocates for strategy.[130]

2.3.3 Vexatious and Spurious Claims

A related context in which lawyers might violate their rule of law duties is in the making of vexatious claims; where claims of no, little, or already adjudicated legal merit are re-litigated, litigated in multiple fora, or pursued persistently. In so doing, lawyers are frustrating the proper administration of justice (taking up time and resources of the courts and their opponents) and the rule of law (where the alleged claims lack foundation).

A related concept is spurious nuisance claiming where meritless or weak claims are submitted to defendants on the working assumption that many will settle with little resistance to avoid the expense of defending them. The SRA, for example, noted between 2013 and 2017 a fivefold increase in claims against hotels for gastric illness on holiday. The regulator issued a warning notice to solicitors about identifying and taking action in relation to claims that may be bogus.[131] More recently, the SRA closed three law firms almost immediately following an investigation by *The Daily Mail* that raised concerns that those firms were submitting improper asylum claims.[132]

As with unfounded claims more generally, it may not be the claim itself but matters ancillary to it that can be implicated. Illegal file-sharing claims have been in the spotlight because lawyers insinuated embarrassing or illegal pornography use against claimants when seeking damage payments, akin to fines.[133] Put another way, the rule of law does not exist to provide a mechanism to be used purely or mainly for embarrassing opponents; that is likely to be a collateral, impermissible purpose if it is the reason why legal action is threatened through lawyers. The SRA's rules against taking unfair advantage exist, in part, because of these sorts of situations.

Such nuisance claims may not involve courts much, if at all, but it is nevertheless reasonable to bracket them with the other abuses of litigation noted above as abuses of law and legal process, largely

[128] Interestingly, cases criticised in courts do not necessarily lead to professional sanctions reflecting the judges' concerns when hearing the case. See Rose, 'Tribunal's "Surprise"' (n 121).
[129] SRA, 'Balancing duties' (n 120).
[130] *Farooqi* (n 104).
[131] SRA, 'Balancing duties' (n 120).
[132] Solicitors Regulation Authority, 'SRA closes down three immigration firms' (31 July 2023) <https://www.sra.org.uk/sra/news/press/three-immigration-firms/> accessed 23 August 2023.
[133] See 'ACS: Law solicitor Andrew Crossley suspended by SRA' BBC News (8 March 2012) <https://www.bbc.co.uk/news/technology-16616803> accessed 15 August 2023.

through the status of the lawyers making those claims and the background threat of claims being heard in court.

2.3.4 Strategic Lawsuits Against Public Participation (SLAPPs)

SLAPPs are an emerging, if controversial, example of the (alleged) misuse of litigation and litigation threats: this is when a lawyer initiates a proceeding intended 'to harass or intimidate . . . and thereby discourag[e] scrutiny of matters in the public interest.'[134] SLAPPs represent another example of the tension between a narrow conception of the rule of law (a claim can be vigourously prosecuted as legitimate until shown to be illegitimate, because to do otherwise infringes the claimant's access to courts) and concerns about excessive zeal or improper motives.

Under one traditional and narrow framing, clients have rights, lawyers facilitate the exercise of those rights, and this includes a right to bring proceedings as long as they are merely arguable. On the other hand, under a broader conception of the rule of law, the lawyer has an affirmative duty to avoid initiating or advancing proceedings like SLAPPs that employ the legal system to, in the SRA's words, 'discourag[e] scrutiny of matters in the public interest.'[135]

SLAPPs also raise distributional questions about the effects of adopting a narrow version of the rule of law. In essence, very rich individuals and corporations are amongst the *only* parties able to exploit every right the law affords and, because of their wealth, are inoculated from the normal restraints that limit the bringing of claims and excessive tactics (such as a funder's merits tests and funding constraints, and the potential imposition of costs).

Outside of rule of law related duties, professional rules on lawyers offer minimal restraint when it comes to SLAPPs: there are obligations not to take unfair advantage of third parties; or to make allegations of serious misconduct (only where there is some, rather than sufficient, material to support such an allegation). There is a sense that these professional rules allow arguments to be made by lawyers as long as they are merely arguable. There are no requirements of reasonableness or serious thresholds of evidential strength to be met. This allows claims to be brought which are either meritless, or close to it, because the parties on the opposite side will be unable or unwilling to resist, and/or because the court will be reluctant to intervene until a trial (which is unlikely ever to come). Even getting to a strike-out application might require considerable resources and persistence from a defendant facing a meritless case. Such still depends on the SLAPP claimant actually bringing a claim; and a great deal of SLAPP-like behaviour is said to occur pre-action.

As a result, without clarity on rule of law related duties, lawyers are accused of initiating and advancing what some label as SLAPPs. The law firm Discreet Law brought a libel action on behalf of Wagner Group leader Yevgeny Prigozhin against journalist Eliot Higgins, one that Higgins' lawyers characterised as a, '…"blatant" example of a lawsuit intended to stifle public debate.'[136] The environmental movement argues it has also been subject to a different kind of SLAPP-like suit in the UK, with private actors seeking sweeping injunctions or heavy damages for purposes of dampening environmentalists' criticism or protest.[137] In another case prominently described as a SLAPP,[138] Carter-Ruck brought defamation claims on behalf of Conservative Party donor Mohamed Amersi against former MP Charlotte Leslie, who had written memos addressing Amersi's business dealings and

[134] Solicitors Regulation Authority, 'Warning Notice: Strategic Lawsuits against Public Participation (SLAPPs)' (28 November 2022) <https://www.sra.org.uk/solicitors/guidance/slapps-warning-notice/> accessed 28 July 2023.
[135] ibid
[136] Jane Croft and Max Seddon, 'Evgeny Prigozhin's libel lawsuit against Bellingcat founder thrown out of UK court,' *Financial Times* (18 May 2022).
[137] Christopher J. Hilson, 'Environmental SLAPPs in the UK: Threat or Opportunity' (2016) 25 Environmental Politics 248.
[138] See HC Deb 29 June 2023, vol 735, col 537.

circulated them within the Conservative Party.[139] The claimant rejected the notion that he had filed a SLAPP case with a traditional, formal rule of law rebuttal:

> … [N]othing could be further from the truth. The right to bring a legal claim is a fundamental right in a democracy, and it is my wish, as is well within my right, to challenge the defamatory allegations that have been made about me by the Defendants in a court of law in order to vindicate my reputation.[140]

The judge in that case did not consider whether it was in fact a SLAPP (there was no need to do so to decide the case) but found that Amersi's Particulars of Claim failed to disclose a proper pleading of serious harm to reputation and also found that there was not, 'any realistic prospect that he could advance such a case.'[141] The court also suggested that vindicating 'my right *uber alles*' has not been the court's function for a long time. The court quoted Lord Phillips MR in *Dow Jones & Co Inc v. Jameel*:

> It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.[142]

One could say, in countering the claimant's rhetoric on rights, the rule of law depends on appropriateness and proportionality.

Concern regarding SLAPPs arises from the recognition that the legal system might allow a plaintiff to derive private benefits (e.g. a protected reputation) from legal actions that result in public harms (e.g. chilled public discourse). But the line between rule of law-eroding SLAPPs and legitimate vindication of rights is blurry, as demonstrated by contestation over the applicability of the label 'SLAPP' in particular cases. As the *Amersi* example demonstrates, claimants strenuously resist the label.[143] Courts are often resistant as well. For example, in *Banks v Cadwalldr*, the High Court judge specifically disavowed the idea that Brexit campaign donor Arron Banks' suit against journalist Carole Cadwalladr was a SLAPP.[144]

Moreover, the danger of externalities from opportunistic use of the legal process extends to legal actions that appear more publicly spirited. For example, the development of litigation crowdfunding platforms heightens the risk of the inversion of SLAPPs: suits that, in funders' eyes, offer apparent public-interest benefits, but are simultaneously meritless as a legal matter.[145] It may be that many crowd-funded actions are both publicly interested (at least in intention) and meritorious.[146] But on some occasions, these two qualities might not coincide.[147] An absence of improper motive in bringing

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[139] Tom Burgis, 'Tory fundraising machine to come under scrutiny in UK court case' *Financial Times* (11 Feb 2022); *Amersi* (n 121).

[140] *Amersi* (n 121) [52].

[141] ibid [237].

[142] ibid (quoting *Dow Jones & Co Inc v Jameel* [2005] QB 946 [54]).

[143] See also, e.g., Letter from ENRC to Tom Tugendhat MP, Foreign Affairs Select Committee (14 March 2022) <https://committees.parliament.uk/publications/9327/documents/160580/default/> accessed 17 August 2023.

[144] *Banks v Cadwalldr*, [2022] EWHC 1417 (QB) [9].

[145] See Ronen Perry, 'Crowdfunding Civil Justice' (2018) 59 Boston College L Rev 1357, 1384-94.

[146] See Sam Guy, 'Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation' (2023) 86 MLR 331, 335.

[147] For example, using the crowdfunding platform CrowdJustice, the campaign group The People's Lawyers raised funds via (at the time of writing) 4,597 pledges from, members of the public - many accompanied by message of great conviction - to pursue 'titanic scale' litigation challenging various governmental coronavirus-related policies, litigation that the High Court judge eventually found 'totally without merit.' See documents available at 'The Coronavirus Act 2020 is Null and Void!' (*Crowd Justice*) <https://www.crowdjustice.com/case/the-coronavirus-act-2020/> accessed 14 August 2023; see also Sam

a meritless claim would not render it unproblematic, in that it may waste judicial time or drive unwarranted settlements.[148] Even where the motivations of clients and third-party funders are altruistic, duties to the rule of law necessitate that lawyers exercise independent judgement on them.[149]

Because of the difficulties of disentangling legitimate and exploitative uses of the law, and the courts' unwillingness to get into that exercise (as seen in *Amersi*), the tendency is to place great reliance on lawyers to police the cases without sufficient merit and the cases brought for improper motives themselves (not least because they have more information about what clients are actually trying to do, and why). In other words, this sort of potentially problematic conduct is a matter of professional ethics and regulation rather than something which is solely or mainly the domain of the courts. Professional regulators may also be better placed to assist or, where they can to lift professional privilege, to investigate and regulate the balancing exercises involved.

2.3.5 Enabling and Intimidation Beyond SLAPPs

Parliamentarians have complained about SLAPPs but also more generally that some lawyers act as professional enablers of corruption; with a particular focus on an axis with Russian clients with posited links to the Russian State.'[150] Whilst the lawyers emphasise their clients' rights to bring legal actions for defamation, privacy, data protection, and so on, the allegation is that some lawyers:

> … use our justice system to threaten, intimidate and put the fear of God into British journalists, citizens, officials and media organisations. …[suppressing] free speech [and offering] protection from investigation and …encouragement to fraudsters, crooks and money launderers [sometimes] ….as extensions of foreign powers. [151]

It is not fear of God, but rather the fear of the courts (and the fear of the associated time and costs), plus the potential for 'reputational and financial ruin' associated with claims, which is really invoked.[152]

Not all such allegations are confined to the misuse of the courts. Some claim lawyers' association with lower-level harassment, for example, via social media; stalking through private investigators and similar.[153] The surveillance of critical investigators or regime opponents has been alleged and much of this activity is associated with private, and in some cases governmental, intelligence organisations, which may or may not be working hand-in-glove with the law firms. We do not know how well evidenced this problem is, although there are examples of it being raised.[154] One suggestion, beyond any speculation that extra-legal pressure is coordinated with or by law firms, is that instructions for

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Guy, 'Eroding the Public Law's Exclusions? Charting the Landscape of Crowdfunding in Judicial review' (*UK Constitutional Law Association Blog*, 8 November 2022) <https://ukconstitutionallaw.org/2022/11/08/sam-guy-eroding-public-laws-exclusions-charting-the-landscape-of-crowdfunding-in-judicial-review/> accessed 14 August 2023 (discussing this case).

[148] Perry (n 145) at 1386.

[149] See ibid 1386-87.

[150] HC Deb 20 January 2022, vol 707, col 563; see also Richard Moorhead, 'Lawfare: "An Industry That Hides Evil in Plain Sight"?' (*Lawyer Watch*, 23 Jan 2022) <https://lawyerwatch.wordpress.com/2022/01/25/lawfare-an-industry-that-hides-evil-in-plain-sight/> accessed 26 July 2023.

[151] HC Deb 20 January 2022, vol 707, col 563; see also Moorhead, 'Lawfare' (n 150).

[152] Moorhead, 'Lawfare' (n 150).

[153] See Foreign Affairs Committee, Use of strategic lawsuits against public participation, 15 March 2022 HC 1196.

[154] The role of lawyers in various newspaper hacking cases has been raised. See, for example, Nick Miller, 'Former News of the World Lawyer Tom Crone Cleared of Professional Misconduct' (*Sydney Morning Herald*, 15 August 2016) <https://www.smh.com.au/business/companies/former-news-of-the-world-lawyer-tom-crone-cleared-of-professional-misconduct-20160816-gqt6x7.html> accessed 19 August 2023. See also *Boreh* (n 112) (involving intercepted telephone calls); Kate Beioley, 'Hacked emails and torture claims: how top lawyer Neil Gerrard became engulfed in serious allegations' *Financial Times* (19 Jan 2022); Alexi Mostrous, 'Did this high-flying London lawyer play a role in the abduction and torture of political prisoners in the U.A.E?' *Daily Mail* (17 May 2023).

such work can be 'run through' law firms to provide legal professional privilege shields against the scrutiny of such action. If evidence were being illegally obtained, (potentially spurious) assertions of legal professional privilege would be being used to shield breaches of privacy and data protection.

2.4 Rule of Law Beyond the Courts

Tensions between a lawyer's duties to their clients and their more public-oriented duties (to the rule of law, independence, candour etc) can and do also arise beyond litigation. Two main scenarios are prominent. First, tensions can arise where the process of private ordering - the legal transactions themselves - involve wrongful or potentially wrongful behaviour. Second, tensions can arise where lawyers complete legal transactions that serve a client's underlying purposes that are exploitative or socially corrosive.

