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# Legal Ethics, Code of Conduct for Barristers and the Overriding Objective in Criminal Trials

Zia Akhtar

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# ARTICLE

*Zia Akhtar*

## Legal Ethics, Code of Conduct for Barristers and the Overriding Objective in Criminal Trials

**Abstract.** The criminal lawyer has a duty to his client, to the court, and to the administration of justice. This must be accomplished within a framework of ethics comprised from codes of conduct regulating the legal profession. There are difficult ethical problems arising from conflicts between a lawyer's responsibilities to clients, the legal system, and the disciplinary codes of the profession. In England, the barrister's conduct is governed by the Bar Standard Board, and legal professionals must abide by the regulations that are imposed upon them when acting for their clients. The new Criminal Procedure Rules and Criminal Practice Directions, promulgated in December 2021, affirm the overriding objectives of trials as fairness and procedural propriety. There is a need to consider the ethical standards which lawyers must abide and the way those frameworks are interpreted to prevent unfair advantages over the other parties and the consolidation of the principle of innocent until proven guilty. This Article draws a comparative approach between the law in England and the United States, where attorneys in criminal trials must follow the American Bar Association's Model Rules of Professional Conduct that affirm the principles of duties owed to the client and to the court.

**Author.** LLB (London), LLM (London), Diploma in Socio-Legal Studies (specialty Jury and Crown courts), College of Law, Grays Inn, Bolton University.

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## I. INTRODUCTION

The legal ethical rules for lawyers in the United Kingdom are central to the way in which its lawyers carry out their fiduciary duties to clients. These rules are an important consideration for lawyers and are expressed in the codes of conduct which regulate the profession. The barristers are officers of the court and must respect the code of conduct formulated by the Bar Standards Board ("BSB").[1] This is particularly important for a barrister who is representing a client in a criminal trial where issues such as honesty, privilege, and trust are crucial in the case both at the stage of accepting the brief and at trial. This requires an evaluation of the practitioner's role in England and Wales, and a comparative analysis to the standards followed by an attorney in the United States.

In the U.K., there are traditionally two legal branches of the profession representing clients in advocacy, and each has a disciplinary body determining when there has been a breach of the code of conduct.[2] The primary objectives of the current regulatory framework in England are consumer protection and public interest.[3] The Legal Services Act 2007 ("LSA 2007")[4] "establishe[d] a new framework for the regulation of legal services in England and Wales."[5] The LSA established an independent

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1. *Welcome to the BSB,* BAR STANDARDS BD., https://www.barstandardsboard.org.uk/ [https://perma.cc/UR2U-FK9F].

2. The barristers and solicitors are the recognised members of the profession and they have been joined by the Legal Executives by the Legal Services Act. Their governing body is the Chartered Institute of Legal Executives ("CILEx") which sets out the regulatory standards for their profession. *See generally* CILEX REG., CILEX REGULATION ANNUAL REPORT (2021), https://cilexregulation.org.uk/wp-content/uploads/2022/07/CILEx-Regulation-2021-Annual-Report.pdf. *But see What rights of audience do I have as a member of CILEx?,* CILEX, https://www.cilex.org.uk/membership/practice_advice/rights_of_audience/members_rights_of_audience/ [https://perma.cc/8GWF-KHLL] ("As a member of CILEx, you do not automatically have a right of audience, that is to say that you are not an 'authorised person' within the definition of the [LSA] 2007, for the reserved legal activity of exercising a right of audience.").

3. *See* Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report*, at 11 (Dec. 2004), http://www.avocatsparis.org/Presence_Internationale/droit_homme/PDF/Rapport_Clementi.pdf [https://perma.cc/S8U2-2AJX] (emphasizing the statutory objectives for the Legal Services Board, which mainly concern "serv[ing] both the public and the consumer interest").

4. Legal Services Act 2007, c. 29 (UK).

5. *Id.* explanatory notes, at 16–17 ("[The] new regulatory framework . . . replaces the existing framework which comprises a number of oversight regulators with overlapping responsibilities."). Zia

body—the Office for Legal Complaints ("OLC")—to "administer an ombudsman scheme" to deal with consumer complaints about legal services.[6] The OLC was placed under the supervision of the Legal Services Board ("LSB"), which is "responsible for overseeing the regulation of all lawyers [in England and Wales,] and is sponsored by the Ministry of Justice."[7] The OLC's role in administering the Legal Ombudsman scheme, includes the duties of "mak[ing] [the] scheme rules" and "overseeing the scheme's performance."[8] As of October 6, 2010, the Legal Ombudsman[9]—established by the OLC—has dealt with complaints against all lawyers registered in England and Wales.[10]

The most significant legislation for regulatory bodies in the legal profession was the enactment of LSA 2007, which changed the way the U.K. legal profession is regulated. Perhaps its most important provision was the establishment of a national body, the LSB.[11] The LSB operates independently of the courts and the bar to exercise regulatory oversight of the legal profession and of the approved regulators directly regulating the practice of law in England and Wales.[12] The LSA 2007 has established that legal obligations extend beyond those simply owed to the client.

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Akhtar, *Conditional Fees and the Contingency Fees Distinction: A Comparative Study of the UK and US Risk Assessment for Insurers in Litigation (English Text)*, 2021 EUR. INS. L. REV. 54, 55 (2021) [hereinafter Akhtar, *A Comparative Study of UK and US Risk Assessment in Litigation*].

6. Legal Services Act 2007, c. 29, explanatory notes, at 16–17

7. *Id.* at 54. *See also About Us: Who We Are*, LEGAL SERVS. BD., https://legalservicesboard.org.uk/about-us [https://perma.cc/B37L-UJU4] (outlining the roles and responsibilities of the LSB); *The Regulatory Objectives*, LEGAL SERVS. BD. (June 2017), https://legalservicesboard.org.uk/about_us/Regulatory_Objectives.pdf [https://perma.cc/T24Y-XELR].

8. Catherine Fairbairn & Natasha Mutebi, *Complaints Against Solicitors and Other Lawyers* 4 (House of Commons Library, Briefing Paper No. 03762, 2020), https://researchbriefings.files.parliament.uk/documents/SN03762/SN03762.pdf [https://perma.cc/7RFR-3SNV]. *OLC Operating Framework*, LEGAL OMBUDSMAN, https://www.legalombudsman.org.uk/information-centre/corporate-publications/olc-operating-framework/ [https://perma.cc/T4BU-BHKS].

9. *See generally How We Work*, LEGAL OMBUDSMAN, https://www.legalombudsman.org.uk/how-we-work/ [https://perma.cc/384L-5HGF].

10. *LSB oversight of the Office for Legal Complaints (OLC)*, LEGAL SERVS. BD., https://legalservicesboard.org.uk/our-relationships/our-relationships-office-for-legal-complaints [https://perma.cc/VEU6-Q5ZA]; *Approved Regulators*, LEGAL SERVS. BD., https://legalservicesboard.org.uk/about-us/approved-regulators [https://perma.cc/82WQ-LPZ2].

11. Legal Services Act 2007, c. 29, Part 2 (UK).

12. *Id.* § 1.

The five professional principles established in LSA 2007 require "authorised persons"[13] to: (1) "act with independence and integrity;" (2) "maintain proper standards of work;" (3) "act in the best interests of their clients;" (4) "comply with their duty to the court to act with independence in the interests of justice;" and (5) ensure that the "affairs of clients are kept confidential."[14] These objectives seem to have been met because the LSA 2007 has successfully merged the need for consumer protection with a regulatory framework that can also discipline lawyers in an enlarged spectrum where different business structures can also offer legal services.[15]

Complaints of professional misconduct lodged against barristers are overseen by the Bar Standards Board and more serious complaints are referred by the Conduct Committee to either a summary procedure panel or a disciplinary tribunal.[16] The appeals from the decisions of those bodies are referred to the judicial committee which is composed of the members of the Bar and the High Court judges.[17] The complaints of professional misconduct against solicitors are dealt with by adjudicators at the Legal

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13. *See id.* § 18 (defining "authorised person" as either: "a person who is authorised to carry on the relevant activity by a relevant approved regulator in relation to the relevant activity" or "a licensable body which, by virtue of such a licence, is authorised to carry on the relevant activity by a licensing authority in relation to the reserved legal activity").

