

Principles behind principles

December 2021



New Year, a time for resolutions, for predictions about the year ahead, for reflection and hopes, for joining gyms and visiting them occasionally. This article will have none of that! There are no dreams here, only nightmares better suited to Halloween.

'Those are my principles, and if you don't like them... well, I have others.' The Christmas Quiz season is over, like turkey or mushroom risotto, so no prizes for guessing that Groucho Marx said this. The Solicitors Regulation Authority (SRA) has Principles, the SRA Principles 2019 (formerly, the SRA Principles 2011). If we solicitors don't like them ... well, tough because the SRA doesn't, currently, have others. Principles are the benchmark against which our conduct (including that of those who work with and for us) is measured. What follows is a summary analysis of how the SRA Principles are applied in practice, studded with gems of cases along the way.

What is a 'Principle'? A quick 'Google' brings up 7,470,000,000 results. I like the Cambridge Dictionary suggestion of 'a moral rule or standard of good behaviour'. This fits our purpose well. The SRA defines the term in its Principles 2019 as:

'the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold.'

Back in the dark ages of 2011, the definition was longer and less prescriptive:

'The Principles embody the key ethical requirements on firms and individuals who are involved in the provision of legal services. You should always have regard to the Principles and use them as your starting point when faced with an ethical dilemma.'

The status of the Principles has, it seems, been quietly upgraded from starting point when facing an ethical

dilemma to fundamental tenet. It is essential to understand what the Principles are and how they can be broken when practising as a solicitor in 2022.

The word 'ethical' is emotionally charged. Look at the divergence of opinion on Insulate Britain. There is little doubt that the nine protestors jailed for breaking an injunction against illegally blockading traffic on the M25 believe that what they are doing is ethical in furtherance of their campaign on home insulation. Those who were unable to get to hospital appointments, drive their children to school, get help by ambulance, may disagree that the protestors are behaving ethically. 'Ethical' relates to human morals and human morals are deeply personal rather than 'one size fits all'. Morals are fluid, especially when talking about our own as opposed to someone else's. This can be seen in the move from fault to no fault divorce, the treatment of women who kill when subjected to coercive control, our views of MPs who have second jobs. When we get into the realm of 'morals', we are venturing outside the boundaries of professional conduct and into the realm of private conduct. We saw where that can lead in the High Court decision of [Beckwith v Solicitors Regulation Authority](#) about which much has been said and will not be repeated here. We are dealing with the expected standard of behaviour; what's right and wrong. Such judgements inevitably involve the placing of our baggage on the table and are, therefore, nuanced, and subject to unconscious bias.

The SRA provides guidance on its website on the application of its Principles in situations where they conflict with each other:

*'Should the Principles come into conflict, 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.** You should, where relevant, inform your client of the circumstances in which your duty to the Court and other professional obligations will outweigh your duty to them.' (my emphasis).

Public interest trumps individual client interest. Informing a client of 'circumstances' does not necessarily mean that the client will remember receiving that information when the chips are down. Clients in most situations tend not to care overly about the public interest when making legal services distress purchases. That's human nature; are any of us wholly altruistic? In regulatory language (albeit that some are coy about saying so), 'clients' are now 'consumers of legal services'. Section 1 of the Legal Services Act 2007 sets out the regulatory objectives, including at 1(d) 'protecting and promoting the interests of consumers'. The Legal Services Consumer Panel created by that same Act provides 'independent advice to the Legal Services Board about the interests of legal services consumers'. The Legal Ombudsman refers to 'consumers' on its website. Consumers may not be willing to accept that the provider of a service owes a higher duty to anyone other than them. They who pay the piper etc. A synonym for 'consumer' is 'customer' and, as Mr Selfridge said back in 1909, 'the customer is always right'.

The table below sets out the Principles as they are and as they were:

| 2019 | 2011 |
|-----------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------|
| We must act: | We must: |
| 1. in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice | 1. uphold the rule of law and the proper administration of justice |
| 2. in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons | 2. act with integrity |
| 3. with independence | 3. not allow our independence to be compromised |

| | |
|---------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 4. with honesty | 4. act in the best interests of each client |
| 5. with integrity | 5. provide a proper standard of service to our clients |
| 6. in a way that encourages equality, diversity and inclusion | 6. behave in a way that maintains the trust the public places in us and in the provision of legal services |
| 7. in the best interests of each client | 7. comply with our legal and regulatory obligations and deal with our regulators and ombudsmen in an open, timely and co-operative manner |
| | 8. run our business or carry out our role in the business effectively and in accordance with proper governance and sound financial and risk management principles |
| | 9. run our business or carry out our role in the business in a way that encourages equality of opportunity and respect for diversity; and |
| | 10. protect client money and assets. |

There are now 7 where there used to be 10 Principles. The Principles are supplemented by 'Codes of Conduct' for Solicitors and Firms. Where allegations are made by the SRA, they are likely to plead breaches of Principles and Codes.