2.4.1 Misleading in Negotiation and Other Contexts

The making of misleading legal or factual claims is not confined to litigation; there are examples in relation to deal negotiations,[155] and when dealing with internal investigations.[156]

Does this relate to the rule of law? Seeing any legal activity conducted by lawyers as being done in the shadow of the law suggests it might. The rights of counterparties in contractual negotiations may be compromised, or transactions may be structured on the basis of erroneous facts or erroneous understandings of the law. Compromised investigations may preclude legitimate legal claims or the effective and proper adjudication of disputes in-house. Where lawyers directly and deliberately (or recklessly) contribute to maladministration of the law in this way, it corrupts the operation of law and, of course, may also bring the legal system into disrepute.

As noted already, professional rules typically prohibit misleading anyone, not just courts. In that sense, the rules of justice require its agents to be, to paraphrase Lord Justice Jackson in *Wingate v Evans*, scrupulously honest.[157] This form of integrity might be said, in and of itself, to be an inherent part of the rule of law because it is so central to what is expected of just dealing.

Conversely, adversarialism, and the idea that one does not have to do one's opponent's job for them, is also part of the legal culture and informs some legal rules. Lawyers often adhere to the idea that certain rules of the game, or tricks of the trade, justify sharp practice. In a recent SDT case, *SRA v Woolf*, the SDT would not find a solicitor dishonest who, as the SRA put it, had, 'devised a plan to deliberately mislead an elderly tenant.'[158] The aim, in the defendant's words was to, 'spoof the tenant's advisers'; in essence to trick them into not noticing one of the notices of termination of their tenancy, meaning they would fail to challenge it and so lose security of tenure.[159] The solicitor denied dishonesty saying he was, 'engaging in …[a] common practice of creating a possibility that one or more …Notices [of eviction] might be overlooked …disentitling the Tenant from challenging the Notices….'[160]

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[155] See, for example, below and accompanying text for the discussion of *PCP Capital Partners LLP v Barclays Bank PLC* [2021] EWHC 307 (Comm).

[156] See, for example, below and accompanying text for a discussion of the Levitt Report on the internal audit and firing of non-executive directors at the Royal Institute of Chartered Surveyors.

[157] See above and accompanying text.

[158] *SRA v Woolf Case No 12374-2022*; Richard Moorhead, 'Dishonest? Not If You Think Everyone Is at It?' (*Lawyer Watch*, 17 April 2023) <https://lawyerwatch.wordpress.com/2023/04/17/dishonest-not-if-you-think-everyone-is-at-it/> accessed 13 July 2023.

[159] *Woolf* (ibid) [14.6]-[14.8].

[160] ibid [14.43].

The defence amounted to suggesting a 'commonplace' practice by agricultural lawyers that subverts tenants' rights by disguising notices of eviction.[161]

Does such trickery support or contradict, or is it irrelevant to, the rule of law? The SDT's decision was that frustration of the procedural rights was 'not dishonest' (questionably to our mind) but that, having admitted a lack of integrity, the defendant solicitor was convicted of misconduct anyway. The simple fact is that this lawyer's conduct was a trick to defeat a legitimate procedural right; lacking in integrity, and denying another's rights, it is anathema to the rule of law.

Tricks of the trade arguments aside, the particular logic of adversarial lawyering may also place lawyers on the horns of a dilemma: often facts their client tells them are properly hidden behind the walls of confidentiality and legal professional privilege. The lawyer is then charged with representing the client without revealing confidential information whilst not misleading others. The desire to put the best gloss on a client's story can be a powerful driver. Alistair Brett, for instance, was prosecuted and disciplined for running a case on the basis that a *Times* journalist had discovered the identity of an anonymous blogger through searching public information, when in reality Brett knew (confidentially) that the journalist had originally identified the blogger by illegally hacking his email account.[162] Similarly, 'difficult facts' can be recharacterised, with legal support, to enable misleading pictures to be presented. The *PCP Capital Partners LLP v Barclays* case seems to show Barclays lawyers helping to recharacterise (potentially unlawfully) commissions on a share deal as consultancy fees, in a way that assisted executives in the misleading of a potential investor and seem to have contemplated misleading the Board (their own client).[163]

There are academics and practitioners, typically in US literature, who suggest that a facility with un/truth is part of the lawyer's make-up. Some have even gone as far as suggesting that lying is necessary to put the client's best interests first.[164] This is legally wrong in England & Wales; both Bar and solicitor's rules are clear that lawyers must not mislead the courts or third parties (including opponents and counterparties). Yet this attitude, and a trained facility to manipulate legal and factual uncertainty to a client's advantage, may inform lawyers' behaviour in the grey zone. The negotiation literature, for instance, sometimes speaks of rules of the game which allow the tactical or conventional misleading of opponents; no one truly believes a 'final offer' in a sale and purchase deal is definitely a final offer, to give one example.[165]

More subtly, lawyers may become complicit in misleading claims or steps taken by their clients. One of the concerns presented by Lehman's 'repo' (repurchase) transactions was that legal advice was used by some in Lehman's, somewhat tendentiously, to justify the claim that they were deleveraging debt that they were not. The legal advice used was not wrong or tendentious, but its misuse may have been foreseeable (ultimately we do not know what actually happened here).[166] Where one gives

[161] ibid [25].
[162] *Brett* (n 112).
[163] *PCP Capital Partners* (n 155); see Trevor Clark, 'PCP v Barclays: The Dirty Work of Lawyering?' (*Lawyer Watch*, 5 March 2021) <https://lawyerwatch.wordpress.com/2021/03/05/pcp-v-barclays-the-dirty-work-of-lawyering/> accessed 23 August 2023, for one example. Richard Moorhead, 'Something Smelly at Barclays…' (*Lawyer Watch*, 4 March 2021) <https://lawyerwatch.wordpress.com/2021/03/04/theres-something-smelly-about-barclays/> accessed 23 August 2023.
[164] Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton UP 2009); Gerald B Wetlaufer, 'The Ethics of Lying in Negotiations' (1989) 75 Iowa L Rev 1219; James J White, 'Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation' (1980) 5 Law & Social Inquiry 926.
[165] See, e.g., Taya R. Cohen and others, 'Honesty Among Lawyers: Moral Character, Game Framing, and Honest Disclosures in Negotiations' (2022) 38 Negotiation J 199, 199 ('Professional rules of conduct generally prohibit outright lying concerning material facts or statements of the law, though misdirection is expected on negotiation goals and bottom lines.').
[166] Kershaw and Moorhead, 'Consequential Responsibility for Client Wrongs' (n 70).

advice knowing or expecting the client's misuse of that advice, for example, then one is complicit in the deliberate evasion of law; such advice counsels clients away from, rather than towards, legality.

2.4.2 Facilitating Abusive or Exploitative Private Ordering

Another context outside of courts in which lawyers' actions can be inconsistent with the rule of law arises when, often based on unequal bargaining power, lawyers facilitate private ordering that harms counterparties or is otherwise socially detrimental. Common forms of private ordering involve negotiating contracts and the organisation of trusts and corporate entities. Commissioning lawyers to conduct investigations might also be seen as a form of private ordering.

Research on 'shadow clients' – undertaken in the banking law area in particular - suggests a significant lack of independence.[167] Trevor Clark shows how loan documents, badly drawn because they improperly favour the interest of a private equity sponsor shadow client, can impact on the financial stability of a bank or the broader financial system.[168] Beyond multi-million-dollar financing, Eleanor Rowan found that lawyers appointed to give 'independent legal advice' to wives whose husbands sought to remortgage the family home were generally more influenced by the banks doing the lending (as those banks were repeat players who might give further work to the lawyers) than they were by the needs of their clients.[169]

A better-known example is lawyers improperly stifling the disclosure of misconduct (through inhibiting or preventing disclosure to regulators or courts of relevant illegality,[170] for instance) or enabling serially abusive conduct through the use of non-disclosure agreements (NDAs). NDAs can have rule of law impacts on the ability of the immediate parties to exercise their rights under the law, but also on the broader functioning of the legal system. For example, NDAs were a critical reason why the Post Office was able to contain criticism of its Horizon Software. There also seems to be a strong case to be made that NDAs, here and in the USA, were part of what enabled Harvey Weinstein's history of predatory behaviour.[171] A notorious Presidents Club charity dinner showed NDAs being used in an apparent bid to anticipate and protect wealthy individuals vulnerable to malicious gossip, but also to protect those that engaged in sexual harassment.[172]

This latter example is a clue to the dilemma posed by NDAs: the mixture of potentially legitimate and illegitimate uses to which they can be put. As with SLAPPs, lawyers can deploy legitimate legal tools - here, contract - to protect legitimate rights (privacy) and interests (reputation) but can also do so, knowingly or unknowingly, for illegitimate ends (covering up misconduct; making it harder to prosecute or be legitimately litigated by other parties) or in potentially illegitimate ways (excessive definitions of confidentiality; intimidatory use of penalties and clawbacks; excessive or unenforceable

[167] See Claire Coe and Steven Vaughan, 'Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms' (Report for the SRA, 2015); Oakley and Vaughan, 'In dependence' (n 56).
[168] Trevor Clark, 'Ethically dysfunctional: the problem with designation in leveraged finance' (*The Lawyer*, 18 Oct 2022) <https://www.thelawyer.com/ethically-dysfunctional-the-problem-with-designation-in-leveraged-finance/> accessed 23 August 2023.
[169] Eleanor Louise Rowan, 'Independent Legal Advice in (Re)Mortgage Transactions 20 Years on from *RBS v Etridge (No.2)*' (2023) 2 The Conveyancer and Property Lawyer 166.
[170] If discovered and scrutinised, this is likely to be unlawful, but the point is that in practice it may succeed without its legality being properly considered. For a stark example, the evidence provided by Ian Henderson to the High Court in the *Bates* case was subject to a non-disparagement agreement and may have inhibited his evidence. Neither side challenged the agreement and so the judge let it pass with only a note of disquiet.
[171] Richard Moorhead and Steven Vaughan, 'In search of public interest lawyering: What does it take to give practical content to better professional norms?' in Julian Webb (ed.), *Leading Works in Legal Ethics* (Routledge 2023) 174-195.
[172] Madison Marriage, 'Men Only: Inside the charity fundraiser where hostesses are put on show' *Financial Times* (23 Jan 2018).

inhibitions on proper disclosure).[173] Some of these illegitimate ends and means frustrate, and might pervert in the criminal sense, the administration of justice; and some inhibit the freedoms of those subject to the agreements (to seek medical advice unrestrained, for instance, or to discuss the traumas of the relevant misconduct with their loved ones).

Whether NDAs are used legitimately or illegally is a question of judgement, in the light of the relevant rules of conduct, the broader law (contract and the prohibition on perverting the course of justice in particular), and the particulars of any case.[174] Rule of law arguments do not determine arguments about the professional regulation of NDAs, however.[175] An NDA's legitimacy is not determined solely by its legality; and so a lawful NDA might be imposed in a way that amounts to taking unfair advantage under the SRA's rules, for instance. Also, a professional regulator may be better placed than courts to consider the circumstances of, and instructions leading to, an NDA (partly because of approaches to privilege and because those subject to NDAs may find recourse to the courts prohibitively expensive). The Bar Council's view that professional regulators have no role in determining the legitimacy of NDAs and their use is plainly wrong.[176]

As with SLAPPs, NDAs raise issues beyond the confines of individual cases. A reputable professional might be expected to have growing concerns each time the same client comes back with a case necessitating an NDA for alleged misconduct. At some point, a lawyer negotiating NDAs for a client repeatedly accused of wrongdoing might properly recognise that they are likely complicit in or facilitating that wrongdoing, and that legal tools are being deployed to ends that seek to put their client beyond, not within, the rule of law.

Lawyers' involvement in money laundering provides an example of legal tools deployed in private ordering that exploits not particular counterparties but the legal system itself. Lawyers acting as 'professional enablers' of money laundering are 'parasitical' upon the rule of law, free-riding on legitimate behaviour to obscure their clients' criminality.[177] In practice, laundering entails activity - conveyancing, settlements, use of client accounts, formation of corporate entities - of a piece with the routine transactions of legitimate legal work.[178] It is precisely this 'essential similarity' that makes laundering possible.[179] It is said that third parties like public authorities, investigative journalists, and suspicious counterparties often lack the resources to follow the long and circuitous paper trails that lawyers create to obscure the origin of funds or beneficial ownership of assets.[180]

As with SLAPPs and NDAs, the line between money laundering and quotidian work of the 'wealth defence industry' is also blurred.[181] The funds in question often arise from client activities like bribes or tax avoidance/evasion, that are of ambiguous legality, or that has been created in societies where

[173] Richard Moorhead, 'Professional Ethics and NDAs: Contracts as Lies and Abuse?' in Paul S. Davies and Magda Raczynska (eds), *Contents of Commercial Contracts: Terms Affecting Freedoms* (Hart 2020).
[174] ibid.
[175] Whilst the NDA in Philip Green's case against the Telegraph was upheld on an interim basis, the court recognised competing rights were at stake and how the rights in that case needed to be balanced. *Arcadia Group Limited and others v Telegraph Media Group Ltd [*2019] EWHC 223 (QB).
[176] For an interesting discussion see, Graeme Johnston, 'Regulating Silence-Buying' (*Lawyer Watch*, 15 August 2023) <https://lawyerwatch.wordpress.com/2023/08/15/regulating-silence-buying/> accessed 19 August 2023.
[177] Katie Benson, *Lawyers and the Proceeds of Crime: The Facilitation of Money Laundering and its Control* (Routledge 2020) 10-12.
[178] ibid 72-73; Michael Levi, 'Lawyers as money laundering enablers? An evolving and contentious relationship' (2022) 23 Global Crime 1, 2.
[179] Benson (n 177) 71-72.
[180] Levi (n 178) 11.
[181] ibid 3.

the rule of law was altogether absent.[182] Lawyers may even feel some moral justification in protecting clients' wealth from 'oppressive regimes', however they interpret that term.[183] Additionally, as Katie Benson describes, lawyers often facilitate laundering 'on the borders of knowingness,' lacking a detailed knowledge of the underlying activity originating the funds, but attuned at least to the hint of illicit sources.[184] Money laundering thus presents a situation in which lawyers exploit uncertainty to benefit clients, and often themselves,[185] while shifting costs (of due diligence, investigation, enforcement) onto the rest of society and undermining the rule of law.