14. BAR STANDARDS BD., THE BSB HANDBOOK, at I2(a)–(e) (version 4.6, 2020), https://www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/ca69145f-01ad-46de-ab3024436b11e45e/second-edition-test31072019104713.pdf [https://perma.cc/HH2C-S5XF] [hereinafter BSB HANDBOOK].

15. Judith L. Maute, Global Continental Shifts to a New Governance Paradigm in Lawyer Regulation and Consumer Protection: Riding the Wave, *in* ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION 11 (Francesca Bartlett et al., eds. Routledge: New York, 2010).

16. *See* BSB HANDBOOK, *supra* note 14, at rE4 ("If a report is received by the [BSB] from a person entitled to complain to the Legal Ombudsman about the subject of the report, the Commissioner must refer the report without further consideration to the Legal Ombudsman or signpost the provider of the report to the Legal Ombudsman."); *see also id.* at rE22 (providing guidance regarding the "Powers of an Independent Decision-Making Panel in relation to allegations referred to it"); *Id.* at rE25 (outlining the requirements for the "Independent Decision-Making Panel and Commissioner" in exercising its authority).

17. BSB HANDBOOK, *supra* note 14, at rE236. *Appeals*, BAR STANDARDS BD. (Sept. 26, 2019), https://www.barstandardsboard.org.uk/about-us/how-we-regulate/the-decisions-we-take/enforcement-decisions/tribunals-and-findings/appeals.html [https://perma.cc/R7J6-8PZJ].

Complaints Service of the Solicitors Regulation Authority ("SRA"),[18] and in more serious cases, by reference to the Solicitors Disciplinary Tribunal ("SDT"), which acts independently of the SRA.[19] The appeals from decisions of the SDT are to the High Court and there is reference to judgments of the court that ascribe high standards of ethical conduct.[20]

In contrast, lawyers in the United States are guided by the professional standards promulgated by the American Bar Association ("ABA"),[21] the ABA Model Rules of Professional Conduct.[22] The ABA's Standing Committee on Ethics and Professional Responsibility "develop[s] model national ethics standards for lawyers and the judiciary" in addition to drafting Formal Ethics Opinions which "interpret[] and apply[] those standards."[23] The ABA's Ethics Committee has, since its 1908 inception,[24]

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18. *See About Us: What We Do,* SOLICITORS REG. AUTH., https://www.sra.org.uk/sra/how-we-work/#:~:text=The%20SRA%20is%20the%20regulator,solicitors%20in%20England%20and%20Wales.&text=by%20acting%20when%20risks%20are%20identified [https://perma.cc/2RAJ-Z2FB] (outlining the responsibilities of the SRA in handling complaints of professional misconduct against solicitors).

19. *See About Us*, SOLICITORS DISCIPLINARY TRIBUNAL, https://www.solicitorstribunal.org.uk/ [https://perma.cc/47SX-SB5H] (explaining the SDT is "independent of the [SRA], which instigates the majority of the cases dealt with by the [SDT]" while the "remaining cases are commenced by members of the public").

20. Bolton v. Law Society [1993] EWCA Civ 32, ¶ 16 (appeal taken from Eng.), https://www.bailii.org/ew/cases/EWCA/Civ/1993/32.html [https://perma.cc/MVS2-MMFB]. In this case, Lord Bingham MR established the principles that will be considered where a solicitor (or barrister) faces a disciplinary tribunal. He reasoned, "[b]ecause orders [made by disciplinary tribunals] are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases." His Lordship stated further: "[t]he reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price." *Id.*

21. *See About Us*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/ [https://perma.cc/WR84-Z8QX].

22. *See generally Model Rules of Professional Conduct—Table of Contents,* AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ [https://perma.cc/2SML-B44A].

23. *See* Akhtar, *A Comparative Study of the UK and US Risk Assessment for Insurers in Litigation, supra* note 6, at 55.

24. *See Consumer FAQs: What does the Standing Committee on Ethics and Professional Responsibility do?*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/resources/resources_for_the_public/consumer_faqs/ [https://perma.cc/8VMB-GXYF] ("Since 1908, the Ethics Committee has focused its efforts on the development of model national ethics standards and the drafting of definitive ethics opinions interpreting and applying those standards.").

"led the development of model national ethics standards for lawyers and the judiciary."[25] In 1984, the ABA "undertook an effort to encourage nationwide adoption" of a new set of ethics rules—the Model Rules of Professional Conduct—which were the result of a seven-year project to "update[] and refine[] the then prevailing ethical standards."[26] The Center for Professional Responsibility ("CPR") Policy Implementation Committee focuses on implementation of the "revisions to the Model Rules of Professional Conduct and the Model Code of Judicial Conduct, the policies of the Multijurisdictional Practice Commission and other models and policies developed by the Center for Professional Responsibility."[27] The committee also assists states in their implementation of changes to the Model Rules of Professional Conduct.[28]

The relationship between barrister and client in the U.K., can be distinguished from the attorney-client relationship in the U.S. In the U.K., "the lawyer has to satisfy the bona fides of the legal agreement with their clients" while risking the hazards of the trust being damaged when the client commits an offence and there is a potential breach of conduct apparent in the representation.[29] The salient criteria in the professional conduct of lawyers in the U.K., is comparable to the ABA Model Rules of Professional Conduct—which have been adopted by the majority of states under their own regulations.[30] A comparative analysis between both frameworks will

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25. *Id.*

26. Akhtar, *A Comparative Study of the UK and US Risk Assessment for Insurers in Litigation, supra* note 6, at 55; *see also Model Rules for Judicial Disciplinary Enforcement*, AM. BAR ASS'N (Aug. 18, 2018), https://www.americanbar.org/groups/professional_responsibility/model_rules_judicial_disciplinary_enforcement/preface/#:~:text=To%20assist%20jurisdictions%20in%20the%20implementation%20of%20these,significantly%20revised%20its%20Model%20Code%20of%20Judicial%20Conduct [https://perma.cc/EF5X-3MJA] (stating between 1987 and 1990 the Standing Committee developed a revised Model Code of Judicial Conduct, adopted by the American Bar Association which has been widely accepted throughout the country. The Committee also provides consultation to other American Bar Association entities, state and local bars, law school communities, the legal news media and the public on matters of emerging interest in the area of legal and judicial ethics).

27. *CPR Policy Implementation Committee*, AM. BAR ASS'N (2022), https://www.americanbar.org/groups/professional_responsibility/policy/aboutUs.html [https://perma.cc/MQ7M-FM8V].

28. *Id.*

29. *See* Akhtar, *A Comparative Study of UK and US Risk Assessment in Litigation, supra* note 6, at 55.

30. *See Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/6BFY-ZZ8D]

illustrate the distinctions and similarities between the U.K. and the U.S., and the duties that are owed to the court and those owed to the client.

## II. U.K. CODE OF CONDUCT

### A. *Core Duties of Barristers*

The legal profession is highly regulated by disciplinary rules and professional codes, which are designed to conform to high standards in an effort to maintain public reputation while upholding the rule of law.[31] This makes regulation imperative for the legal profession, as its members are expected to employ a high standard of honesty, integrity, and independence when dealing with clients and the courts. The LSA 2007 established Regulatory Objectives and Professional Principles intended to guide the regulatory process, as well as the decisions of the LSB and the regulatory authorities falling under its jurisdiction.[32]

The members of the bar in England and Wales—whether self-employed or employed—are governed by the Core Duties and the Conduct Rules for barristers set out in the BSB handbook.[33] The ten Core Duties require a barrister: (1) "to observe [their] duty to the court in the administration of justice;" (2) "to act in the best interests of each client;" (3) "to act with honesty and integrity;" (4) "to maintain [their] independence;" (5) "to not behave in a way which is likely to diminish the trust and confidence which the public places in [them] or in the profession;" (6) "to keep the affairs of each client confidential;" (7) "to provide a competent standard of work and service to each client; (8) "to not discriminate unlawfully against any person;" (9) "to be open and co-operative with [their] regulators;" and

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(providing a comprehensive list of jurisdictions that have adopted the ABA Model Rules of Professional Conduct and including dates of initial adoption).

31. Since the Courts and Legal Services Act of 1990, a solicitor can become a Solicitor Advocate—entitling them to appear in the higher criminal and civil courts of England and Wales, and exercise rights of audience in such courts—so long as the solicitor obtains necessary qualification. In theory, this puts Solicitor Advocates and Barristers on par with respect to higher rights of audience. *See generally* Courts and Legal Services Act 1990, c. 41, § 27 (UK).