Some context is provided on the SRA's website, in the 'Introduction to the SRA's Enforcement Strategy'. One point on the website is that we must search hard to find what we want. Useful information is hidden under layers of web pages. SRA: must do better! The Introduction states that:

'Our SRA Principles and Codes of Conduct aim to drive high professional standards. Through them we seek to give a clear message to the public, regulated individuals and firms about what regulation stands for and what a competent and an ethical legal profession looks like.

*We work in the public interest, **protecting consumers**, setting and enforcing high professional standards, **and supporting access to affordable legal services**, the rule of law and the administration of justice.*

Our regulation therefore seeks to:

- ensure a strong, competitive, and highly effective legal market
- ensure a focus on quality and client care
- ***promote a culture in which ethical values and behaviours are embedded.*** (my emphasis)

There is inevitable tension between the expectations of consumers buying a service, protection of those same consumers, affordable legal services, and high professional standards. This tension is exacerbated by what follows next in the Introduction (and remember this is about enforcement, or rather 'the act of compelling observance of or compliance with a law, rule, or obligation'):

*'In doing so, we will not second guess the approach [solicitors and firms] take or the way in which [solicitors and firms] choose to comply. **We do, however, require all those we regulate to be familiar with our standards, explanatory guidance, and the law and regulation governing their work, and to be able to explain and justify their decisions and actions.***' (my emphasis)

Please look again at the Principles 2019 listed above. If the SRA dropped by for a cuppa and biscuit, would you be able to 'explain and justify' your decisions and actions? On every case, on your Anti-Money Laundering policies, procedures and controls, in respect of your firm and accounts management, your supervision of employees, the transparency of your published costs information, the operation of your complaints procedure? You might be providing that explanation some time down the line, and the requirement to justify is likely to be prompted by an adverse event e.g. a consumer complaint to the Legal Ombudsman or direct to the SRA. The sand will not be deep enough for your head to hide itself. And regrets? By

then, you may have a few. What we are talking about here is not the dishonest solicitor. They remain few and far between. We are talking about the usual, average solicitor with a busy practice (because if it's not busy no money will be made) serving the local community, doing work for less than its full value or pro bono, and finding opportunities to see the spouse and kids and the lockdown dog occasionally (time for eating, sleeping, and comfort breaks optional).

There is a paucity of published decisions citing the 2019 Principles. This makes sense. Conduct after the 2019 Principles came into effect on 25 November 2019 will, no doubt, be under current investigation or moving slowly through the disciplinary process, save for the most obvious such as conviction cases.

Take a look at examples from recent internal SRA and external Solicitors Disciplinary Tribunals (SDT).

Principle 1

This Principle has its own guidance on the SRA website. Reference is made to the words of Lord Bingham in his book 'The Rule of Law' published in 2010 who stated:

"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."

The SRA interprets Lord Bingham's words by describing the rule of law as a principle that the law is of equal application put into effect by individuals and organisations, including "emanations of the State", and through activities engaging the justice system. Sounds good. Catchy!

The SRA references criminal convictions as, possibly but not necessarily, engaging Principle 1. *'Any behaviour which indicates a serious disregard for the principle that the law applies equally to all, is likely to be a breach of Principle 1.'* Interestingly, my research indicates that Principle 2 'public trust' is more generally pleaded by the SRA in conviction cases.

Examples of possible breaches of Principle 1 provided by the SRA include:

- Knowingly facilitating organised people trafficking
- Involvement in money laundering

- Misleading the court
- Failure to comply with the lawful exercise of investigative powers e.g. failing to provide a specimen of breath where it is lawfully required
- Failure to report a criminal conviction or regulatory breach to the SRA – remember that only serious breaches are to be reported, but how do we define 'serious'?

Principle 2

This Principle is the 'catch-all' (if that's not too disrespectful) and is pleaded in many cases. It is, indeed, ubiquitous, a legal Bake Off celebrity, if you will.

On 17 November 2021 the SRA published an internal decision involving a frying pan. Solicitor Mr Bains was on holiday in Bangor in October 2020. He struck a member of the public around the head with said pan during an argument. The person on the receiving end did not want to press charges. Mr Bains was, however, duly charged with public order offences. He pleaded guilty a month later and was fined £1,760 and ordered to pay victim surcharge and costs. He reported the conviction to the SRA the same day. He admitted that, by reason of his conduct and his conviction, he was in breach of Principle 2. Mr Bains accepted a rebuke, publication of the Regulatory Settlement Agreement with the SRA, and costs of £600. By adopting this approach, he no doubt avoided an SDT hearing where the sanction may have been more robust and the costs certainly higher.

17 November 2021 was a busy publication day for the SRA, a kpi busting rush! Mr Emerson, a partner in a firm, was found by the SRA to have attempted (by way of a draft settlement agreement) to prevent an individual and a company from making disclosures to HMRC, in breach of Principle 2. He also accepted a rebuke and costs of £600. Two very different cases with the same outcome.