As with so many areas of practice, the rule of law depends upon lawyers self-policing but 'it would be difficult, if not impossible, to prevent all opportunities for facilitating money laundering.'[186] Interestingly, whilst some lawyers bridle at the perceived incursion on their independence demanded by money-laundering obligations,[187] Benson's research uncovers another view prevailing among UK lawyers, namely a widespread intuition that diligent avoidance of complicity in money laundering—implicitly a duty to the rule of law—is an obvious part of one's membership in the profession.[188] How far such intuitions are resisted or ignored is unknown. As Levi has cautioned, there is no way to know how often lawyers decline to facilitate money laundering.[189] Nonetheless, the UK property market is thought to be flush with illicit monies, making the UK a 'global money laundering capital', as a Chatham House report puts it.[190]

2.5 The Rule of Law and the Exploitation of Legal Uncertainty

Our examples so far have depended on accepting or making assumptions about whether a particular factual or legal assertion is misleading, whether a claim is a SLAPP, whether an NDA is improper, and so on. But, of course, facts and laws are interpreted; they are protean, adaptable to situations. Uncertainty about rules is inherent in common law systems; and facts are always open to interpretation.

The examples hitherto show, we hope, how managing that uncertainty properly is essential to the rule of law. And those examples have sometimes drawn attention to the tension between an adversarial view (a client has a right to do or say whatever is not plainly forbidden by clear rules) and a contextual view (a client's rights are central but are restrained, and those restraints must be sensibly not self-servingly interpreted). In professional terms, sensibly means independently, and with integrity. The High Court put this powerfully in the opening paragraph of its judgment in *Lumsdon*:

> It is a critical test of the freedom inherent in our democratic society that those accused (usually by the State) of committing criminal offences can and should be represented by capable criminal advocates, independent in spirit who, subject to the

[182] John Heathershaw and others, *The UK's kleptocracy problem: How servicing post-Soviet elites weakens the rule of law* (Chatham House 2021) 19. The transnational quality of much money laundering raises questions about the permissibility of domestic lawyering that denies others the fruits of the rule of law abroad, for example, in post-Soviet states and global south. For examples of UK money laundering activities associated with corruption, bribery, embezzlement in the global south and Post-soviet states see generally ibid; Levi (n 178) 6-8.
[183] Levi (n 178) 8.
[184] Benson (n 177) 114-115; see also Levi (n 178) 4.
[185] But see Benson (n 177) 88-89.
[186] ibid 76.
[187] ibid 123 (discussing Karin Svedberg Helgesson and Ulrika Mörth, 'Instruments of Securitization and Resist-ing Subjects: For-Profit Professionals in the Finance-Security Nexus' (2019) 50 Security Dialogue 257).
[188] Benson (n 177) 124-26.
[189] Levi (n 178) 3.
[190] Heathershaw and others (n 182) 26; Jamie Doward 'The dark side of Britain's gold rush: how corruption crept into our suburbs' The Guardian (14 January 2017) <https://www.theguardian.com/uk-news/2017/jan/14/corrupt-money-crept-britain-property-kleptocrats> accessed 8 August 2023.

> rules of law and procedure which operate in our courts and to the dictates of professional propriety, are prepared to put the interests of their clients at the forefront and irrespective of personal disadvantage. Similarly, advocates instructed to prosecute crime must be impartial, balanced and fair. These are the values, to the great advantage of the rule of law in this country, that have long been embedded in the practice of advocates before our criminal courts. Those who have the responsibility for the regulation of advocates (whether barristers or solicitors) are imbued with the same sense of the centrality of independence and mindful both of the need to maintain standards and the critical importance of supporting professional independence.[191]

An ethical conundrum is how to judge lawyers in situations of uncertainty: desirous of interpreting the facts and the law in a way favourable to their client (to whom they also owe obligations in tort and contract, as well as fiduciary obligations), how much leeway should lawyers be given before forming an adverse judgement against them? While there is no clear answer that can be generalised across all situations, what is clear is that there is a point at which exploiting legal and factual uncertainty in a client's interest may become inconsistent with the rule of law. During the Hacking Inquiry, Alistair Brett's plea that he happened to believe he had presented his client's case properly, and that the judge's criticism of him was a 'subjective view', met with Leveson saying, with some acidity, 'Let's just cease to be subjective shall we?' and with Leveson proceeding to demonstrate several ways in which Brett's presentation of his client's case was 'utterly misleading'. Subjectivity by Brett had led to the court being misled and the law being wrongly applied.

The following subsections explore how a lawyer's exploitation of legal uncertainty can bleed into affirmative misrepresentation of the facts or an inappropriately self-serving view of the law, which can, in effect, seek to put the client beyond a reasonable interpretation of what (rule of law) legality demands.

As we have remarked several times now, a (very) formal approach to the rule of law concerns itself primarily with permitting clients to advance any claim that is merely arguable (a very low threshold); and in ways that advance the client's interests, as long as these means are not *clearly* prohibited by rules of law or professional conduct. Similarly, adversarial models of ethics, founded on high levels of partisanship, do the same. The contextual view, and interestingly the public's understanding of the rule of law of the kind discussed in the Law Society's research discussed above, suggests that some means of advancing a client's interests, even if not clearly prohibited, can offend shared understandings about fair play or the actual meaning of a law.[192] This comes back to the role of the lawyer mediating between their client and the wider public interest.

The positions are not as neatly aligned or misaligned with the rule of law as one might think. The law contains folk concepts (honesty, reasonableness, unfairness, and the like), and zealous self-interest can drive the misinterpretation of law (or facts). Take the example of Ben Horwitz being 'kept out of jail' by his GC, Jordan Breslow.[193] It is a US example, but it is of relevance anywhere. Breslow was asked by his CEO, Horwitz, whether to use a new stock option clause with new employees as an incentive for them to join.[194] It had been proposed by the company's CFO and Breslow could find no legal

[191] *Lumsdon & Ors, R (On the Application Of) v General Council of the Bar & Ors* [2014] EWHC 28 (Admin) (20 January 2014).
[192] Boyce (n 38). For a theoretical derivation of a similar idea drawing on economics and jurisprudence see, Gillian K Hadfield, Jens Meierhenrich and Barry R Weingast, 'A Positive Theory of the Rule of Law' in Meierhenrich and Loughlin (eds), *The Cambridge Companion to the Rule of Law* (CUP 2021).
[193] Ben Horowitz, 'Why I Did Not Go To Jail' (Andreessen Horowitz, 6 Feb 2014) <https://a16z.com/2014/02/06/why-i-did-not-go-to-jail/> accessed 19 August 2023.
[194] Richard Moorhead, 'Not *strictly* Legal: When and How to Say No as a GC' (*Lawyer Watch*, 25 April 2023) <https://lawyerwatch.wordpress.com/2023/04/25/not-strictly-legal-when-and-how-to-say-no-as-a-gc/> accessed 19 August 2023.

impediment to the deal (which allowed highly favourable valuations for the stock option), was advised by an outside law firm it was not unlawful, and could see competitor businesses were able to recruit better staff by using such options. Everything pointed towards accepting the legality of the option. But the basic integrity of the approach rankled and the GC demurred; Breslow then realised it would give them problems in financial reporting. That point proved crucial when such deals were investigated and prosecuted some time later; Horowitz credits Breslow with keeping him out of jail. An intuition of illegality prompted a more objective and independent approach by the GC that meant the company got legality right.

How to properly balance risk and reward, when the law is uncertain, in a way respectful of the rule of law is a central dilemma of professional practice not solved by rhetoric about the rule of law. In the commercial vernacular, risk appetites need to be appropriately calibrated: risk aversion and risk friendliness can both be harmful. The lawyer's job is to advise as independently and objectively as possible. In so doing, they give their clients the best advice and they discharge their office's respect for the rule of law: they counsel their clients towards as objective and as independent a view of legality as possible. Interpretations of laws and facts that are too subjective, offered as ways of leaning towards the clients' preferences are problematic, as Alistair Brett learned to his cost.

For regulators, the question is how to maintain and promote that lawyerly independence without prompting too much or too little risk aversion. Both too much or too little pose challenges to the rule of law: too much threatens the client's rights and autonomies, too little poses risks to legality and the public interest in the administration of justice. Regulatory intervention risks being portrayed as illiberal and inept if it seeks to second-guess reasonable decisions lawyers made, even given the pressure on lawyers to be commercial encourages risk-tolerant, blind-eye turning, complicit advice-providing behaviour.[195]

Before we return to the implications of this argument, let us consider some examples.

2.5.1 Protean Facts and Law

Curless v Shell is an interesting example of courts (or, in this case, the tribunal system) struggling with lawyers' handling of legal uncertainty. The claimant, Curless, was a lawyer employed by Shell who also suffered from a disability.[196] Shell wanted to dismiss him, but there was considerable risk that a discrimination claim would follow.[197] Shortly afterwards, and separately, a need for redundancies was apparent in the organisation.[198] Shell's lawyers advised that rather than dismiss him, they could bring Curless within the redundancy system and design it in a way to reduce the risk of him claiming unfair dismissal.[199] To simplify, and according to Curless's allegations, Shell's lawyers reshaped the protean facts that suggested an unfair, discriminatory dismissal into facts suggesting an uncontroversial redundancy. Various information was leaked to Curless suggesting that the redundancy was a 'sham' designed to mask a discriminatory termination.

The courts considered this conduct in the narrower context of deciding whether the leaked material was privileged and could be relied on in the ultimate discrimination case. Different courts disagreed on whether the overheard and leaked communications revealed an iniquitous (and so disclosable) sham or was more 'business as usual' risk management by legal firms for their clients.[200] In particular,

[195] Donald C Langevoort, 'Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis' [2012] Wis. L. Rev. 495.
[196] *Curless v Shell*, [2019] EWCA Civ 1710 [4]-[5].
[197] ibid [11], [21].
[198] ibid [11].
[199] ibid
[200] ibid [18]-[28], [54]-[60]

Slade J sitting as an EAT judge felt this sufficiently iniquitous to lose privilege;[201] whereas the initial tribunal and the Court of Appeal did not.[202]

The case neatly illustrates the difficulty sometimes of second-guessing such decisions, but also shows the tension between zealous advice and the rule of law. If the redundancy process was a sham, Shell was improperly seeking to avoid their legal obligations. And whilst one can plainly and reasonably take different views on the rights or wrongs in the *Curless* example, it is a reminder of how lawyers structure the legal terrain for their clients in ways sometimes explicit, sometimes more subtle, that impact on how the law is applied to a situation balancing the client's interests, their opponent's interests, and the rule of law.

A similar challenge is evident when restraints arise from another area with an enforcement deficit: international law. In our dualist legal system in the UK, international law (and international legal obligations) can only be accepted into law in one of two ways: by Parliament (through legislation) or by judges (through the common law). Academic and political debate exists on whether compliance with international law obligations (that have not been accepted into law) form part of the rule of law or not. The Attorney General's changing opinions prior to the invasion of Iraq by Tony Blair's government provides an interesting example. De facto, Goldsmith's initial advice on the Iraq War settled, for the purposes of executive action, the question of the legality of the invasion.[203] A pressure was then brought to bear on him to revise his opinion for the civil servants and the armed forces to act lawfully on the invasion and, on the eve of the invasion, the Attorney General reached the 'better view' that the invasion was in fact authorised by the UN Security Council.[204] The substance of the second opinion is, of course, controversial: many international lawyers say the Attorney General got it wrong and that the day Goldsmith updated his view was, in Lord Steyn's words, 'a black day for the rule of law'.[205] Given his professional obligations of independence, one might question the way the advice was handled by the Attorney General (although his prosecution in relation to that advice was unsuccessful).[206]

In relation to government action, we also see examples of lawyers seeking to restrain executive action based on international law and in the name of the rule of law. In the Iraq War context, for reasons of substance and process, senior Foreign Office lawyer Elizabeth Wilmshurst resigned in response to Goldsmith's change in position.[207] More recently, Sir Jonathan Jones, then Head of the Government Legal Department, resigned when the Government proposed an Act in breach of international law. He thought the government's proposals in the Internal Market Bill to override the NI Protocol were a clear breach of the UK's international law obligations; and the government itself accepted that there was a 'limited and specific' breach. He was of the view that the breach put civil servants in an impossible position, contrary to AG Braverman's analysis that Parliament's (undoubted) sovereignty in domestic law somehow provided a justification for breach of treaty obligations. The relevant provisions were eventually dropped. Examples like Wilmshurst and Jones demonstrate how independence is required

[201] X v Y Ltd UKEAT/0261/17/JOJ
[202] *Curless* (n 196) [57]-[60].
[203] Goldsmith's opinion concerned whether an invasion was authorised by UN Security Council resolution 1441, or whether a further authorization was needed. In January 2003, Goldsmith wrote to the Prime Minister: 'I remain of the view that the correct legal interpretation of resolution 1441 is that it does not authorise the use of military force without a further determination by the Security Council . . . my view remains that a further decision is required.' The Report of the Iraq Inquiry: Report of a Committee of Privy Counsellors (2016) vol. V, 57.
[204] ibid 123.
[205] 'Steyn: Blair is undermining international rule of law' (*The Lawyer*, 30 Nov 2006) < https://www.thelawyer.com/issues /27-november-2006/steyn-blair-is-undermining-international-rule-of-law/> accessed 17 August 2023.
[206] Richard Moorhead, 'Independence Play – Chilcot on the Legal Process' (*Lawyer Watch*, 7 July 2016) <https://lawyer watch.wordpress.com/2016/07/07/independence-play-chilcot-on-the-legal-process/> accessed 16 August 2016.
[207] 'Wilmshurst Resignation Letter' *BBC* (24 March 2005) <http://news.bbc.co.uk/1/hi/uk_politics/4377605.stm> accessed 23 August 2013.

from and acted upon by lawyers as 'gatekeepers for legality', especially in circumstances where fidelity to law, in this case, international obligations, is unlikely to be tested in litigation.[208]

2.5.2 Creative Compliance and Worse

Choices about which laws are applied and how, and which facts are presented or not, are part of a lawyer's art but they are also sometimes problematic parts. Our own discussion with corporate and in-house lawyers suggests that significant, and sometimes problematic, choices are made as to what regulatory problems are attended to or ignored in a business.