32. Legal Services Act 2007, c. 29, § 1(1), (3) (UK).

33. *See* BSB HANDBOOK, *supra* note 14, at I5.2 (describing the Code of Conduct as containing "the ten Core Duties which underpin the Bar Standards Board's entire regulatory framework, as well as the [Conduct Rules] which supplement those Core Duties"); *see also id.*, at I6.3 (outlining the three purposes of the Conduct Rules).

(10) "to take reasonable steps to manage [their] practice, or carry out [their] role within [their] practice, competently and in such a way as to achieve compliance with [their] legal and regulatory obligations."[34]

Core Duty 4 requires barristers to maintain their independence, and by implication, their integrity.[35] This duty is reinforced by Rule C21.10 in the BSB Handbook, which prohibits barristers from "accept[ing] instructions to act" if there is a "real prospect" that they will not "be able to maintain [their] independence."[36] Additionally, Rules C21.2 and C21.3 provide that barristers must not accept instructions to act, if a conflict of interest exists "between [the barrister's] personal interests and the interests of the prospective *client* in respect of the particular matter" or where one exists "between the prospective *client* and one or more of [the barrister's] former or existing *clients* in respect of the particular matter."[37] However, there is an exception where "all of the *clients* who have an interest in the particular matter give their informed consent to [the barrister's] acting in such circumstances."[38]

Conformity with legal ethics assumes even greater significance when the case is a criminal matter being tried in court. This elevated significant is due to the guaranteed right of the criminal defendant to a fair trial under Article 6.1 of the Human Rights Act of 1998,[39] in addition to the duty of the advocate to the client which must be balanced with the duty owed to the court.[40] In these instances, the machinery of justice is interested in maintaining the rule of law as a fundamental requirement for advocates, and

34. BSB HANDBOOK, *supra* note 14, at CD1–CD10. Nicola Laver, *Code of Conduct for Barristers*, IN BRIEF, https://www.inbrief.co.uk/legal-system/barristers-code-of-conduct/ [https://perma.cc/87FR-8C39].

35. *See* BSB HANDBOOK, *supra* note 14, at rC29 (stating barristers are subject to the "cab rank rule" and are under an obligation to accept instructions from every client regardless of their view of the case or the personal views of the client). The BSB's cab-rank rule is located in rule C29 of the BAB Handbook, and states in pertinent part: "If you receive instructions from a professional client, . . . you must . . . accept the instructions . . . irrespective of: . . . the identity of the client; . . . the nature of the case. . .[and] any belief or opinion which you may have formed as to the [client's] character, reputation, cause, conduct, guilt or innocence." *Id.*

36. *See* BSB HANDBOOK, *supra* note 14, at rC21.10.

37. *See id.* at rC21.2–3 (emphasis in original).

38. *See id.* at rC21.3 (emphasis in original).

39. Human Rights Act (HRA) 1998, c. 42, sch. 1, art. 6.1 (UK) ("In the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

40. *See supra* notes 77–166 and accompanying text.

of course lawyers, who are expected to act competently and independently while adhering to the requisite ethical standards.

The Criminal Procedure Rules ("CrimPR") articulate the overriding objective in criminal cases is for the criminal case to "be dealt with justly."[41] CrimPR 1.1(2)(a) provides dealing with a criminal case justly requires: "acquitting the innocent and convicting the guilty;" "dealing with the prosecution and the defence fairly;" "recognising the rights of a defendant;"[42] "respecting the interests of witnesses, victims and jurors and keeping them informed of [case progress];" and "dealing with the case efficiently and expeditiously."[43]

The Criminal Procedure Rules and the Criminal Practice Directions, taken together, provide "a code of current practice that is binding on the courts to which they are directed, and which promotes the consistent administration of justice."[44] The Practice Directions state in relevant part:

> The presumption of innocence and an adversarial process are essential features of English and Welsh legal tradition and of the defendant's right to a fair trial. But it is no part of a fair trial that questions of guilt and innocence should be determined by procedural manoeuvres. On the contrary, fairness is best served when the issues between the parties are identified as early and as clearly as possible.[45]

Thus, the trial process must be conducted fairly and efficiently. This is an obligation upon the advocates, and it has been the subject of judicial comment in criminal trials. For example, in *R v. Farooqi*,[46] the Court of Appeals stated the trial judge must respect the "very wide discretion is vested in the judgment of the advocate about how best to conduct the trial, recognising that . . . the advocate will be party to confidential instructions from his client from which the judge must be excluded."[47] Importantly, the

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41. CRIMPR, 2015 No. 1490, r. 1.1(1).

42. *See id.* at 1.1(2)(c) (emphasizing the importance of particularly recognizing the defendant's rights "under Article 6 of the European Convention on Human Rights").

43. *Id.* at 1.1(2)(a)–(e).

44. CRIM. PRAC. DIRECTIONS, I General Matters 1A.3, https://www.judiciary.uk/wp-content/uploads/2019/03/crim-pd-amendment-no-8-consolidated-mar2019.pdf [https://perma.cc/8NQ6-WCQC].

45. *Id.* at 1A.1.

46. *See* R v. Farooqi [2013] EWCA (Crim) 1649.

47. *Id.* ¶ 108–109.

court noted that there should be "mutual respect" between the judge and the advocates on all sides.[48] It is also crucial for lawyers to guarantee the trial is conducted fairly and efficiently, in a manner which "enhance the prospect that justice will be done."[49] For this to be achieved, the advocate must "abide by the rulings of the court,"[50] ensuring that his or her clients "understand that he must abide by procedural requirements[,] . . . practice directions[,] and court orders."[51] Moreover, the court emphasized the importance of clearly presenting case to the witness:

> Now that is a considerable accusation to make, and one which if it was to be made, should have been put to Detective Chief Inspector Richardson, the senior investigating officer when he was in the witness box, so that he could deal with it. He has had no opportunity of dealing with what is a very grave allegation . . . Counsel simply cannot wait until his closing speech to make such an allegation because the Crown have no way of answering it or dealing with it.[52]

The aforementioned principles are invoked when there is any doubt as to the commitment of the barrister to its duties. Thus, these principles have been enforced by courts in criminal trials where a barrister is at risk of conflict with its client, due to a conflicting obligation is owed to another client. To illustrate, in *R v. Ekareib*,[53] the Court of Appeals expressed concern as to whether the barrister was in breach of the rules due to his undertaking a substantial amount of work from a client while "carrying out a very complex murder trial" for a different client.[54] Although the court made no formal findings in relation to this issue, it referred the matter of the barrister's conduct to the BSB for their consideration.[55] The court also expressed concern that "the practice of making personal criticism of

48. *Id.* ¶ 109.
49. *Id.* ¶¶ 109, 114.
50. *Id.* ¶ 108.
51. *Id.* ¶ 114.
52. *Id.* ¶ 93(f).
53. R v. Ekareib [2015] EWCA (Crim) 1936 (appeal taken from Eng.), https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2015/1936.html&query=EWCA+Crim+1936 [https://perma.cc/FR6R-FR6L].
54. *Id.* ¶ 57.
55. *Id.*

prosecution advocates has become a feature of some addresses to the jury made by the defence advocates"[56]—which, is a development "which judges must ensure ceases immediately and not be repeated in any case."[57]

Additionally, there has been a current emphasis on the duty of advocates not to mislead the court, which is increasingly crucial when the party is an in-person litigant. Thus, the opposing party's lack of legal representation is particularly relevant when it comes to legal submissions—in which case, requires an advocate to "draw the court's attention to any case or statutory provision which is plainly against a [legal principle] which she [has made, or] is proposing to make."[58] There are guidelines to assist lawyers in dealing with litigants in person ("LIPs"), including notes for both clients and LIPs, one of which provides that the opposing party's "lawyer cannot give you legal or tactical advice[,] but [they] can explain the court procedures to you."[59]

There has been an increase in the LIPs appearing in criminal trials because of legal aid reductions—among other things—and as such, the guidelines include LIPs in terms of the responsibilities of the professional advocate.[60] The Master of Rolls issued guidelines for LIPs, and included those who appear in criminal trials in its definition.[61] The Equal Treatment Bench Book[62] contains a section on LIPs and the role of professional lawyers in maintaining a fair trial proceeding. The LIP is entitled to get assistance [from the judge], "in the conduct of his or her case." This right is crucial

56. *Id.* ¶ 60.