Drink-driving convictions seemingly fall under the Principle 2 heading and are subject to separate SRA detailed guidance. There has been a positive move by the SRA away from referring drink-driving cases to the SDT over the last 4 years. In the most recently published SRA decision, Miss Salunke collided with a roundabout sign whilst under the influence (over twice the legal limit). Cornwall Magistrates Court imposed a 20-month disqualification from driving, to be reduced by 20 weeks on completion of a certain course, plus a fine of £1,380

together with the usual victim surcharge and costs. The conviction was reported to the SRA the same day. Under a Regulatory Settlement Agreement, the solicitor accepted a fine of £1,100, publication of the decision and costs of £300. The decision itself sets out in detail the basis upon which the fine was calculated and is worth a read.

In its detailed guidance on Principle 2, the SRA refers to conduct outside of practice. The guidance does not appear to have been updated since the *Beckwith* decision. I think it should be. My eye was drawn to this paragraph:

'We do not expect everyone to conform to a perfect ideal of behaviour outside of practice. The threshold for us taking action relating to conduct in personal relationships is high but may well be crossed by unlawful or abusive behaviour.'

'For example, the exaggeration of personal attributes on a dating website is not a regulatory matter. But we will consider some conduct, for example using a false identity, as serious in this context as in any other.'

I wonder how many solicitors are dreaming about the Principles when drafting their online dating profiles? How do we define 'personal attributes'? Could exaggeration of a personal attribute equate to using a false identity? Metaphysical stuff!

Principle 3

Breach of Principle 3 is most likely to come up in conflict cases. The 2011 version makes an appearance in the SDT case of Hetherington [12175-2021]. The SDT judgment is endorsed to indicate that some part of the decision is subject to appeal. The case involves client investment in parking spaces and storage pods, a 'You and Yours' favourite. 'Own interest' conflict in breach of Principle 3 was alleged, namely that the solicitors preferred their own interests over those of their clients. There is an absolute prohibition against acting in 'own interest' conflict cases. The specific allegation was that referrals and fee income were put above the interests of clients when advising on transactional risk. The SDT found the allegations proved. Dishonesty was also found, with the result that the solicitors were struck off with a joint and several costs order of an eye-watering £98,000. How did those costs happen!

Principle 4

The Principles 2019 specifically reference honesty (in contrast to the 2011 version). Solicitor dishonesty cases will almost always be heard at the SDT which is the only entity, currently, with power to strike off, enshrined in the Solicitors Act 1974.

Principle 5

The concept of 'integrity' has troubled many regulators over the years. In solicitor cases be mindful of the words of Lord Justice Jackson in [Wingate and Evans v SRA and SRA v Malins](#):

'Integrity is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members ... [Professionals] are required to live up to their own professional standards ... Integrity connotes adherence to the ethical standards of one's own profession'.

In [SRA v Holdaway](#), the concept was pleaded under Principle 2 (2011). It was alleged, amongst other things, that Ms Holdaway failed to act with integrity (when not practising as a solicitor) by falsely stating in a job interview that she was employed by her previous firm with a one month's notice period. It was also alleged that she had provided false information about her previous employment to an employment agency. Dishonesty was alleged (as is common in integrity cases). Ms Holdaway had been dismissed by her previous employer. The SDT found the allegations proved on the *Wingate* test. Dishonesty was found proved and Ms Holdaway struck off (in absence of appearance).

Principle 6

The SRA has provided guidance on obligations under this Principle. That guidance is detailed. In short, solicitors and firms are expected to comply with The Equality Act 2010 and to encourage equality of opportunity and respect for diversity. The SRA also expects inclusion in our approach to everything we do. The concepts are described in shorthand as EDI. There is a lack of published SRA-specific case law in this area. This is an important consideration for us all. The SRA's guidance focuses on the wisdom of having in place:

- Development and implementation of an EDI policy statement for our workforce

- Monitoring and analysis of the diversity of our staff and clients
- Recruitment policies to attract a diverse workforce
- Encouragement of EDI by senior leadership

I expect to see more cases pleading breach of Principle 6 in the next 12 to 18 months.

Principle 7

A recent example of a breach of Principle 4 (2011) (Principle 7 (2019)) appears in the Agreed Outcome approved by the SDT in [SRA v Ali](#). It was said by the SRA, admitted by Ms Ali, and accepted by the SDT, that Ms Ali had failed to advise her commercially unsophisticated client on obligations under a commercial lease and to carry out proper due diligence which had an impact on the quality of her advice. This was found, unsurprisingly, to be a failure to act in client best interests. It was agreed that Ms Ali should be fined £10,000 and pay costs of £35,000.

There is a fine line between breach of Principle 7 and negligence. This can make for some interesting argument in such cases. It is not the SDT's job to decide whether a solicitor has been negligent.

What I hope for 2022 is that this article has encouraged you to delve more deeply into the SRA Principles. Knowing what they are and how to comply with them is akin to eating your 5 or 10 a day, engaging in vigorous exercise and experimenting with dry January. Professionally nourishing and a stimulating intellectual workout. Enjoy!

Contact regulatory specialist Susan Humble today.

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Note: This is not legal advice; it is intended to provide information of general interest about current legal issues.