In the context of advice on compliance with regulation, concerns are expressed about 'creative compliance,' the interpretation of regulatory law so as to 'manipulate formal legal obligations so that they fail in capturing and controlling the substance rather than the form of a real life transaction or relationship.' [209] Lawyers have an important role to play in nudging their clients towards adherence with the law (and away from creative compliance).[210] That they do not always do so is suggested by Australian research that shows that it is often lawyers (not clients) who can encourage creative compliance approaches.[211]

Creative compliance undermines the effect of law. As Hector Sants, when CEO of the Financial Services Authority (the bank regulator) said:

> We would like firms not to just take the narrow perspective of what can they get away with within the rules and how long can their lawyers delay, but take the broad perspective. When the right way forward is clear, they should get on with it.[212]

The difference between creative compliance and illegality, as with the difference sometimes between tax avoidance and tax evasion, can be a slim one. For example, Standard Chartered Bank's London HQ allegedly relied on strategies and advice from in-house lawyers that 'wire-stripping' transfers from sanctioned countries in the Middle East were reasonable and/or enforcement-proof in spite of apparently clear advice that such practices breached US law around due diligence and was being used inappropriately, and with some knowledge, to launder terrorist funds.[213] Some see this as creative compliance: suggesting the bank was complying in a way not anticipated by, or in a way which would meet the perceived needs of, the regulator, or which they hoped met the letter of the law.[214] Some might also portray this as an imprudent retaliation against US regulatory overreach.[215] The US prosecutor in its statement on settlement treated it as fraud, however.[216]

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[208] See Moorhead, 'Independence Play' (n 206).
[209] Agnes Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU' (2016) 94 Public Administration 685, 689.
[210] Boon, *Lawyers and the Rule of Law* (n 27) 189.
[211] Parker, Rosen, and Nielsen, 'Two faces of lawyers' (n 59).
[212] Brooke Masters, 'Financial sector must change, says Sants,' *Financial Times* (6 February 2012).
[213] See Alison Frankel, 'Blame Standard Chartered in-house lawyers in money-laundering mess' *Reuters* (8 August 2012) <https://www.reuters.com/article/idUS58495103720120808> accessed 17 August 2023; Consent Order Under New York Banking Law § 44, New York Department of Financial Services, *In re Standard Chartered Bank*, New York State Department of Financial Services (21 September 2012) available at <https://www.rns-pdf.londonstockexchange.com/rns/9158M_-2012-9-21.pdf> accessed 24 August 2024; Richard Moorhead, 'On the Wire' [2012] New Law Journal 1080.
[214] Joan Loughrey, 'Accountability and the Regulation of the Large Law Firm Lawyer' (2014) 77 MLR 732.
[215] As 'expletive-laden' evidence suggests, Standard Chartered officials were politically opposed to the U.S. Government's imperiously 'tell[ing] us, the rest of the world, that we're not going to deal with Iranians'. See Cynthia O'Murchu, Martin Arnold and Gina Chon, 'Standard Chartered: The Iranian connection' *Financial Times* (20 Sept 2015).
[216] Department of Justice, 'Press Release: Standard Chartered Bank Admits to Illegally Processing Transactions in Violation of Iranian Sanctions and Agrees to Pay More Than $1 Billion' (9 April 2019) < https://www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions> accessed 24 August 2023.

Even if some would frame lawyer conduct as 'merely' creative compliance, it seems to us relevant to the rule of law. What takes place is a deliberate avoidance (or frustration) of a legislator's or regulator's proper goals and methods; it relates to US law but originates in (and appears to have been managed by) UK based, and regulated, lawyers. A very formal conception of the rule of law might say there is no problem with that (as long as no law has clearly been broken); a wider version would highlight concerns that lawyers here are counselling their client toward illegality, diminishing respect for law (and the rule of law) generally and compliance with US law specifically.

Thinking about related rules on lawyers' professional conduct, the questions here might be whether the lawyers had misled regulators or others, or been complicit in so misleading them or otherwise behaved with a lack of integrity. There is also the question of whether lawyers have acted independently in interpreting and advising on the legal obligations to which their client is subject. An interesting question (and one we have broadly discussed above) is by which standards we should judge lawyers' conduct in these creative compliance situations: is it sufficient, for instance, that the advice lawyers gave was based on points that were merely arguable or is greater objectivity and reasonableness of approach required?

The *PCP Capital Partners LLP v Barclays* case provides another example. Here it was alleged that unlawful financial assistance and share commissions were paid through phony consultancy agreements so that Barclays could avoid restrictions in the Companies Act (and also mislead PCP Capital Partners head, Amanda Staveley).[217] Lawyers drafted those agreements, with evident concern about their content and a keen eye on presenting the consultancies as entirely separate from the share deal when they were patently not. There was also an apparent willingness to mislead the Board on this if needed. Again, the appearance, on the facts as known, is of lawyers counselling clients towards, or assisting them in the delivery of, unlawful conduct in ways lacking in integrity.

2.5.3 Accountability and Responsibility Issues

Legal uncertainty and protean facts pose particular problems around communication between lawyer, client, and others. How the lawyer advises, as well as what the lawyer advises, can be important. What questions the client asks the lawyer to advise them on, and how and when they ask for that advice can similarly be important. In the Iraq War, for instance, the Attorney General was specifically asked not to provide early advice, probably to avoid unhelpful advice prejudicing the Government's actions leading up to the invasion.

Lawyers may tend to the view that lawyers advise and the client decides;[218] simultaneously, clients may justify their actions on the basis that the lawyers told them they could or should take some particular action. This division creates a risk that legal work results in 'mutually assured irresponsibility.'[219] In such circumstances, legal work may be structured so that neither lawyer nor client is accountable for advice or resulting action. The Senior Manager Regime in financial services regulation has sought to tackle this problem as well as the exacerbation of this problem by inequalities of power between senior and lower-ranking decision-makers.

Recent examples of tax advice provide an example. In one case, advice was given, apparently on the basis of untenable factual assumptions, for the purpose of enabling the marketing of a fraudulent

[217] *PCP Capital Partners* (n 155).

[218] See Steven Vaughan and Emma Oakley, '"Gorilla exceptions" and the ethically apathetic corporate lawyer' (2016) 19 Legal Ethics 50; Richard Moorhead, Steven Vaughan, and Cristina Godinho, *In-house Lawyers' Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Bloomsbury Publishing 2018).

[219] Richard Moorhead, ' Mutually Assured Irresponsibility: An Example from the Post Office' (*Lawyer Watch*, 18 Sept 2021) <https://lawyerwatch.wordpress.com/2021/09/18/mutually-assured-irresponsibility-an-example-from-the-post-office/> accessed 29 July 2023.

scheme. As well as the marketing advantage, the advice was aimed at protecting those involved against prosecution. Here the hope was that such legal advice would persuade third parties to sign up to the scheme, on the basis a KC had advised the promoters of its validity (and in spite of the investors being warned that they could not rely on the opinion), and that such an opinion would also provide a defence against prosecution for tax offences (based on dishonesty or bad faith).[220] In this case, there were, it is alleged, 'unstated assumptions which the KC should have realised were fictional'; and claims that the KC ignored 'red flags' for evasion or fraud, as well as a view that, 'the entire opinion depended on … astonishing omissions of caselaw and authority'.[221]

Another family of such situations involves the lawyer strategically economising, sometimes at the client's implicit or explicit behest, on information provided to a client. Keeping 'difficult' material away from the Board is, we are told by in-house lawyers, a feature of bad cultures within organisations to which lawyers can and are sometimes very much encouraged to contribute.[222] The nature of this problem is evident from regulatory responses to it. There is an interesting strain of research, based on the United States' Sarbanes Oxley Act and related regulatory measures, that illustrate the importance of influence of lawyers and giving them clear lines of accountability on reducing harmful risk-taking.[223]

Under the Sarbanes-Oxley Act, passed in the wake of the Enron scandal,[224] the U.S. Congress mandated the creation of standards of professional conduct for attorneys practising before the Securities Exchange Commission to include a rule, 'requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company,' and if necessary to the board of directors.[225] There is work suggesting that clear 'reporting up' requirements, like those mandated by Sarbanes Oxley, and clear signing off requirements (for example, individual firms' rules around insider trading) reduce harmful risk-taking because lines of accountability are clear: the ethical legal work here does not permit strategically cultivating a client's plausible deniability.[226] Hence reporting lines, and sign-off requirements for key, risky transactions, make clear who should know what, and who should be accountable for what.

In the US examples, these requirements reduce insider trading pre-emptively, rather than policing it after the fact. A similar logic drives the Senior Managers Regime in UK financial services. A lawyer's professional independence - an essential element of the rule of law, as we have repeatedly noted - includes an obligation to ensure that all material matters are brought to the client's attention, and necessitates, in theory, such reporting up beyond the securities regulation context. Indeed, The Law

[220] Dan Neidle, 'The Outrageous £50m Tax Scheme That Was KC-Approved. Part 1: The Scheme.' (*Tax Policy Associates Ltd*, 6 July 2023) <https://www.taxpolicy.org.uk/2023/07/03/scheme/> accessed 20 July 2023; Dan Neidle, 'The Outrageous £50m Tax Scheme That Was KC-Approved. Part 2: The Opinion.' (*Tax Policy Associates Ltd*, 6 July 2023) <https://www.tax policy.org.uk/2023/07/04/kc/> accessed 20 July 2023; Dan Neidle, 'The Other KC Opinion behind the Outrageous £50m Tax Scheme (Part 3 of a Series)' (*Tax Policy Associates Ltd*, 4 July 2023) <https://www.taxpolicy.org.uk/2023/07/06/kc_2/> accessed 20 July 2023.

[221] Neidle, 'The Outrageous £50m Tax Scheme That Was KC-Approved. Part 1' (ibid).

[222] See Clark, 'PCP v Barclays' (n 163), for one example. Moorhead, 'Something Smelly at Barclays…' (n 163).

[223] See Morse, Wang and Wu, (n 58); Alan D. Jagolinzer and others, 'Corporate Governance and the Information Content of Insider Trades' (2011) 49 J Accounting Res 1249; see also Richard Moorhead, 'Corporate governance and senior lawyers, more evidence…' (*Lawyer Watch*, 28 Mar 2017) <https://lawyerwatch.wordpress.com/2017/03/28/corporate-governance-and-senior-lawyers-more-evidence/> accessed 15 August 2023.

[224] An accounting scandal brought down one of the largest US companies which involved misleading regulators and investors through the misstatement of debts and assets. One element of it touched on a UK law firm (see Kershaw and Moorhead (n 70)) but had much bigger implications in the US for professional service firms.

[225] Sarbanes-Oxley Act, 15 U.S.C. §§ 7245(1)-(2).

[226] Jagolinzer and others (n 223).

Society, when lobbying to reduce the impact of Sarbanes Oxley's introduction, argued that solicitors' existing legal obligations already required reporting up.[227]

To fulfill this duty, the lawyer may need to overcome social and economic disincentives to report up and fully inform the client, even by internal whistleblowing. If organisations are to act on misconduct, and illegality in particular, then the processes for identifying misconduct and illegality need to be fair and objective. Interpreting whether linen is indeed 'dirty' or not is a classic example of where the need for independence and objectivity is paramount. Yet, as was seen in the Royal Institute of Chartered Surveyors case, faced with challenges where independence and objectivity are vital, individual lawyers or legal teams may problematically see their role instead as serving the more powerful executives within an organisation.[228] The clear rules governing who the client was, and the rights and reputations of stakeholders in the organization, suffered detriment as a result.

2.5.4 Uncertainty and The Rule of Which Law?

As we noted above, private ordering by lawyers is not confined to contracts and can involve choices about legal frameworks that implicate the rights of others. Choices are being made by lawyers about which laws apply, and how, to a situation where there is a great deal of discretion. The *Curless* case is one such example. When an organisation is dealing with sexual misconduct by an employee against another employee, a decision to deploy criminal standards to investigate the conduct (has there been a sexual offence?; does the evidence meet criminal standards of proof?) has a different impact to a decision to deploy different tests (such as has there been a breach of the organisation's code of conduct about respectful relations, on the balance of probabilities?). Decisions on process have an impact on which rules are applied and how fairly they are applied.[229]

The Post Office case provides examples of how legal framing choices have profound impacts on individuals, and the application of legal rights and processes to them. A central one is how sub-postmasters, treated to their mind like employees, were contracted as arms-length commercial parties, defined as agents of the Post Office, and required under contracts they had no say in to either accept 'statements of account' (from a flawed computer system) as accurate each month or to cease trading. This legal framing, specifically their treatment as agents 'agreeing' to statements of account, gave rise to legal and evidential presumptions that added significantly to the already considerable practical difficulties in disputing such debts.[230] The problem was exacerbated because such tests were deployed aggressively and misleadingly by the business, and there is evidence that the idea that 'the contract said they could do this' reinforced such aggression. As we know, similar aggressive lawyering informed sub-postmaster prosecutions now recognised to have been profoundly flawed.[231] The *Bates* litigation suggests this was possibly taking unfair advantage of sub-postmasters on a grand scale and so may amount to professional misconduct. It also shows how an (arguably) unreasonable approach to defining and managing legal rights, not in all likelihood solely the responsibility of the lawyers here, impacts on the rule of law in sometimes multiple ways: that unreasonableness impacted on debt enforcement, insolvency, contract termination, civil litigation, and prosecutions.