57. *Id.* ¶ 59.

58. *The Lord Slynn Memorial Lecture 2016: Ethics and Advocacy in the Twenty-First Century: Lord Neuberger*, SUPREME COURT U.K., ¶ 30 (June 15, 2016), https://www.supremecourt.uk/docs/speech-160615.pdf [https://perma.cc/T4R8-CGQJ].

59. THE LAW SOCIETY ET AL., LITIGANTS IN PERSON: GUIDELINES FOR LAWYERS 27 (June 2015), https://prdsitecore93.azureedge.net/-/media/files/topics/family-and-children/litigants-in-person-guidelines-lawyers-june-2015.pdf?rev=5ce3bada643d41b1bac820a1cdb0872c&hash=F7D2D2F1BBD072A03D58680ECB3C70B6 [https://perma.cc/5U9C-AH8T].

60. *See generally id.* at 2–19.

61. *See* Lord Dyson Master of the Rolls, *Practice Guidance: Terminology for Litigants in Person* (Mar. 2013), 2 All ER 624, http://pinktape.co.uk/wp/wp-content/uploads/2013/03/annex-a-practice-guidance_litigants-in-person-2.pdf [https://perma.cc/P2DS-XQL8] (applying the Guidance to "proceedings in all criminal, civil and family courts").

62. JUDICIAL COLL., EQUAL TREATMENT BENCH BOOK (2018), https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february-v6-2018.pdf [https://perma.cc/PV5D-FR45].

when the LIP is "examining or cross-examining witnesses and giving evidence," upon which the judge must: make inquiry as to "whether the [LIP] wishes to call any witnesses;" ensure it is "prepared to discuss the course of proceedings with the [LIP]" outside of the presence of the jury "before he or she embarks on any cross-examination;" and, "be ready to restrain unnecessary, intimidating or humiliating cross examination."[63]

This process has been reinforced by the Criminal Practice Directions and the CrimPR, which affirm the statutory prohibitions on cross-examination by an unrepresented defendant.[64] It places a duty on a judge to address an "unrepresented defendant at the conclusion of the evidence for the prosecution, and in the presence of the jury,"[65] with verbal directions by the trial judge that concludes: "[a]fterwards you may also, if you wish, address the jury"[66] by "arguing your case from the dock."[67] However, at that stage "you cannot . . . give evidence."[68]

> The Code of Conduct provides guidance to the barrister where a client requests representation but they have a case which appears hopeless. If it is fraud-related, then a practising barrister is prohibited from
>
> *'devising facts which will assist in advancing [the client's] case' and from 'draft[ing] any statement of case, witness statement, affidavit, notice of appeal' if it contains 'any allegation of fraud unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a prima facie case of fraud.'*[69]

Practising barristers are encountered with myriad "ethical challenges when they come into possession of information adverse to their client's

63. *Id.* at 1–19.

64. *See* CRIM. PRAC. DIRECTIONS 2015, VI Trial 26P.5 (as amended May 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/924047/crim-practice-directions-VI-trial-2015.pdf [https://perma.cc/69U2-K4Y3] (stating the judge has a duty to assist an unrepresented defendant "when appropriate, and in the presence of the jury").

65. *See* EQUAL TREATMENT BENCH BOOK (2018), *supra* note 61, at 1–19.

66. CRIM. PRAC. DIRECTIONS 2015, VI Trial 26P.5 (as amended May 2020).

67. EQUAL TREATMENT BENCH BOOK (2018), *supra* note 61, at 1–19.

68. *Id.; see also* CRIM. PRAC. DIRECTIONS 2015, VI Trial 26P.5 (as amended May 2020).

69. CODE OF CONDUCT OF THE BAR OF ENGLAND & WALES, BAR STANDARD BD., r. 704(c) (8th ed. 2004), https://www.barstandardsboard.org.uk/uploads/assets/8946a269-bd50-46ea-923e2069957cb11c/codeofconduct22october2013.pdf [https://perma.cc/JSN7-FL5P].

case."[70] Dilemmas arise particularly where the barrister is representing a client who may be guilty of a crime. However, it has been argued that "there is no shame in a lawyer honestly using the law to protect his client from the consequences of his crimes. It is far more important that there is confidence in the rule of law than that every criminal should inevitably be punished."[71]

Barristers are officers of the court and they are engaged in the art of advocacy. Barristers are called to balance the desires of their client against the court's expectation of the barrister as an advocate for the client. This responsibility is further complicated when the matter potentially sets the barrister's fiduciary duties to the client at issue, in conflict with their duties to another client. For instance, in *Medcalf v. Weatherill*,[72] Lord Steyn formulated the following principle:

> Making allegations of dishonesty without adequate grounds for doing so may be improper conduct. Not making allegation of dishonesty where it is proper to make such allegations may amount to dereliction of duty. The barrister must promote and protect fearlessly and by all proper and lawful means his [clients'] interests . . . Often the decision will depend on circumstantial evidence. It may sometimes be finely balanced. What the decision should be may be a difficult matter of judgment on which reasonable minds may differ.[73]

In some scenarios, a barrister may feel as if there is a conflict between the duty it owes to the court and the duty owed to its client. For example, suppose your client in a criminal matter wishes to enter a not guilty plea, but *you* believe your client is untruthful and that they did indeed commit the alleged crime. In this situation, subjective belief is irrelevant and must not cloud a barrister's judgment in carrying out its duty to fairly represent the client.[74] The rules set out in the codes of conduct for barristers are intended to regulate the profession. The barrister is given discretion, but the latitude

70. Jo Delahunty [K]C, *Ethics In and Out of the Courtroom*, GRESHAM COLL., at 10 (2018), https://s3-eu-west-1.amazonaws.com/content.gresham.ac.uk/data/binary/2820/2018-10-04_JoDelahunty_EthicsInAndOutOfCourtRoom_t.pdf [https://perma.cc/G3AR-QY2H].

71. *See id.* at 9.

72. Medcalf v. Weatherill [2002] UKHL 27 (appeal taken from Eng.).

73. *Id.* ¶ 35 (citing para 203 of the Code of Conduct). *See* BSB HANDBOOK, *supra* note 14,

74. *See* Delahunty, *supra* note 70, at 5 (explaining this scenario and stating "[t]his principle lies at the heart of The Cab Rank Rule. W[h]ere it disrespected those who face the most serious consequences for the crimes or acts they have <u>allegedly</u> committed would be deprived of representation").

in exercising such discretion is based on the duties it owes to the court. Additionally, there is an obligation to uphold the principles that have been codified and that have regulatory effects on the profession.

B. *Duty of Confidentiality Waiver*

Core Duty 1 of the Code of Conduct imposes on barrister's a "duty to the court in the administration of justice."[75] The guidance to CD1 provides "if and to the extent" that any other core duty conflicts with the barrister's duty to the court, its duty to the court will override any inconsistent duty.[76] Thus, it follows, that the duty of confidentiality may be set aside by the barrister to support the interests of the administration of justice.[77] This duty is a reflection of the overriding objective stated in CrimPR 2.1, requiring "criminal cases be dealt with justly."[78] The CrimPR 2.2 further provides the essential features of the defendant's fair trial—both of which, are acknowledged by the overriding objective—are the notions of a "presumption of innocence and a robust adversarial process."[79] Moreover, the rules emphasize "[i]t is not justice that questions of guilt or innocence are determined by procedural manoeuvres. On the contrary, justice is best served when the issues between the parties are identified as early and as clearly as possible."[80] This obligation is imposed on all participants,[81] which includes "the parties to the proceedings (the prosecuting authority and defendant) and extends to others such as the police, witnesses (prosecution and defence), experts, defence representatives, court staff, and judges."[82]

As mentioned above, expert witnesses are subject to this obligation. Indeed, under the CrimPR, an expert has a duty to the court to assist the

75. *See* BSB HANDBOOK, *supra* note 14, at CD1 ("You must observe your duty to the court in the administration of justice.").

76. *See id.* at gC1 ("CD1 overrides any other core duty, if and to the extent the two are inconsistent.").

77. *Id.*; *see also id.* at CD6 ("You must keep the affairs of each client confidential.").