2.5.5 Uncertainty, Risk Taking, and the Rule of Law

[227] See Letter from The Law Society to Jonathan G. Katz, SEC (12 December 2004) <https://www.sec.gov/rules/proposed/s74502/ckirby1.htm> accessed 23 August 2023.
[228] See Richard Moorhead, 'The Levitt Report: Independence Frayed' (*Lawyer Watch*, 11 Sept 2021) <https://lawyerwatch.wordpress.com/2021/09/11/the-levitt-report-independence-frayed/> accessed 29 July 2023.
[229] *AB v The University of XYZ* [2020] EWHC 2978 (QB).
[230] *Post Office Ltd v Castleton* [2007] EWHC 5 (QB).
[231] *Hamilton & Others v Post Office Ltd* [2021] EWCA Crim 21.

As we have already noted, the lawyer's duty to the client can come into tensions with rule of law-related duties to independently evaluate and reflect a best understanding of the law where the lawyer must decide how to present legal uncertainty and attendant risks to the client. Clients typically, although not always, want their lawyers to take a commercial view of risk. Excessive zeal by the lawyer may be in the eye of the beholder, especially where the legality of an action is uncertain. Who is responsible for taking that risk? And at what point does excessive risk-taking, supported or promoted by lawyers, challenge the rule of law?

An example of how executive functions relate to and can influence lawyers' behaviour in ways which might undermine the rule of law is seen in the Attorney General's 2022 Guidance on Legal Risk.[232] The governmental context and constitutional role of the AG raises its own issues, but we use the example here to illustrate more generally the relationship between uncertainty, risk-taking, and the rule of law.

This Guidance by the AG has attempted to define and strengthen the risk appetite of the Government Legal Department. It notes that, 'well-made evidence-based decisions will carry a low or medium risk of successful challenge' and also that, 'If, having assessed the likelihood of a successful challenge, you [the government lawyer] conclude that there is no respectable legal argument that can be put to a court, then you will need to advise that the proposed action is unlawful.'[233] However, the Guidance also says that:

> [U]nless there is no respectable legal argument that can be put to the court in support or defence of the action we wish to take, you can advise that there is a sufficient legal basis to proceed, even if high risk. It is likely to be exceptional that there are no respectable arguments and if you are in this territory you should refer the matter to your line manager and Legal Director before you advise.[234]

This suggests that even very risky policies in legal terms can garner the advice 'that there is a sufficient legal basis to proceed', with the advice only being that the government cannot proceed unless there is 'no respectable legal argument'. Any advice that there is 'no respectable legal argument' then has to be escalated. The potential is that any 'no respectable legal argument' advice continues to escalate up the chain until the relevant course of action is approved by someone, including possibly the AG. As such, there is both a substantive and procedural emphasis, one might even say pressure, on Government Legal Department lawyers towards saying that a policy can proceed in spite of substantial concerns about its legality. This is notwithstanding that the Guidance also notes that, 'Legal risks should be fully integrated into policy analysis and the appraisal of options, and communicated accurately and clearly to senior decision makers and to Ministers',[235] alongside careful thought about mitigations.

The House of Lords Constitution Committee in January 2023 had concerns about the AG's Guidance:

> An updated version [of the AG's Guidance] was published on 2 August 2022. There was speculation at the time that the revised guidance would forbid Government lawyers from advising a course of action was unlawful. The new guidance does not go as far as that but expands upon the need for lawyers to provide solutions to legal obstacles. The then Attorney General, Suella Braverman, elaborated in a series of tweets that Government lawyers were "too cautious in their advice and this has hampered ministerial policy objectives needlessly," the change was intended to

[232] Attorney General's Office, Attorney General's Guidance on Legal Risk (2 August 2022) <https://www.gov.uk/government/publications/attorney-generals-guidance-on-legal-risk> accessed 23 August 2023. This section draws in part on the work of Graeme Johnston on this Guidance, on file with the authors, with his kind permission.
[233] ibid [7]-[8].
[234] ibid [8].
[235] ibid [12].

> move away from the "'computer says no' approach", to encourage a "solutions-based approach and use innovative legal thinking" and to "instil a 'private sector' approach to client service." It is unclear whether the guidance has had a chilling effect on the willingness of Government lawyers to advise that a course of action is unlawful.
>
> . . . .
>
> While it may be conceptually correct that an action is not "unlawful" until tested by the courts or where no legal justification can be found, acting on such an uncertain basis is dubious practice and contrary to the rule of law... [W]e are concerned that the threshold as currently set out in the guidance could sometimes be used purely for the convenience of the Government. Public confidence in the Government's commitment to the rule of law demands that any threshold is meaningful and aligns with an ethos of genuinely seeking to comply with the law.[236]

Whatever the rights or wrongs of the AG's Guidance, it illustrates well the tensions between the rule of law and the autonomy of the client. It argues that lawyers should say that, 'there is sufficient basis to proceed' on policies that are highly likely to be unlawful. Again, whatever one's view of the rights and wrongs of that approach, it illustrates how signally important the independent and objective assessment of those legal risks is, and whether any respectable arguments as to legality really exist.

There are good reasons to argue that the AG's Guidance encourages deliberate risk-taking with the rule of law: it influences what is seen as permissible, but also how the lawyer is supposed to advise on risk itself. Whilst the Guidance could be defended on the basis that it allocates the decision about risk to the true client (the Minister or the Government), it also permits or encourages deliberate risk-taking on strategies more likely than not to breach the law.

There seem to us to be two main ways of thinking about that.

One would be to suggest that deliberate risk-taking should be inhibited, not encouraged. We would expect that to be an argument not appealing to government lawyers, or the Government itself, or to corporate clients (for instance). And one might expect regulators to be anxious about intruding too far into client autonomy.

The second approach (which to us seems more consistent with how the multiple professional obligations flowing from the Legal Services Act are framed) is to insist that lawyers make independent, context-specific determinations balancing risk appetite against the rule of law and that their independence is fully reflected in the manner, content, and tone of their advice. They should not succumb to any desire to present risks in a misleadingly optimistic light.

A particular issue, as we have already emphasised, is ensuring that a lawyer's advice on riskier strategies is independent and objective (in the sense that it does not give a more favourable view of lawfulness or the applicability of particular facts simply because it helps the client justify to themselves that risk is within tolerable bounds). A related point is that in executing any higher risk strategy, the lawyer must take care not to be complicit in presenting a misleading view of the legal function's role in the matter or in taking unfair advantage of others.

[236] See Select Committee on the Constitution, The roles of the Lord Chancellor and the Law Officers (HL Paper 118) <https://publications.parliament.uk/pa/ld5803/ldselect/ldconst/118/11802.htm> accessed 23 August 2023, ch 3, [135]-[149] and summary [13]-[15].

SECTION 3 – THE SCALE OF THE PROBLEM

So far in this report, we have set out the various ways in which the rule of law might be understood, and the obligations on the legal services regulators as to the rule of law coming out of the Legal Services Act. We have explored at a general and then more directed level how lawyer conduct might support or challenge their legal and professional commitments to the rule of law. Section 2 highlighted some of the many ways in which lawyers work might be relevant to the rule of law.

The Legal Services Board also asked us to consider the scale of this sort of potentially problematic conduct. This is difficult for at least three reasons.

First, while there is a volume of academic and other research on solicitors (split, unevenly, across different practice areas and law firm sizes), there is much less on barristers, and very little indeed on the other lawyers regulated via the Legal Services Act. Of that body of research that has been undertaken on lawyers of various forms in England & Wales, only a small subset engages with professional ethics issues and the sorts of questions we have addressed in this report.

The SRA's attempts to engage with issues through thematic review and their risk reviews show the utility and also some of the difficulties of doing such work.[237] This sort of work is nevertheless important and should be deepened and made more robust. There are various mechanisms for taking such work forward, beginning with a commitment by the leaders of the frontline regulators that such work is useful and has regulatory value. From there, the production of new research could come: from regulators undertaking their own research (using existing or new data); from regulators sharing existing data with researchers; through regulators committing to an annual spend on new research on those they regulate; from regulators supporting academics with research bids on lawyers and/or with data collection on lawyers, and so on. A starting point is likely to be found in asking and answering a series of questions: what would we like to know, and for what purposes, about our regulated communities and our regulatory obligations?; what do we know already and what gaps exist?; how do we prioritise our response to those gaps, given other commitments and obligations?; and what levers are best pulled by way of response?

Second, much research conducted on lawyers is not empirical, and even more rarely quantitative, tending then to raise possibilities more theoretical than demonstrably manifest.

Third, and importantly, there are a number of reasons why ethical problems (and so rule of law challenges) do not come to light: client confidentiality and legal privilege shield various forms of communication; the courts are not uniformly inclined to raise ethical concerns in the conduct of cases before them; conduct which takes place away from courts and judges is still less likely to be brought into the public arena; generally, many clients do not complain to legal services regulators about the conduct of their own lawyers or even lawyers on the other side (sometimes because their complaints are dealt with internally by the lawyer or firm);[238] some clients may choose other avenues of redress

[237] Richard Moorhead, 'Thematic Credibility' (*Lawyer Watch*, 20 March 2023) <https://lawyerwatch.wordpress.com/2023/03/20/thematic-credibility/> accessed 19 August 2023; Karen Nokes, 'Thematic Credibility Part II – There Are More Questions than Answers…' (*Lawyer Watch*, 4 April 2023) <https://lawyerwatch.wordpress.com/2023/04/04/thematic-credibility-part-ii-there-are-more-questions-than-answers/> accessed 19 August 2023; ~ Richard Moorhead, 'SLAPP Slips' (*Lawyer Watch*, 7 September 2023) <https://lawyerwatch.wordpress.com/2023/09/07/slapp-slips/> accessed 4 October 2023.

[238] See, e.g., Douglas Rosenthal, *Lawyer and Client: Who's in Charge?* (Transaction Books 1974) 111; Lynn Mather, Craig A. McEwen, and Richard J. Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (OUP 2001) 92-93. Internal complaints systems are sometimes said to be designed to 'exhaust clients'. Sharon Gilad, 'Accountability or Expectations Management? The Role of the Ombudsman in Financial Regulation' (2008) 30 Law & Policy 227; Laura Nader, *No Access to Law: Alternatives to the American Judicial System* (Academic Press, 1980).

(such as civil claims) or terminate retainers instead of making complaints;[239] and lawyers are reluctant to and only infrequently report their own problematic conduct or those of other lawyers to the relevant regulators. Better understanding the (lack of) reporting by lawyers to regulators of conduct problems might be seen as a priority.

Legal services regulators are also sometimes accused of being slow to take action to investigate and/or to speak publicly about the problematic conduct they uncover. In interpreting levels of risk, they also sometimes appear to downplay evidence that plainly does exist.[240] And, as Levi has pointed out in the context of money laundering,[241] the other side of the coin is also obscured: quantifying the occasions upon which lawyers decline courses of action, notwithstanding client pressure, on the basis of rule of law related concerns would be difficult and has not, to our knowledge, been meaningfully attempted.

We also hope Section 2 clarifies the many diverse ways in which obligations to the rule of law are engaged in many practice areas and through various forms of conduct. As such, the *potential* for the rule of law to be challenged by certain forms of lawyer conduct is widespread and significant. Whilst much legal work may be routine, or unproblematic in so far as how the law is being applied or in how lawyers are influencing client behaviour, the question is then: when does such application become problematic? The particular examples we have discussed clearly show that there have been and continue to be a number of actual, serious threats to the rule of law posed by some members of the legal profession, even if we cannot at this point fully delineate the volume of those threats.

How can we better understand the scale of the issue here? One option would be for the Legal Services Board to gather evidence from each of the frontline legal services regulators (where those regulators might already hold such data or might need to put some resources into its compilation). Those frontline regulators might be asked to explain how they see their compliance with their regulatory requirement in the LSA to uphold the constitutional principle of the rule of law, what data they hold on their regulated communities in relation to the rule of law, what risks they see from their communities in relation to the rule of law, what complaints etc they receive in relation to the rule of law, and so on. Were this to be done by the LSB, hopefully this report could assist those regulators in thinking reflectively about what the rule of law is/could be for their particular regulatory tasks and their specific regulatees.

A framework might be developed from the categories we have begun to develop in Section 2 to assist in the range and detail of such reporting by the frontline regulators. Consideration would need to be given to how to overcome the lack of information, the ways in which privilege shields certain activity from scrutiny, with further consideration on the ways of engaging other stakeholders such as courts, tribunals, and other regulators, in collecting and assessing data on risk.

The second, and not mutually exclusive option, would be to commission further research on this issue. With either approach, an apposite question must be: to what end would this further work be done, given this report has clearly shown that risks to the rule of law are significant and widespread? Here, even if more empirical data were collected, that might not necessarily take us that much further (though it would help to plug some of the many gaps). This is because, and as one of us has argued before:

[239] Christine Parker, Tahlia Gordon and Steve Mark, 'Regulating Law Firm Ethical Infrastructure: An Empirical Assessment of the Potential for Management Based Regulation of Legal Practices' (2010) 37 J L & Soc 466.
[240] Lucie Cruz, 'The SRA Report into Ethical Culture In-House Is Being Spun – and GCs Aren't Happy' (*The Lawyer*, 24 April 2023) <https://www.thelawyer.com/the-sra-report-into-ethical-culture-in-house-is-being-spun-and-gcs-arent-happy/> accessed 19 August 2023; Moorhead, 'Thematic Credibility' (n 237); Nokes, 'Thematic Credibility Part II' (n 237) .
[241] See supra at s 2.4.2.

> Where evidence on ethicality is available, it is almost always capable of different normative interpretations: once data collection has stopped, facts still have to be applied to standards of one sort or another. Relatedly, answers to ethical problems are often controversial or contested. There may not be a right or wrong answer.[242]

To give a current example, evidence on the prevalence of SLAPPs is in essence, based, at the moment, on the targets of SLAPPs saying inappropriate behaviours are prevalent and the lawyers accused of engaging in SLAPPs in turn saying that such behaviours are either not prevalent or are not inappropriate. The critical question - are the behaviours in each relevant case *in fact* inappropriate? - is unanswered. The answer to that crucial question involves of course a highly contextual judgement: it turns on the specifics of each case. Proper research evaluating the scale of such problems would thus need to be detailed and capable of making such contextual judgements at scale. Reviewing, independently and in-depth, investigations and enforcements in such areas and strengthening the quality of risk and thematic review work undertaken by frontline regulators may be the most efficient approach here.

The risks we have surfaced are evident and significant; and other studies have shone some light on particular conduct and lawyer practice areas. For example, in our own work on in-house lawyers (the largest ever study of that community), 32% of in-housers (across business, the public sector, and the third sector) said that they had been asked to advise on something that made them feel uncomfortable ethically.[243] 26% of those in-house lawyers who took part in our research agreed that there are tensions between the way they and their business respect obligations to uphold the rule of law.[244] In the recent 2023 SRA thematic review of in-house lawyers, 5% of respondents said they had been pressured into suppressing information that conflicted with their regulatory obligations.[245] And 10% said their regulatory obligations had been compromised trying to meet organisational priorities.[246] While the figures in these two studies differ, they both plainly show that the extent of the issues here is not insignificant.

The examples in Section 2 are clear cases where a lawyer's legal and professional commitment to the rule of law are and have been challenged. This report shows that such behaviours are legitimate areas of interest for the regulators and raise rule of law concerns. That does not mean the regulator always has to intervene, or speaks to how a regulator should regulate; whether in any particular case professional obligations have been breached turns on the particular facts of each case. 'Measuring' the scale of the problem would require investigating the frequencies of such (often concealed) behaviours and judging them in context. Whilst, for the reasons given, we cannot quantify the size of this problem in this way, our analysis provides a qualitative indication of how and where rule of law concerns may be driven by poor professional ethics, combined with the broader touchpoints of rule of law application in Section 1.

[242] Richard Moorhead and others, *Designing Ethics Indicators for Legal Services Provision* (Legal Services Board 2012) <https://www.legalservicesboard.org.uk/wp-content/media/designing_ethics_indicators_for_legal_services_provision_lsb_report_sep_2012.pdf> accessed 23 August 2023, 23.
[243] Moorhead, Vaughan, and Godinho, *In-house Lawyers' Ethics* (n 218) 65.
[244] ibid
[245] See Solicitors Regulation Authority, In-house solicitors thematic review (14 March 2023) <https://www.sra.org.uk/sra/research-publications/in-house-solicitors-thematic-review/> accessed 23 August 2023.
[246] ibid

SECTION 4 – DRIVERS OF PROBLEMATIC CONDUCT

The Legal Services Board asked that we consider the causes of professional failures that challenge the rule of law. Lawyer behaviour, and compliance with professional norms including the rule of law, is complex and best understood as multi-dimensional and an interactive phenomenon. As such, and given the primary purpose of this report, this Section is limited in ambition. Those wishing to engage further with these issues are encouraged to follow the lengthier discussions in the research cited in the footnotes.

As one of us has emphasised in previous work, there are three dimensions that likely underlie ethical risk and on which we should focus:[247]

- character (individuals and professional dispositions to regard something as ethical or unethical);
- context (incentives, infrastructure, and culture); and
- capacities (our knowledge of the applicable rules and the issues problems pose; how we recognise and reason our decisions).

As we have previously argued, one's tendency to see something as acceptable or unacceptable, 'is determined by our own character; the context within which we work and our capacities (what we know and how we reason about ethical issues)'. Lawyers are varied but also come with certain patterns of values and psychological profiles,[248] with some demarcations along gender and practice area orientations.[249] An individual's behaviour can influence her own and her colleagues' context.[250] Work has shown that recently-called advocates' knowledge and use of ethical rules is poor.[251]

> A motivation to be ethical is derived from one's own values and intuitions, and from the social, economic and cultural contexts within which one works. Values, context and knowledge interact with each other to shape our understandings of what is problematic and how to 'solve' that problem.[252]

There are a great many ways in which legal cultures in law schools and law firms may weaken, but also sometimes strengthen, ethical inclinations.[253]

Being able to reason ethically has been linked to behaving ethically, although it is equally possible to reason ethically and behave unethically.[254] Much ethical decision-making is intuitive rather than

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[247] This Section of our report draws substantially on existing work that one of us did, with colleagues, for the LSB in 2012. Moorhead and others, *Designing Ethics Indicators* (n 242).

[248] Susan Swaim Daicoff, *Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses* (American Psychological Association 2004).

[249] Richard Moorhead and others, 'The Ethical Identity of Law Students' (2016) 23 Intl J Legal Profession 235.

[250] See, generally: A.G. Rezler and others, 'Professional Decisions and Ethical Values in Medical and Law Students' (1990) 65 Academic Medicine S31. See also A. G. Rezler and others, 'Assessment of Ethical Decisions and Values' (1992) 26 Medical Education 7.

[251] Richard Moorhead and others, 'The Ethical Capacities of New Advocates' (Inns of Court College of Advocacy 2016) <https://www.icca.ac.uk/wp-content/uploads/2019/07/The-Ethical-Capacities-of-New-Advocates.pdf> accessed 23 August 2023.

[252] Moorhead and others, *Designing Ethics Indicators* (n 242) 21 (citing Jonathan Haidt, *The Righteous Mind* (Allen Lane 2012)),

[253] Elizabeth Mertz, *The Language of Law School: Learning to 'Think Like a Lawyer'* (OUP 2007); Moorhead and others, *Designing Ethics Indicators* (n 242); Moorhead, Vaughan, and Godinho, *In-house Lawyers' Ethics* (n 218).

[254] Moorhead and others, *Designing Ethics Indicators* (n 242) 22 (citing work including Banaji and others, "How (Un)ethical Are You?" (2003) 81(12) Harvard Business Review 56).

formally rational.[255] The rational application of professional rules and ethical principles can be a key part of the process of ethical decision-making; but it is not the only part, and it may not always be the dominant part. If we think back to the Jordan Breslow example, the independence and clarity of his thinking depended on good relationships between lawyers in the business, and the lawyer attending to his intuition about the dubious stock option approach.

Theories of ethical action suggest that ethicality requires ethical motivation (the desire or incentive to act ethically) and ethical capacity (the knowledge, skills and resources to be able to decide to act ethically). On motivation, studies of lawyers in England & Wales have pointed to minimal ethical consciousness;[256] and a general apathy among lawyers about their own work and the work of their clients.[257] As we just noted, knowledge of professional rules is a necessary element of acting ethically that supports practitioners to recognise, and if so motivated, to act on ethical dilemmas.[258] While baseline 'Day 1' knowledge of professional rules will be assessed by the various entry assessments into each regulated legal services profession, various studies have found that *practising* lawyers in England & Wales have only a very limited understanding of the professional principles promulgated by their respective regulators.[259] Work by one of us has suggested that, in the largest law firms, some of this might be a consequence of a particular regulatory approach – the introduction of Compliance Officers for Legal Practice (COLP) – which, for many corporate and finance solicitors, in-sourced their feeling of a need to know the rules they should comply with (i.e. those lawyers felt someone inside their law firm was dealing with these rules, and so they could ignore them);[260] although other research has argued that COLPs can have a critical role to play in promoting professional values.[261] Both findings may be correct at the same time.

Multiple studies have also shown the importance of context to the ethical decision-making of lawyers. This context includes formal and informal matters, not least: 'economic incentives; formal systems and institutions that promote decision making… and, cultural/interpersonal influences (which includes how economic incentives and formal systems are interpreted).'[262] Economic incentives include how profits are made and distributed; job-security; the business model(s) adopted; and how performance targets are set (including the use or not of billable hours). The broad point here is a simple one: incentives drive behaviour and this tendency is widely acknowledged.[263] Economic incentives are also a fact of life. Regulators cannot simply turn off economic incentives, but they can understand and account for them in regulatory approaches.

Ethical infrastructure, the formal systems and institutions that promote decision making, include: ethics codes and/or policy statements about purpose and values; ethics officers; inspection; reporting

[255] Moorhead and others, *Designing Ethics Indicators* (n 242) 22. The literature on this area is voluminous. Two great introductions to how behavioral ethics applies to lawyers are Jennifer K Robbennolt and Jean R Sternlight, 'Behavioral Legal Ethics' (2013) 45 Arizona State Law Journal 1107; Langevoort (n 195).

[256] Richard Moorhead and Victoria Hinchly, 'Professional minimalism? The ethical consciousness of commercial lawyers' (2015) 42 J L & Soc 387.

[257] Vaughan and Oakley, 'Gorilla exceptions' (n 218).

[258] Anusorn Singhapakdi, C. P. Rao and Scott J. Vitell, 'Ethical Decision Making: An Investigation of Services Marketing Professionals' (1996) 15 J Business Ethics 635; Donald Nicolson, 'Making lawyers moral? Ethical codes and moral character' (2005) 25 Legal Studies 601.

[259] Vaughan and Oakley, 'Gorilla exceptions' (n 218); Oakley and Vaughan, 'In dependence' (n 56); Moorhead and Hinchly, 'Professional minimalism?' (n 256); Richard Moorhead and others, 'Ethical Capacities of New Advocates' (n 251).

[260] Steven Vaughan, 'Response to LSUC Consultation paper: "Promoting better legal practices"' (CEPLER Working Paper 2016-02) <http://epapers.bham.ac.uk/2121/> 24 August 2023.

[261] Sundeep Aulakh and Joan Loughrey, 'Regulating law firms from the inside: the role of compliance officers for legal practice in England and Wales' (2018) 45 *J L & Soc* 254.

[262] Moorhead and others, *Designing Ethics Indicators* (n 242) 59.

[263] Richard Moorhead, 'Filthy Lucre: Lawyers' Fees and Lawyers' Ethics – What is Wrong with Informed Consent?' (2011) 31 Legal Studies 345; Carlo Patetta Rotta, *A Short Guide to Ethical Risk* (Gower 2010); Susan Saab Fortney, 'I Don't Have Time to Be Ethical: Addressing the Effects of Billable Hour Pressure' (2003) 39 Idaho Law Review 30.

hotlines; advice hotlines; investigation and sanctioning of misconduct; training; self-assessment (including through appraisals); and ethics/values evaluations.[264] Lawyers report particular anxiety around reporting up and out (whistleblowing), not least because they are uncertain whether and when whistleblowing law protects them, given that the information they might wish to whistleblow on is legally privileged.[265] Anecdotally, lawyers with experience of the Senior Managers Regime in the UK report that improved ethical cultures result. This fits with the apparent reductions in legal risks shown under the US research on Sarbanes Oxley etc 'responsibilisation' regimes that we discussed above.[266]

Firm and community culture speak to: the ethical climate of the workplace; leadership signals; the role and work of supervisors; responses to observed misconduct; the perceived handling of misconduct; peer group behaviour and influences; client and stakeholder behaviour and influences; and perceptions of attitudes of others.[267]

Relationships with clients, other lawyers, referrers of work, and regulators are also critical. In our work on the practices and ethics of in-house lawyers, for example, we talked of a 'tournament of influence' in which in-house counsel negotiate their place in their employer's organisation; showing how their place and influence is relational, founded (over time and various interactions) on trust and credibility.[268] To counsel towards legality, in-house lawyers have to win their organisation's trust, but they have to do so without straining their independence beyond repair. Regulators may well be able to do more to assist lawyers in the striking of these balances.[269] There may be much to learn from accountability approaches such as the Senior Managers Regime.

4.1 The Role of Regulation and Regulators

The early years of post-Legal Services Act 2007 legal services regulation were characterised by a preference for 'outcomes focused regulation' (OFR).[270] While that term is no longer so much in fashion, the ideas behind OFR – a move away from lots of detailed rules to more emphasis on principles, and placing responsibility on those who are regulated to be actively reflective about their own compliance – remain in various forms. We have seen this, for example, in this report in how the regulatory objective to support the rule of law in the LSA has been translated into action (and limited regulatory guidance) by the frontline regulators.

Holding lawyers and their regulated entities to account is complex, and different parts of the legal profession may require and/or respond to different approaches to enforcement and regulation.[271] Whilst evidence supports the importance of regulatory attention (monitoring, enforcement, and sanctioning) in reducing ethical risk, it is not enough on its own. Motivation to do 'good' (to be

[264] For a fuller discussion, see Christine Parker and others 'The ethical infrastructure of legal practice in larger law firms: values, policy and behaviour' (2008) 31 Univ. New South Wales L J 158.
[265] Graeme Johnston, Jenifer Swallow, and Richard Moorhead, 'What's Wrong with SRA Guidance on Confidential Information' (*Lawyer Watch*, 21 November 2022) <https://lawyerwatch.wordpress.com/2022/11/21/whats-wrong-with-sra-guidance-on-confidential-information/> accessed 19 August 2023.
[266] See supra at s 2.5.3.
[267] Elizabeth Chambliss, 'Measuring law firm culture' *Special Issue: Law Firms, Legal Culture, and Legal Practice* (Emerald Group Publishing 2010) 1-31; Susan Saab Fortney, 'Soul for sale: An empirical study of associate satisfaction, law firm culture, and the effects of billable hour requirements' (2000) 69 UMKC L. Rev. 239.
[268] Moorhead, Vaughan, and Godinho, *In-house Lawyers' Ethics* (n 218).
[269] Lucie Cruz, 'GCs Speak up over Corporate Governance Review' (*The Lawyer | Legal insight, benchmarking data and jobs*, 1 September 2023) <https://www.thelawyer.com/gcs-speak-up-over-corporate-governance-review/> accessed 19 October 2023; Cruz, 'SRA Report' (n 240); Richard Moorhead and others, 'In-House Lawyers and Non-Executive Directors: A Discussion About Best Practice' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3410929 <https://papers.ssrn.com/abstract=3410929> accessed 16 March 2021.
[270] See, generally, Alan Paterson, *Lawyers and the Public Good: Democracy in Action? (The Hamlyn Lectures)* (CUP 2011).
[271] See, e.g., Loughrey (n 214).

compliant) is also important, whether such comes from a place of moral conscience, a desire to be seen to be doing 'good', and/or a fear of sanctions, loss of business, reputation etc.[272]

Whilst it may be useful for the LSB and the frontline regulators to more definitively restate a broader, substantive conception of the rule of law - in particular to restate the importance of professional independence and integrity, sometimes in the face of client pressures - we do not feel that the LSB and the frontline regulators need to agree or disagree with any specific 'laundry list' of rule of law elements, but rather to proffer the simple and more general conclusion that Section 1 of this Report comes to: that is, that the formalist conception of the rule of law is too narrow in the context of legal services and legal services regulation.