78. CRIMPR, 2015 No. 1490, r. 1.1(1).

79. *CPS Guidance for Experts on Disclosure, Unused Material, and Case Management*, CROWN PROSECUTION SERV. (Sept. 19, 2019), https://www.cps.gov.uk/legal-guidance/cps-guidance-experts-disclosure-unused-material-and-case-management [https://perma.cc/KQR4-WNWK]; CRIM. PRAC. DIRECTIONS 2015, I General Matters 1.A.1 (as amended May 2020).

80. *CPS Guidance for Experts, supra* note 78.

81. *See* CRIMPR, 2020 No. 759, r. 1.2 (UK) (providing the duty of the participants in a criminal case).

82. *CPS Guidance for Experts, supra* note 78.

court in furthering its overriding objective, by "giving [an objective and unbiased] opinion" that is "within the expert's area . . . of expertise," and assist the court with case management by "complying with [the court] directions," and promptly "informing the court of any significant failure . . . to take any step [the court] requires."[83] Moreover, this duty includes an obligation to "inform all parties and the court if the expert's opinion changes from that contained in [an earlier] report."[84] Moreover, the expert has a responsibility to disclose—to the party introducing the product of their expertise into evidence—anything of which the expert is aware, that "might reasonably be thought capable of—undermining . . . the expert's opinion," or "detracting from the credibility or impartiality of the expert."[85]

## III. U.S. MODEL RULES OF PROFESSIONAL CONDUCT

The Preamble to the ABA Model Rules of Professional Conduct ("ABA Model Rules") states in relevant part: "Lawyers play a vital role in the preservation of society. The fulfilment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship."[86] There can be significant variations between the different versions of the rules between states, and each state has a process for considering and adopting new ABA standards for its implementation. In order to avoid disciplinary proceedings, lawyers must comply with their jurisdictions rules and not the ABA's Model Rules.[87] These rules of professional conduct for lawyers promulgated in each jurisdiction, function much like statutes and are not adopted by the legislature; rather, they are adopted by state bar associations or the highest court of the jurisdiction.[88]

The most significant provisions of the ABA Model Rules—as applied to criminal law practitioners—are those presented in the first section,

83. CRIMPR, 2020 No. 759, r. 19.2(1)(a)–(c) (UK).

84. *Id.* r. 19.3(3)(c) (UK).

85. *Id.* r. 19.3(3)(d)(i)–(ii) (UK).

86. MODEL RULES OF PROF'L CONDUCT Preamble and Scope (AM. BAR ASS'N 2023).

87. *Id.*

88. *See generally Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/6BFY-ZZ8D] (listing U.S. states that have adopted the ABA Model Rules, including the date of its inception).

governing the Client-Lawyer Relationship. These rules regulate many issues prevalent in the client-lawyer relationship, such as: competence (Rule 1.1);[89] scope of representation (Rule 1.2);[90] diligence (Rule 1.3);[91] client communications (Rule 1.4);[92] fees (Rule 1.5);[93] confidentiality of information (Rule 1.6);[94] and conflicts of interests with current clients (Rule 1.7–1.8).[95] Additionally, other rules implicated by those governing the client-lawyer relationship, including: candor toward the tribunal (Rule 3.3); lawyer professional independence (Rule 5.4); reporting professional misconduct (Rule 8.3); and lawyer misconduct (Rule 8.4).[96] These provisions represent the core values of the U.S. legal profession.

The disclosure rules in the U.S. have been balanced with the duty of confidentiality towards the client. These obligations are set out as in Rule 3 of the Model Rules of Professional Conduct, which concern: the pleading of meritorious claims and contentions (Rule 3.1);[97] expediting litigation (Rule 3.2);[98] candor toward the tribunal (Rule 3.3);[99] fairness to opposing party and counsel (Rule 3.4);[100] impartiality and decorum of the tribunal

89. MODEL RULES OF PROF'L CONDUCT R. 1.1 (defining competent representation as one which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

90. *Id.* R. 1.2 (describing the scope of representation & allocation of authority between client and lawyer).

91. *Id.* R. 1.3 (requiring the lawyer to "act with reasonable diligence and promptness in representing a client").

92. *Id.* R. 1.4.

93. *Id.* R. 1.5 (providing factors for determining the reasonableness of a fee).

94. *Id.* R. 1.6 (stating the rule which governs the disclosure by a lawyer of information relating to the representation of a client during such representation).

95. *Id.* R. 1.7 (explaining except under limited circumstances, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest"); *see also id.* at R. 1.8 (prohibiting a lawyer from "enter[ing] into a business transaction with a client or knowingly acquir[ing] an ownership, possessory, security or other pecuniary interest adverse to a client" except under limited circumstances proscribed under the rule).

96. *Id.* at R. 3.3, 5.4, 8.3–8.4.

97. *Id.* R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

98. *Id.* R. 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").

99. *Id.* R. 3.3 (setting out the rule governing the conduct of a lawyer who is representing a client in the proceedings of a tribunal).

100. *Id.* R. 3.4 (securing the fairness of the adversary system by imposing certain prohibitions and requirements of the parties).

(Rule 3.5);[101] trial publicity (Rule 3.6);[102] lawyer as witness (Rule 3.7);[103] special responsibilities of a prosecutor (Rule 3.8);[104] and advocate in non-adjudicative proceedings (Rule 3.9).[105]

Thus, the ABA Model Rules promotes disclosure of client communications—by the advocate to the court—when the court determines that such privilege is deemed waived.[106] The Commentary to this rule explains, "although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law . . . or to vouch for the evidence submitted . . . the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."[107] Consequently, if the lawyer is aware that its client or witness has offered false testimony, then he must take remedial measures, including disclosures to the court, if necessary.[108] However, the lawyer cannot refuse the testimony of a defendant in a criminal matter.[109] Thus, the commentary suggests an appropriate remedial measure in a scenario premised on a client's misconduct is "to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor . . . and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence."[110] If the initial attempt to remedy the situation fails, the lawyer is required to take further remedial action, either through a withdrawal from

101. *Id.* R. 3.5 (requiring lawyers to abstain from disruptive conduct and improper influence upon a tribunal).

102. *Id.* R. 3.6 (providing a general prohibition against a lawyer's making statements that it "knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding").

103. *Id.* R. 3.7 ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.").

104. *Id.* R. 3.8 (proscribing responsibilities to the prosecution in a criminal case).

105. *Id.* R. 3.9, cmt. 3 (applying to scenarios where "a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument").

106. Zia Akhtar, *Legal Privilege and Third Party Disclosure: A Comparative Analysis of UK and the US Rules*, 16 INT'L COMMENT ON EVID. 1, 6 (2019).

107. *Id.* R. 3.3 cmt. 2.

108. *Id.* R. 3.3(a)(1)–(3).

109. *Id.* R. 3.3 cmt. 10; *see also id.* R. 3.3 cmt. 2 (explaining the disclosure requirement rule does "not permit a lawyer to refuse to offer the testimony of [its client in a criminal case] where the lawyer *reasonably believes* but does not know that the testimony will be false. Unless the lawyer *knows* the testimony will be false, the lawyer must honor the client's decision to testify") (emphasis added).

110. *Id.* R. 3.3 cmt. 10.

representing the client, or if that does not suffice to remedy the situation or the court does not permit the withdrawal request, then it must make "disclosure to the tribunal as is reasonably necessary" to comply with its duty of candor (even if it results in a breach of confidentiality).[111]

According to the Model Rules, a lawyer who complies with the duty of candor imposed by Rule 3.3, generally will not need to request permission to withdraw from representing the client. However, under certain circumstances, a lawyer may be required to seek withdrawal when its compliance with the "duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client."[112] Moreover, lawyers have an obligation to preserve the integrity of the judicial process which includes a duty to protect the court against criminal or fraudulent conduct. For example, a lawyer must not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value," and the lawyer must not advise any person, including its client, to do the same.[113] Thus, when the lawyer has knowledge of anyone "intend[ing] to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding," it must make a remedial disclosure to the tribunal.[114]

There are many parallels between the professional conduct rules in the U.S. and the U.K. as well as many parallels between and the objectives and principles established by the BSB and the ABA Model Rules. This can be ascertained by the Regulatory Objectives of the LSA 2007 "protecting and promoting the public interest . . . supporting the constitutional principle of the rule of law . . . improving access to justice [and] increasing public understanding of the citizen's legal rights and duties,"[115] which are similar to certain provisions in the Preamble to the ABA Model Rules, such as the responsibility of "a lawyer [to] seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."[116]

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111. *Id.*
112. *Id.* R. 3.3 cmt. 15. *See also id.* R. 1.16 (declining or terminating representation).
113. *Id.* R. 3.4 (requiring fairness to opposing party and counsel).
114. *Id.* R. 3.3 cmt. 12.
115. Legal Services Act 2007, c. 29, § 1(a)–(c), (g).
116. MODEL RULES OF PROF'L CONDUCT Preamble.