More important to the rule of law is its instantiation within the rules, guidance, and practices of regulators and the regulated communities. To our minds this means:

- continually developing the evidence base on risks posed by lawyer misconduct to the rule of law;
- to inform reflection and proportionate action on the rule-book, guidance, and operational strategies of regulators and legal service providers for promoting the rule of law informed by such work on risk;
- through an analysis which considers the problem at the level of the case, the individual lawyer, and the lawyer's relation to the organisation (be that a firm or chambers or, for in-house lawyers and others, a host organisation).

The rule of law is foundational to a healthy society and lawyers foundational to that health. Lawyer independence and integrity in striking the balances that a healthy society needs is foundational to that too.

This view seems to be, from the guidance and so on that we have discussed in this report, already held by the LSB; and likely also by a number of the frontline regulators. It is a view also recognised by the courts, who have interpreted lawyers behaving with integrity, honesty, and independence from their clients (as well as from the state) as part of the rule of law. We are suggesting that the LSB and the frontline regulators might be more definitive than their current practice because one of the themes of our work, consistent across Section 2 of this report, is that lawyers have a mistaken and frequent adherence to the narrow view of the rule of law when falling into error, and that is where many of the more borderline (and problematic) situations arise.

[272] Ann E. Tenbrunsel and others, 'Misrepresentation and Expectations of Misrepresentation in an Ethical Dilemma: The Role of Incentives and Temptation' (1998) 41 Academy of Management J 330.

APPENDIX 1 – THE RULE OF LAW AND THE FRONTLINE LEGAL SERVICES REGULATORS

Principle 1 of the ***Solicitors Regulation Authority's*** mandatory professional Principles puts an obligation on solicitors to act 'in a way that upholds the constitutional principle of the rule of law'.[273] The SRA's 7 Principles are not ranked and are meant to operate in tandem. When the Principles come into conflict, the SRA sets out that 'those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over an individual client's interests'.

In a 2019 'Topic Guide' on Principle 1, the SRA sets out that it considers that, 'the rule of law is a principle that the law is of equal application, and this is put into effect by individuals and organisations, including "emanations of the State", and through activities engaging the justice system.'[274] The form of 'equal application' the SRA references in its guidance is relatively broad. In the Guide, the SRA cross-references this quotation by Lord Bingham:

> The core of the existing principle is…that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.[275]

The Guide also sets out, through high level commentary and specific examples, situations in which the SRA thinks Principle 1 may be engaged. The former include the commission of an offence, involvement in money laundering, as well as 'premeditated actions, intended deliberately to impede or prevent the judicial process or judicial decision-making, or the lawful exercise of enforcement powers.' One specific example concerns, 'A solicitor [who] allowed a witness to give evidence in support of their client in the knowledge that such evidence was untrue, and had been influenced by the actions of a client in seeking to intimidate the witness.'

The Handbook of the ***Bar Standards Board*** (BSB) contains 10 Core Duties which 'underpin [the BSB's] entire regulatory framework and set the mandatory standards that all those [it] regulate[s] are required to meet'.[276] The rule of law is not mentioned expressly in any of these Core Duties. The Duties instead apply rule of law concerns—which we elaborate in Section 1.2—to particular domains of lawyerly conduct, for example, via Core Duties 1 (the barrister's duty to the court and to the administration of justice), 4 (the maintenance of professional independence), 5 (maintenance of public trust and confidence in the profession), 9 (openness with regulators), and 10 (compliance with the law). Core Duty 1, the obligation on barristers to 'observe [their] duty to the court in the administration of justice,' takes precedence over Core Duty 2, the duty to act in the best interests of each client.[277] The term 'the rule of law' is additionally found on four occasions in the BSB's Handbook: three times as part of the introduction to the Handbook; and once in guidance on the BSB requirement not to discriminate.[278] The BSB website returns almost 20,000 hits for the term 'the rule of law' but, so far as we can see, no guidance on its meaning is offered.

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[273] Solicitors Regulation Authority, SRA Principles (2018) <https://www.sra.org.uk/solicitors/standards-regulations/principles/> accessed 26 July 2023.

[274] See Solicitors Regulation Authority, 'A guide to the application of Principle 1' (25 November 2019) < https://www.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy/enforcement-practice/guide-application-principle-1/> accessed 17 August 2023.

[275] ibid

[276] Bar Standards Board, Core Duties (2022) <https://www.barstandardsboard.org.uk/for-barristers/compliance-with-your-obligations/the-core-duties.html> accessed 28 July 2023.

[277] See Bar Standards Board, BSB Handbook (version 4.6, 2020) <https://www.barstandardsboard.org.uk/the-bsb-handbook.html> accessed 28 July 2023, Rule rC16.

[278] See ibid A1, Guidance to Rule C28.

Core Principle 1 of the ***CILEx Regulation*** Code of Conduct sets out that those it regulates have an obligation to, 'uphold the rule of law and the impartial administration of justice'.[279] CILEx Regulation does offer some guidance in its Code of Conduct on meaning-making in relation to this Core Principle: it defines '[u]phold[ing] the rule of law and the impartial administration of justice' as requiring that the lawyer:

> . . . . understand and comply with [the] primary and overriding duty to the court, obey court orders and do nothing which would place [her/him] in contempt …not knowingly or recklessly allow the court to be misled.[280]

As we see above, this is a rather narrow version of the rule of law. Beyond its Code, CILEx Regulation suggests an individual duty to support the rule of law. For example, in guidance for regulated individuals who conduct litigation or dispute resolution, and similar to the SRA's Principles, CILEx Regulation states that should its core principles come into conflict, 'those which safeguard the wider public interest take precedence over an individual client's interests. These include the rule of law and public confidence in a trustworthy profession and a safe and effective market for regulated legal services.'[281]

The ***Council of Licenced Conveyancers*** (CLC) places an express rule of law obligation not on individuals but on regulated bodies in its Handbook, requiring that those bodies 'systematically prevent, identify and address improper influence, allowing independence to be maintained and the rule of law to be upheld.'[282] Its six Overriding Principles, which are said to be 'derived from the Regulatory Objectives' do not specifically reference the rule of law.[283] They instead apply rule of law concerns in more particularised form, via the conveyancer's duty to 'act with independence and integrity' (including a duty to avoid acts that 'bring the legal profession into disrepute'), the duty to the court and the 'interests of justice,' and the duty to 'promote equality of access and services'.[284] The dedicated CLC Guidance on the Handbook does not expressly mention the rule of law.[285] Additionally, of the seventy-nine items returned on the CLC website for the search term 'rule of law', some implicitly indicate individual duties.[286] For example, in the application for a qualifying CLC License, an applicant must demonstrate to a certifying lawyer that s/he individually acts to '[u]phold the rule of law and public trust in the profession and legal services.'[287] None of the search results directly define the rule of law, however.[288]

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[279] CILEx Regulation, CILEx Code of Conduct (2019) <https://cilexregulation.org.uk/wp-content/uploads/2018/11/2.-Code-of-Conduct-2019.pdf> accessed 28 July 2023, 2. Note here the missing word 'constitutional' from the LSA regulatory objective.

[280] ibid 4.

[281] CILEx Regulation, Conduct in Disputes—New CRL Guidance (2022) <https://cilexregulation.org.uk/wp-content/uploads/2022/04/220405-Conduct-on-Disputes-guidance.pdf> accessed 28 July 2023.

[282] Council of Licensed Conveyancers, The Handbook <https://www.clc-uk.org/handbook/the-handbook/> accessed 28 July 2023.

[283] ibid

[284] ibid

[285] Council of Licensed Conveyancers, Guidance <https://www.clc-uk.org/handbook/guidance/> accessed 26 July 2023.

[286] The search was conducted using Google's Site Search operator, as the CLC website's search function does not appear to work.

[287] Council of Licensed Conveyancers, Statement of Practical Experience Form (2023) <https://www.clc-uk.org/wp-content/uploads/2023/07/Statement-of-Practical-Experience-1200-hours-Conveyancing-July-2023.pdf> accessed 26 July 2023.

[288] One search result on the CLC website, a copy of a Competition & Markets Authority report on the legal services market, provides that body's understanding of the rule of law: 'protecting the legal rights of individuals; enshrining the independence of the legal profession; and ensuring access to justice so that individuals may participate equally in society.' Competition & Markets Authority, Legal services market study: Final Report (2016) <https://www.clc-uk.org/wp-content/uploads/2018/01/legal-services-market-study-final-report.pdf > accessed 26 July 2023, 30 n.72. There is no indication, however, of the CLC's views on this definition.

The ***Intellectual Property Regulation Board*** (IPReg) has a new, June 2023, Core Regulatory Framework; the front end of which looks very similar to the SRA's approach to professional regulation.[289] Principle 1 of the IPReg Overarching Principles sets out that those it regulates must, 'act in a way that upholds the constitutional principle of the rule of law and the proper administration of justice'.[290] Where its eight principles come into conflict, 'those which safeguard the wider public interest (such as upholding the rule of law and upholding public confidence) will take precedence.'[291] The Core Regulatory Framework does not define what the rule of law means. In a guidance document explaining the IPReg's rationale for publishing information about disciplinary actions taken against regulated persons, the IPReg indicates that 'the constitutional principle of the rule of law' requires 'that justice be done and be seen to be done in accordance with the principles of natural justice.' [292] The 57 items retuned on the IPReg website for the search term 'rule of law' and the seven returned for the search term 'natural justice' do not define either term.[293]

Although the ***Costs Lawyer Standards Board*** (CLSB) publicly recognises its institutional duty to 'support[] the constitutional principle of the rule of law,'[294] its Code of Conduct does not reference the rule of law.[295] Instead, as with barristers and conveyancers, the regulator applies rule of law concerns in more particularised form, by means of a duty of honesty, integrity and professionalism in all dealings, a 'duty to the court in the administration of justice,' a duty of openness to regulators.[296] Of the 4 items returned on the CLSB website for the search term 'rule of law', none offer the body's definition of the term.[297]

Chapter 1 of the Code of Practice of the regulator of notaries, the ***Master of the Faculties,*** sets out that, 'A notary shall uphold the rule of law and the proper administration of justice', with this accompanying guidance:

> A notary is required, in common with all other lawyers, to uphold the rule of law and the proper administration of justice. This is the foremost and overriding professional duty of any lawyer. It involves the protection of human rights at a basic level, ensuring that no one is above the law, and also includes specific tasks such as acting as a gatekeeper in the battle against terrorist funding and money laundering, questions of privacy, privilege, and data protection that pervade the practice of any lawyer.[298]

This framing of the rule of law, like that of the LSB and in contrast to those offered up by the SRA and by CILEx Regulation, is a broad one.

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[289] Intellectual Property Regulation Board, Core Regulatory Framework (2023) <https://ipreg.org.uk/sites/default/files/Core%20Regulatory%20Framework_0.pdf> accessed 26 July 2023.

[290] ibid

[291] ibid

[292] Intellectual Property Regulation Board, IPReg Publications Guidance <https://ipreg.org.uk/sites/default/files/Publications%20guidance.pdf> accessed 28 July 2023.

[293] The search was conducted using Google's Site Search operator, as the IPReg website's search function returned incomplete results.

[294] Costs Lawyer Standards Board, Who We Are <https://clsb.info/about-us/who-we-are/> accessed 28 July 2023.

[295] Costs Lawyer Standards Board, Costs Lawyer Code of Conduct (2018) <https://clsb.info/download/code-of-conduct/?wpdmdl=1333&refresh=64be5b0a21afd1690196746> accessed 28 July 2023.

[296] ibid

[297] In a 2021 newsletter, the CLSB's CEO states that '[a]ccess to legal advice and representation is central to upholding the rule of law in our society.' Costs Lawyer Standards Board, From the CEO (Nov 2021) <https://clsb.info/regulatory-matters/news/newsletter-november-2021/>.The search was conducted using Google's Site Search operator, as the CLSB website's search function returned incomplete results for both terms.

[298] Faculty Office, Code of Practice, Chapter 1 <https://www.facultyoffice.org.uk/code-of-practice/the-rule-of-law-and-the-proper-administration-of-justice/> accessed 29 July 2023.

The rule of law is not referenced in either the Code of Ethics or the Legal Services Regulations of the ***Institute of Chartered Accountants in England and Wales***.[299] The Code of Ethics and Conduct of the ***Association of Chartered Certified Accountants*** also does not contain the rule of law in its Fundamental Principles.[300]

[299] Institute of Chartered Accountants in England and Wales, ICAEW Code of Ethics (2020) https://www.icaew.com/-/media/corporate/files/members/regulations-standards-and-guidance/ethics/icaew-code-of-ethics-2020.ashx?la=en; Institute of Chartered Accountants in England and Wales, Accountants and legal services (2018) < https://www.icaew.com/regulation/accountants-and-legal-services> accessed 29 July 2023.

[300] Association of Chartered Certified Accountants, Code of Ethics and Conduct (2022) <https://www.accaglobal.com/content/dam/ACCA_Global/Members/Doc/rule/Regulations/15-Dec-22/CEC-15-Dec-2022.pdf> accessed 20 October 2023.

APPENDIX 2 – DEFINING THE RULE OF LAW

In the main body of the Report, we set out different ways in which academics, judges and others have attempted to define the rule of law. This appendix adds some further detail to the main body discussions.