The purpose of these rules is to further the public's understanding and faith in the rule of law and the justice system, because legal institutions depend on civic participation and trust to maintain authority. As such, "all lawyers [are expected to] devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford to secure adequate legal counsel."[117]

The Preamble to the ABA Model Rules implicitly emphasizes the need for an independent, vigorous, and effective legal profession, as well as a the need for lawyer's acting in a criminal case to be wary of victimization.[118] In 2016, the ABA amended Model Rule 8.4[119] to provide that it is "professional misconduct for a lawyer to: . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[120] Likewise, in the BSB Handbook this is reflected by Core Duty 12 which forbids discrimination by the barrister on account of the persons characteristics such as "race, age and gender, etc."[121] The ABA's adding this anti-discrimination provision significantly expanded the scope of the attorney-client relationship. Indeed, prior to the 2016 amendment,[122] the ABA Model Rules only addressed the topic of discrimination in Rule 8.4(d), which provides it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."[123]

117. *Id.*

118. *Id.*

119. Transcript of Hearing on Proposed Amendment to Model Rule 8.4, AM. BAR ASS'N (Feb. 7, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf [https://perma.cc/RT8V-6K5P].

120. MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

121. The BSB Handbook also defines in its Guidance Notes the possible breaches of CD3 and CD5. Conduct likely to be treated as a breach of these core duties, includes "criminal conduct, other than minor criminal offences" and "seriously offensive or discreditable conduct towards third parties; dishonesty; unlawful victimisation or harassment; or abuse of your professional position." *See* BSB HANDBOOK, *supra* note 14, at gC25, gC27.

122. AM. BAR ASS'N STANDING COMM. ON ETHICS & PROF'L RESP. ET AL., REPORT TO THE HOUSE OF DELEGATES (Aug. 8, 2016).

123. MODEL RULES OF PROF'L CONDUCT R. 8.4(d).

The ethical rules are more stringent in the United States than in the those in the U.K. For example, in the U.S., the rules preclude an attorney from representing co-defendants.[124] Indeed, the commentary to the ABA Model Rules notes that "ordinarily a lawyer should decline to represent more than one co-defendant" due to the "[grave] potential for conflict of interest in representing multiple defendants in a criminal case."[125] A lawyer has a duty of *undivided* loyalty to each of its clients, which is described as an "essential element" in the attorney-client relationship.[126] The importance placed on this duty is based on the premise that a lawyer "who is forced or who attempts to serve clients with conflicting interests cannot give unto either the loyalty each deserves."[127] The ABA Model Rules address this matter in Rule 1.7(a), which provides: "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[128] Moreover, it further explains such a conflict exists if "the representation of one client will be directly adverse to another client," or "there is a significant risk that representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."[129]

Where a conflict of interest exists, resolution of the issue may be possible nonetheless, depending on the whether the lawyer will be able to adequately provide competent and diligent representation to the client, despite the conflict—i.e., "whether the conflict is consentable."[130] The commentary to the Model Rules articulates the key issue in determining "consentability" is "whether the interests of the clients will be adequately protected if the

124. *See id.* R. 1.7 cmt. 23 (explaining co-defendant conflicts may exist "by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question").

125. *Id.*

126. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

127. State v. Risinger, 546 S.W.2d 563, 565 (Mo. App. 1977).

128. MODEL RULES OF PROF'L CONDUCT R. 1.7(a). *But see id.* R. 1.7(b)(1) ("Notwithstanding the existence of a concurrent conflict of interest under [Rule 1.7(a)], a lawyer may represent a client if . . . the lawyer reasonably believes [they] will be able to provide competent and diligent representation to each affected client."). *See also id.* R. 1.1 (defining competent representation as one which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); *see also id.* R. 1.3 (requiring the lawyer to "act with reasonable diligence and promptness in representing a client")

129. *Id.* R. 1.7(a)(1)–(2).

130. *Id.* R. 1.7 cmt. 2.

clients are permitted to give their informed consent to representation burdened by a conflict of interest."[131] Consent must be obtained for each client; however, the rule provides two scenarios where conflicts of interest are "nonconsentable," meaning even with the informed consent of the client, the representation is prohibited.[132] One obvious conflict type which presents a nonconsentable scenario, is if the representation is prohibited by law.[133] The other, less obvious type, is if the conflict is nonconsentable because of the "institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal."[134]

The defendant's "demeanour, criminal history, culpability, and attitude will influence the prosecutor, the judge, and the jury."[135] The lawyer's duty of loyalty prohibits the lawyer from pointing out differences in the co-defendants' culpability or criminal history during plea negotiations, trial, and sentencing. If the lawyer makes these comparisons, he or she puts the more-culpable co-defendant or the co-defendant with a more extensive criminal history at a disadvantage.[136] Moreover, the U.S. Supreme Court has held the key "in a case of joint representation of conflicting interests the evil . . . is [] what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pre-trial plea negotiations and in the sentencing process."[137] Accordingly, allowing one lawyer to represent co-defendants is not "per se violative of [the defendant's] constitutional guarantees of effective assistance of counsel," but it is once a conflict of interest is shown to exist.[138]

131. *See id.* R. 1.7 cmt. 15.

132. *See ABA Model Rule 1.7: Reporter's Explanation of Changes*, *Ethics 2000 Comm. Draft for. Pub. Comment*, AM. BAR ASS'N (Mar. 23, 1999), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/rule17memo/#:~:text=%5B6%5D%20This%20essentially%20new%20Comment,with%20the%20client's%20informed%20consent [https://perma.cc/KB6L-3QG5].

133. *Id.* R. 1.7(b)(2).

134. *See id.* R. 1.7 cmt. 17; *see also* R. 1.7(b)(3) ("[T]he representation [must not] involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.").

135. Gary Tobias Lowenthal, *Why Representing Multiple Defendants Is a Bad Idea (Almost Always)*, 3 CRIM. JUST. 7, 8–9 (1988).

136. *Id.*

137. *Holloway v. Arkansas,* 435 U.S. 475, 490 (1978) (emphasis in original).

138. *Id.* at 489–92.

As discussed above, the ABA Model Rules prohibit a lawyer from representing opposing parties in the same litigation.[139] However, a lawyer should be wary of the potential risks that arise if it chooses to engage in concurrent representation of co-defendants in a criminal case, not only between the lawyer and its clients but also between the co-defendants themselves. A lawyer representing co-defendants risks its clients' interests being adverse to one another. Such conflicts manifest in different ways which often depend on the facts of the case and each clients' unique attributes and circumstances.[140] For example, co-defendants may wish to present defenses that are inconsistent with one another, the trial's outcome may be unfair to one client but fair to the other, confidentiality issues are likely to arise from dual representation, and challenging certain evidence may be unfairly prejudicial for one client but helpful to the other.[141] Importantly, these issues are even more difficult to navigate in the plea bargain and sentencing phases.[142] To illustrate, assume a prosecutor makes a group plea offer to the defense, but one client wishes to accept while the other wishes to proceed to trial. A conflict now exists between the co-defendants, and each is entitled to loyalty and independent judgment, which cannot be given in this scenario, due to the joint representation.[143]

Another reason why a lawyer should avoid engaging in joint representation is because it is extremely unlikely that they will be able to seek and obtain a valid waiver of the defendants' right to conflict-free representation.[144] The U.S. Supreme Court has held that a defendant's Sixth Amendment right to Assistance of Counsel "contemplates that such assistance be untrammeled and unimpaired" by a "lawyer simultaneously represent[ing] conflicting interests," and if it does so without a valid waiver, "a valued constitutional safeguard [has been] substantially impaired."[145] In other words, the right to counsel granted under the U.S. Constitution,

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139. *See supra* note 144 and accompanying text.

140. Lowenthal, *supra* note 145, at 9.

141. *See id.* ("[A] lawyer's effectiveness depends on how well the lawyer can differentiate the client from others charged with the same offense and emphasize those attributes of the client that will have a favorable impact. When a lawyer represents codefendants, a responsibility to both may preclude effective representation of either.").

142. *Id.*

143. *Id.*

144. *Id.*

145. *Glasser v. United States*, 315 U.S. 60, 70 (1942).

includes "the right to effective [representation] free of conflicts of interest, and in the case of a single attorney representing multiple defendants, free from conflicting interests among *each* of the defendants."[146] The Court has noted that a defendant "may waive his right to the assistance of an attorney unhindered by a conflict of interests."[147] However, a waiver can only be established by "proving an intentional relinquishment or abandonment of the right."[148] Moreover, the validity of a waiver depends upon the circumstances and its effectiveness is "generally determined by the extent to which the client reasonably understands the material risks that the waiver entails,"[149] and in order for it to be considered valid, the waiver must be done "voluntarily, . . . .knowingly and intelligently."[150] Thus, the commentary to the Model Rules advises that the lawyer must inform the clients affected of "the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved."[151]

## IV. EVIDENTIARY RULES AND THE DUTY TO THE COURT

### A. *Privileged Communications in the Attorney-Client Relationship*

As it relates to legal ethics, the area of professional privilege in the U.K., is comparable to the area of evidence admissibility in criminal law proceedings in the U.S.[152] Both of these issues pertain to professional responsibility standards which have roots in the common law. One significant difference that exists between the two jurisdictions is the legal advice privilege in the U.K., which derives from the case *Three Rivers District Council v. The Governor and Company of the Bank of England* (No. 5).[153] The *Three Rivers* cases stemmed from the long-running litigation between the

146. *Hoffman v. Leeke,* 903 F.2d 280, 285 (4th Cir. 1990).

147. *Glasser*, 315 U.S. at 70.

148. *Leeke,* 903 F.2d at 288 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

149. MODEL RULES OF PROF'L CONDUCT R 1.7 cmt. 22.

150. *Leeke,* 903 F.2d at 288 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

151. MODEL RULES OF PROF'L CONDUCT R 1.7 cmt. 18.

152. *See* Akhtar, *Legal Privilege and Third Party Disclosure: A Comparative Analysis, supra* note 110, at 1 (defining a "legal professional privilege [as] a substantive legal right (not a procedural rule) [that] enables a person to refuse to disclose certain documents in a wide range of situations").

153. Three Rivers DC v. Governor Company of the Bank of England (No. 5), [2003] EWCA (Civ) 474 (Eng.).

Bank of England, and the creditors and liquidators of the collapsed Bank of Credit and Commerce International, which refused to disclose documents it had in its control that were generated throughout the investigation into the bank's collapse (coined the "Bingham Inquiry").[154]

These matters were considered in *Three Rivers* No. 5, defined "client" narrowly, by holding that employees of the Bank were third parties for purposes of claiming privilege, and documents prepared by them could not attract legal advice privilege.[155] In *Three Rivers* No. 10, the Court also defined "legal advice" narrowly, holding communications made between the Bank and its external lawyers could implicate the legal advice privilege only if the communication at issue was made "for the purpose of the seeking or obtaining 'legal advice,'" which it described as only extending to advice regarding a party's legal rights and obligations."[156] Thus, in that case, since the Bank's disclosure to the Bingham Inquiry was merely "presentational," it did not warrant privilege protection.[157]

The House of Lords overruled the *Three Rivers* No. 10, holding that there was legal advice privilege provided a lawyer has been instructed to act in a "relevant legal context," then any confidential communication between client and lawyer directly related to the function of the lawyer's duties should be protected, not just those communications containing advice on the law.[158] The Lords declined, however, to evaluate the Court of Appeals narrow definition of "client" adopted in *Three Rivers* No. 5, which remains the guiding authority on that point.[159]

Thus, at the outset of retainer, the "client" must be clearly defined. There have been conflicting opinions on whether the client should be defined narrowly or broadly, but each case should be considered based on the

154. *Id.*

155. *Id.; see also Three Rivers* (No. 5), *supra* note 171 (holding "the only documents or parts of documents . . . which the Bank is entitled to withhold from inspection on the ground of legal advice privilege are: (1) communications passing between the Bank and its legal advisers . . . for the purpose of seeking or obtaining legal advice; . . . and (2) any part of a document which evidences the substance of such a communication").

156. Akhtar, *Legal Privilege and Third Party Disclosure: A Comparative Analysis, supra* note 110, at 10.

157. *Three Rivers* (No. 5), *supra* note 171.

158. Three Rivers DC v. Governor and Company of the Bank of England (No. 6), [2004] UKHL 48, [2005] A.C. 610 (H.L.), at ¶ 2 (appeal taken from Eng.).

159. *Id.*

totality of the circumstances.[160] No matter what definition is endorsed by the court, the instructions the court is likely to consider are clear: what happened during the course of the transaction, and which parties were in fact charged with the responsibility of communicating with the lawyers. The legal advice privilege will not cover internal documents generated by employees of the client, even if they are necessary to provide information to lawyers for the purpose of obtaining legal advice—however, these documents may be covered by the litigation privilege.[161]

In the U.S., depending upon the circumstances, third-party communications may be protected by the attorney-client privilege if the communication between the third party and the attorney is made so that the attorney is be able to properly represent the client.[162] A classic example might be illustrated by an attorney who hires an accountant who has been engaged to explain a complicated tax issue relating to the client's representation. The communications from both of these scenarios may be protected third-party communications.[163] However, under U.K. law the privilege would only extend if, at the time the communication was made, the litigation is in progress or reasonably in contemplation.[164]

Further, the possibility of selective waiver available in the U.S., is another key difference between the two jurisdictions. The selective waiver doctrine allows the sharing of a copy of legally privileged communication with a third party without losing privilege.[165] Under U.K. law, as long as the document has not entered the public domain and remains confidential, then privilege

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160. Akhtar, *Legal Privilege and Third Party Disclosure: A Comparative Analysis, supra* note 110, at 10.

161. *Id.; Three Rivers* (No. 10) [2004] UKHL 48 [112].

162. *See* Akhtar, *Legal Privilege and Third Party Disclosure: A Comparative Analysis, supra* note 110, at 10–11; John Henry Wigmore, 8 *Evidence in Trials at Common Law* § 2292 at 554 (McNaughton rev. ed. 1961).

163. *Id.*

164. *See* Walsham v. Stainton, [1863] 2 Hem. & M. 1, 71 Eng. Rep. 140 (establishing the privilege applies "[w]here the solicitor, in order to enable himself to advise on the matter, calls in some other person," here, an accountant, "to assist and give his opinion"); *see also In re* Grand Jury Proc., 473 F.2d 840, 845 (8th Cir. 1973) (distinguishing American law from English, explaining that unlike the U.S., "[i]n England, the privilege for confidential attorney-client communications has not been entirely separated from the exemption from discovery of certain documents and prospective witnesses' statements").

165. *See* Civil Aviation Authority v. R (on the application of Jet2.com Limited), [2020] EWCA (Civ) 35 (explaining parties seeking to rely on legal advice privilege must demonstrate that the dominant purpose of the communication in question must either have been to obtain or give legal advice).

will not necessarily be lost by the fact that the document has been transferred to a third party, provided the document was disclosed to a regulator for a specific purpose.[166] In the U.S., on the other hand, the disclosure of a single copy of a privileged document to third parties, including regulators, even if the disclosure takes place outside the country results in complete loss of privilege as to the entire subject matter of the privileged documents.[167]

The difference extends to the definition of the "client" in protecting communications between them and the Attorney. In *Three Rivers*, those employees within the unit created by the Bank to deal with external lawyers in coordinating its response to the Bingham Inquiry were accepted as the "client" such that their communications with lawyers could attract legal advice privilege.[168] Their Lordships accepted this formulation in No. 5, which means that the Court of Appeal's narrow definition of the "client" is still valid.[169]

In contrast, the U.S. Supreme Court has applied the attorney-client privilege more broadly than the U.K. has applied its comparable legal advice privilege. In its landmark decision *Upjohn Co v. United States,*[170] *the Supreme Court* addressed the scope of the privilege in the corporate context and rejected the lower courts attempt to narrow the privilege's application.[171] The Court was faced with the issue of whether the scope of the privilege extends to protect *all* employee communications made to counsel during the course of an investigation. The court below applied a narrow "control group" test, which limited privilege availability to "officers who play a 'substantial role' in deciding and directing a corporation's legal response."[172] Applying this narrow test, the lower court held the privilege inapplicable "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the