While there is common agreement that the rule of law is a good thing and generally to be promoted, there is no agreed definition of what 'the rule of law' actually means,[301] either in general or in relation to legal services. Instead, the meaning of the 'rule of law' is an 'essentially contested concept',[302] with nuanced debates about what it is (or might be) and what it does or might require. The current Attorney General recently describing the rule of law as 'one of the most elusive constitutional principles';[303] and Jens Meierhenrich and Martin Loughlin seeing it as, 'one of the most frequently invoked – and least understood – ideas of legal and political thought.'[304] It is an idea with a long history 'a central feature of our constitutional arrangements since at least the end of the 1600s even if it was only first explicitly acknowledged as such in legislation in 2005 in the Constitutional Reform Act.'[305]

Martin Krygier describes the rule of law as a 'complex practical ideal', a goal intended to be made good (even if only partially), an ideal rather than a simple description. [306] Descriptions of the rule of law also tend to be either formal (and narrow) or substantive (and wider); the relative breadth generally determined by how much the person doing the definition-work thinks the rule of law can or should add to a 'good' political system (in addition to other concepts like democracy, dignity, and so on). Narrower, sometimes labelled 'thinner', accounts focus on legality (are laws clear?; are they prospective? Etc) and (often) the integrity of rule of law procedures and institutions (is there an independent judiciary to administer justice on disputes? etc).[307] Wider – and also called 'thicker' - accounts also look to the substance of the laws and procedures in question, and the outcomes created by those laws and procedures (such as whether they comply with human rights obligations).

Formal descriptions of the rule of law tend to 'identify the formal features that a legal system must possess if law is to be able to function as law.'[308] These would include the generality, publicity, prospectivity, coherence, clarity, stability and practicability of the norms that govern a society',[309] as well as 'the processes by which these norms are administered, and the institutions - like courts and an independent judiciary - that their administration requires'.[310] It is important, not least for our discussions about lawyers, to remember that,

> Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law

[301] Lord Bingham credits A. V. Dicey with coining the expression 'the rule of law' even though 'he did not invent the idea lying behind it'. Bingham (n 24).
[302] Waldron, 'The Rule of Law as an Essentially Contested Concept' (n 30).
[303] Attorney General's Office, Attorney General delivers speech on the Rule of Law (10 July 2023) <https://www.gov.uk/government/news/attorney-general-delivers-speech-on-the-rule-of-law> accessed 29 July 2023.
[304] Loughlin and Meierhenrich, 'Thinking About The Rule of Law' (n 8) 3.
[305] Lord Burnett of Maldon (n 9) 1.
[306] Martin Krygier, 'What's the Point of the Rule of Law' (2019) 67 Buffalo L Rev 743, 758.
[307] See Raz for one of these 'thinner' accounts: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd ed OUP 2009).
[308] King (n 36).
[309] Fuller, *Morality of Law* (n 35).
[310] Waldron, 'Rule of Law' (n 35).

> was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met.[311]

Laws may be 'bad' or unjust and yet still part of formal rule of law systems and accounts: This is because, 'the bare principle of legality is [in theory] morally neutral: any law, whatever its content, will pass muster provided that it is enacted by the appropriate institution in the prescribed way.'[312] We add here 'in theory' as the supposed neutrality of very thin, formal conceptions of the rule of law is not always self-evident.[313] At the same time, 'elements of formal legality are morally good in so far as they enhance the certainty and predictability in people's lives'.[314]

Imagine a country where laws were democratically made and published, applied generally to everyone, and adjudicated upon by an independent judiciary. Imagine also that that country's laws permitted discrimination on the basis of religion. Would you say that was a country where the rule of law was alive and well? For many preferencing a more formal account, the answer would be 'yes'. A more topical example might be to think of a country in which laws were democratically made and published, and which applied generally to everyone and were adjudicated upon by an independent judiciary, but in which the government decided that it could, because of Parliamentary sovereignty, pick and choose which international law obligations to which it had signed up it would in practice actually abide by. Many who proffer formal accounts, 'agree that the rule of law furthers individual autonomy and dignity by allowing people to plan their activities with advance knowledge of its potential legal implications.'[315] This sounds very much like one of the key justifications for the 'standard conception' of lawyers' ethics (which sees lawyers as neutral vehicles for effecting their clients' legal wishes); which we address in Section 1.3.

As accounts of the rule of law become wider/thicker, they include more requirements.[316] As such, substantive descriptions tend to accept the formal requirements of thinner accounts, but also understand certain rights as being based in or coming from the rule of law; seeing the rule of law as protecting liberty and pushing back against 'arbitrary coercive power'.[317] Substantive accounts blend together formal legality (legal clarity, prospectivity etc), democracy, and the protection of rights (individual and sometimes also more collective, social welfare rights).[318] And they are concerned with the content of the law as well as the ways in which the law has been made and is applied: reflecting on a rule of *good* law.

Substantive accounts might be seen as more controversial than formal descriptions;[319] partly because we live in societies where there is frequently fundamental disagreement over basic moral questions. More substantive accounts of the rule of law tend to start from the premise that it is not possible to limit political ideals in the way that formal and/or procedural accounts attempt to do. These thicker accounts seek to bring in virtues or values (liberty, justice, human dignity etc) and/or a sense of rights to underpin and give substance to the rule of law. The challenge here, as Jeremy Waldron has put it, is that we risk beginning a 'sort of competition in which everyone clamors to have their favourite

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311 Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] Public Law 467, 467.

312 Mark Elliott and Robert Thomas, *Public Law* (4th edn OUP 2020) 81.

313 For discussions of how this supposed neutrality might be challenged, see the chapters by Vanessa Munro, ('Feminist critiques of the Rule of Law'), Khiara Bridges ('Critical Race Theory and the Rule of Law') and Mark Tushnet ('Critical Legal Studies and the Rule of Law') in Loughlin and Meierhenrich (eds), *The Cambridge Companion to the Rule of Law* (CUP 2021).

314 Kim (n 14) 790.

315 Tamanaha, *On the Rule of Law* (n 37) 94.

316 ibid chs 7 & 8.

317 King (n 34).

318 For a fuller discussion, see Tamanaha, *On the Rule of Law* (n 37) ch 8.

319 Ronald Dworkin, 'Political Judges and the Rule of Law' (1978) 64 Proceedings of the British Academy 259.

political ideal incorporated as a substantive dimension of the Rule of Law'; and where some might favour property or economic rights and others social justice or civil liberties.[320]

A third sense of the rule of law emphasises the idea that no one is above the law, and that the law is obeyed and enforced. We tend to hear about this most often when it is alleged the government has failed to uphold its legal obligations, but it is an idea of wider application. The Law Society, the representative body for solicitors in England & Wales, did some interesting research on public understandings of the rule of law. As its then President, I Stephanie Boyce, said at the time the public understanding of the rule of law was (to her eyes) very different from the 'high principle' of Dicey and Bingham,

> [T]he public very clearly sees the law in terms of 'the rules of the game. What matters to the public is not the principle, but the fact of the law being adhered to at all times. Everyone has a duty to follow the rules, and the public expects these rules to be properly applied to everyone.[321]

This broad sense of fairness and equality also underpins how Lord Bingham defined the rule of law in his 2010 book on the subject. In it, he sets out his account of the rule of law; a thicker, substantive account with eight elements:

> (1) The law must be accessible and so far as possible intelligible, clear and predictable.
>
> (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
>
> (3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
>
> (4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
>
> (5) The law must afford adequate protection of fundamental human rights.
>
> (6) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
>
> (7) The adjudicative procedures provided by the state should be fair.
>
> (8) The rule of law requires compliance by the state with its obligations in international law as in national law. [322]

This is just one of many iterated formulations of the rule of law, what Jeremy Waldron describes as the practice as one of setting out different 'laundry lists of demands'.[323] Martin Krygier wryly observes

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[320] Waldron, 'Rule of Law' (n 37).

[321] Boyce (n 38) 6-7.

[322] These are largely mirrored in the 'Rule of Law Checklist' produced by Council of Europe's Venice Commission. See: European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, Study No. 711/2013, adopted by the Venice Commission 2016.

[323] Waldron, 'The rule of law and the importance of procedure' (n 81) 5. Fuller (noted above), Finnis, Rawls, Raz, and Tashima (among others) also engaged in these list-making exercises. See, e.g., Lon L. Fuller, *The Law in Quest of Itself* (Beacon Press 1966); Raz, *Authority of Law* (n 308).

that, 'There are so many [rule of law lists] available—"the rule of law is a, b, or c; or x, y, z"—they can't all be right'.[324] Here, much has been written by academics arguing with each other, and with judges and others, over those lists. John Gardner, for example, described Lord Bingham's explanation for a human-rights based, thicker account of the rule of law as 'cursory and strange'; blending, he argues, what we might hope for from good government or from civilised nations with what the rule of law requires.[325]

Setting up the differences in the way we have just done might make it sound like there is a simple binary division between people who put greater weight in formal definitions and those who put more weight in more substantive definitions. There is not. Instead, different commentators emphasise different aspects in different ways. Brian Tamanaha counsels that, 'While the distinction [between formal and substantive] is informative, it should not be taken as strict – the formal versions have substantive implications and the substantive versions incorporate formal requirements.'[326] Nick Barber helpfully suggests that we can think about conceptions of the rule of law along two axes—'those conceptions that focus on questions of legal procedure, structure, and the formulation of laws [as one axis], and … those which include social and political rights at their core [as the second axis]'.[327] Tamanaha maps the various accounts in this way:[328]

ALTERNATIVE RULE OF LAW FORMULATIONS

	Thinner - - - - - - - - - - - - - -> to - - - - - - - - - - - -> Thicker		
FORMAL VERSIONS:	1. **Rule-by-Law** – law as instrument of government action	2. **Formal Legality** – general, prospective, clear, certain	3. **Democracy+ Legality** – consent determines content of law
SUBSTANTIVE VERSIONS:	4. **Individual Rights** – property, contract, privacy, autonomy	5. **Right of Dignity and /or Justice**	6. **Social Welfare** – substantive equality, welfare, preservation of community

Debates about the rule of law are closely associated with debates about the nature of law itself; where we see that 'disagreements are about the relationship between law and morals in conceptions of the (rule of) law'.[329] Some have suggested that the differences in the various rule of law accounts are primarily about the level of ambition, and whether conceptions of the rule of law do or do not include matters such as respect for and observance of human rights,[330] and/or compliance by states with international law obligations (with more formal conceptions generally avoiding such inclusion and wider, more substantive formulations often including).[331] Others comment that substantive accounts are more transparently ideological than formal accounts (which may also be ideological, but less

[324] Krygier, 'What's the Point of the Rule of Law' (n 306) 749.
[325] John Gardner, 'How to Be a Good Judge' (*London Review of Books*, 2010) <https://www.lrb.co.uk/the-paper/v32/n13/john-gardner/how-to-be-a-good-judge> accessed 23 August 2023.
[326] Tamanaha, *On the Rule of Law* (n 37) 92.
[327] Nicholas W. Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?' (2004) 17 Ratio Juris 474, 475.
[328] Tamanaha, *On the Rule of Law* (n 37) 91.
[329] Meierhenrich, 'What the Rule of Law Is ... and Is Not' (n 16) 601.
[330] King (n 34).
[331] Compare and contrast these two accounts: Simon Chesterman, "An International Rule of Law?" (2008) 56 Am J Comp L 331; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the Rule of Law?' (2011) 22 Eur J Intl L 315.

transparently so).[332] Even within government, there is a shared lack of a common understanding of the rule of law.[333]

While differences in definition and content abound, there are also common elements. These include the broad idea that those in power should work within, and be limited by, a framework of law (instead of in an ad hoc space of capriciousness) and should be able to be held accountable through the law; and that citizens should respect a society governed by law and abide by its laws where properly made. There is general consensus that the rule of law means that laws should be made in accordance with the ways prescribed by the relevant legal system, that no one should be above the law, and that everyone should have access to the law's protection. Law tempers and constrains the exercise of power. As such, the rule *of law* is often contrasted with rule *by law*.[334] These are our starting points for the rule of law, even if we might debate exactly what each of these things looks like in detail or how each is applied in practice.[335] At the same time, the fact that the rule of law is an 'essentially contested concept' does not mean that it lacks value: the argument and debate about the rule of law helps us to better understand the 'the area of value that the contested concept marks out'.[336] This is because the rule of law, 'is the concept of a solution to a problem – it is a conceptual answer to a problem – we are unsure how to solve [the problem of what a good society looks like]; and rival conceptions are rival proposals for solving it or proposals for doing the best we can, given that the problem is insoluble.'[337]

Our hope is that the above framing of different takes on the rule of law will help provide a foundation for the discussion in this report – on the role of lawyers in relation to the rule of law – and for how legal services regulators (the LSB and the frontline regulators) reflect on how to give life to their rule of law regulatory objective. As we noted above in Section 1.1, the LSB has already suggested that Lord Bingham's 8 elements give a 'good sense' of what might be included in the rule of law. We think this is sufficient and that it is not necessary for the LSB to put any further stall in further proffering one or another preferred version or definition; not least because the government chose to also not proffer a definition in either the Legal Services Act or the Constitutional Reform Act 2005. Suggesting, as the LSB does, that some form of thicker framing of the rule of law makes more sense than a very narrow, thin framing works for present purposes. This is not a report addressed to academics interested in further theorising the rule of law. It is a report for a regulator which wishes to consider how best to regulate professional ethics with a particular eye on the relationship between professional conduct and the rule of law.

[332] Mark Tushnet, 'Critical Legal Studies and the Rule of Law' in Loughlin and Meierhenrich (eds), *The Cambridge Companion to the Rule of Law* (CUP 2021).
[333] See House of Lords Constitution Committee, Evidence session with the Attorney General, Solicitor General and Advocate General for Scotland - Oral evidence (28 June 2023) <https://committees.parliament.uk/event/18621/formal-meeting-oral-evidence-session/> accessed 24 August 2023.
[334] On which, see: Rundle, *Revisiting the Rule of Law* (n 33); and Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008).
[335] See, here, Richard Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 Columbia L Rev. 1
[336] Waldron, 'The Rule of Law as an Essentially Contested Concept' (n 30) 134.
[337] ibid 133.

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