166. *Three Rivers* (No. 5), (2003) [2003] EWCA (Civ) 474, [2003] Q.B. 1556 at ¶ 65.
167. *Id.* ¶ 67.
168. *Id.* ¶ 68.
169. *See supra* note 173–77 and accompanying text.
170. Upjohn Co. v. United States*,* 449 U.S. 383 (1981).
171. *Id.* at 393.
172. *Id.*

'client's.'"[173] The Supreme Court rejected the lower courts holding, reasoning that it "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[174] Moreover, the Court explained that attorney advice given to the "noncontrol group" seeking it will often be "more significant to noncontrol [employees] than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy."[175] Thus, the U.S. Supreme Court, extending a broader definition of "client," established that the documents created by other employees within the corporation in response to requests for information from attorneys was sufficient to warrant privilege protections.[176]

The Supreme Court criticized the lower court's holding, opining: "Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[177] This critique serves equally well to critique the Court of Appeal's narrow application of the privilege in *Three Rivers (No. 5)*.[178]

The Court in *Upjohn* relied on the ABA Model Code of Professional Responsibility,[179] stating:

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173. United States v. Upjohn Co., 600 F.2d 1223, 1225 (6th Cir. 1979) (holding only the "control group" of employees responsible for acting on the legal advice received were able to create privileged documents).

174. *Upjohn*, 449 U.S. at 392 (stating the harmful nature of the narrow scope to the privilege applied by the court below, as it "not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.").

175. *Id.*

176. *Id.* at 395.

177. *Id.* at 390.

178. *Id.*

179. *See* MODEL CODE OF PROF'L RESP., ETHICAL CONSIDERATION 4-1 (AM. BAR ASS'N 1981), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-code-of-prof-responsibility1969.pdf [https://perma.cc/R3RN-WQ66]. Note, the ABA adopted the Model Rules of Professional Conduct in 1983, which replaced the 1969 Model Code of Professional Responsibility, cited by the Court in *Upjohn*. *About the Model Rules,* AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ [https://perma.cc/2SML-B44A]; *infra* note 198 and accompanying text.

> A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client, but also encourages laymen to seek early legal assistance.[180]

In the U.S., this duty has been embedded into procedural law as well. Federal Rule of Evidence 501 sets provides the law of privileges should continue to be developed by the courts of the U.S., under a uniform standard applicable to both civil and criminal cases.[181] FRE 501 states in relevant part: "The privilege of a witness . . . shall be governed by the principle of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[182] In litigation, the attorney-client privilege and work-product doctrine are the most common types of privilege exerted to protect disclosure, so long as the primary purpose in of providing the communication was for the purpose of obtaining legal advice.[183]

The attorney-client privilege and work-product doctrine in the U.S. serve comparable functions to the U.K.'s legal advice and litigation privileges. However, the attorney-client privilege can apply to communications with third parties (including a company's employees), if the purpose of the communication with the third party is to help the attorney provide legal advice to the client.[184] Similarly, this form of privilege in the U.K. protects confidential communications between an attorney and his client that are made in the course of legal representation and it protects the

180. *Id.* at 319.

181. *See* Akhtar, *Legal Privilege and Third Party Disclosure: A Comparative Analysis, supra* note 110, at 1; *see also* Notes of Comm. on the Judiciary, 93rd Congress, H.R. Rep. No 93-650 (1973) (Conf. Rep.).

182. FED. R. EVID. 501; *see also* FED. R. CRIM. P. 26 ("At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.").

183. Akhtar, *Legal Privilege and Third Party Disclosure: A Comparative Analysis, supra* note 110, at 1.

184. *Id.* at 2.

communication only, not the underlying facts.[185] The client cannot protect documents from being disclosed by merely forwarding them to his lawyer and it applies whether the attorney is in house or with an external law firm.[186]

In the U.S., the applicable standard for the work-product doctrine derives from both federal common law[187] and federal statute. The doctrine was first recognized by the Supreme Court in its landmark case *Hickman v. Taylor*.[188] The work-product rule established in *Hickman* is partially[189] codified in Federal Rule of Civil Procedure 26(b)(3), which protects "documents and tangible things that are prepared in anticipation of litigation . . . by [a party's] representative."[190] Moreover, Federal Rule of Evidence 502(g) includes "tangible material (or its intangible equivalent)" in its definition of work-product protection.[191] The discoverability of such items is limited to items prepared in anticipation of litigation. Moreover, the work-product doctrine does not extend to "documents in an attorney's possession that were prepared by a third party in the ordinary course of business and that would have been created in essentially similar form irrespective of any litigation anticipated."[192] Thus, the privilege does not provide absolute protection,[193] nor does it prevent the disclosure of an attorney's inferences, conclusions, opinions or legal theories with respect to actual or reasonably anticipated

185. *Id.; see also Upjohn*, 449 U.S. at 395 ("[T]he protection of the privilege extends only to communications and not to facts.").

186. Akhtar, *Legal Privilege and Third Party Disclosure: A Comparative Analysis, supra* note 110, at 2.

187. *See* FED. R. EVID. 501(a) ("The common law governs a claim of privilege . . . unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court.").

188. Hickman v. Taylor, 329 U.S. 495 (1947); *see also* FED. R. EVID. 502(g) (defining "work-product protection" as "the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial").

189. The *Hickman* Court looked beyond the text of FRCP 26(b)(3), by noting the protections afforded by the include *intangible* things such as "mental impressions, conclusions, opinions or legal theories." *Hickman*, 329 U.S. at 508.

190. FED. R. CIV. P. 26(b)(3).

191. FED. R. EVID. 502(g) (defining "work-product protection" as "the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial").

192. *In re* Grand Jury Proc., 318 F.3d 379, 384–85 (2d Cir. 2003) (citing United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir.1998)).

193. *See id.* at 383 (explaining the doctrine "provides *qualified protection* for materials prepared by or at the behest of counsel in anticipation of litigation or for trial").

litigation.[194] Importantly, this doctrine applies only to documents prepared either after the commencement of a claim, or while proceedings are pending.[195]

The U.S. Supreme Court has recognized that the work-product doctrine is most frequently asserted as a bar to discovery in civil litigation, yet it emphasizes that the role of the doctrine "in assuring the proper functioning of the criminal justice system is even more vital."[196] In criminal litigation when a grand jury is appointed, the only material protected by the work-product doctrine is that which has been compiled after the attorney's client has received a subpoena.[197] Thus, communications made for the purpose of obtaining advice on matters relating to potential litigation may not come within the ambit of the work-product doctrine protections if the legal advice is rendered before a claim has arisen or before the client has been notified of possible criminal culpability.[198] The purpose of work-product privilege is to prepare the grounds for litigation.[199] Therefore, the "test of whether the work product doctrine applies is not whether litigation has begun but

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194. "The protective cloak of the [work-product] privilege does not extend to information . . . [contained in] memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; . . . or to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." *Hickman*, 329 U.S. at 508.

195. Akhtar, *Legal Privilege and Third Party Disclosure: A Comparative Analysis, supra* note 110, at 2. *But see supra* note 208.

196. United States v. Nobles, 422 U.S. 225, 238 (1975) ("The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.").

197. *See In re* Sealed Case, 29 F.3d 715, 718 (D.C. Cir. 1994) (stating the doctrine applies to materials prepared in connection with or in anticipation of various adversarial proceedings, including grand jury proceedings, whether or not the proceedings have been commenced); *see also In re* Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979) ("[L]awyer's investigation into 'suspected criminal investigations' generally sufficient to trigger work product privilege.").

198. United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949); Byers Theaters v. Murphy, 1 F.R.D. 286 (W.D. Va. 1940); Smith v. Washington Gas Light Co., 7 F.R.D. 735 (D. D.C. 1948); Revheim v. Merritt–Chapman & Scott Corp., 2 F.R.D. 361 (S.D. N.Y. 1942). *But see In re* Sealed Case, 29 F.3d 715, 718 (D.C. Cir. 1994) ("Some cases [interpreting the work product privilege] have attributed significance to whether a document was obtained before or after litigation was commenced, but this cannot be sound. Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced.") (citing 8 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2024, at 197–98 (1970)).

199. *See Adlman*, 134 F.3d at 1196 (explaining the work-product doctrine "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategies 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries") (quoting *Hickman*, 329 U.S. at 511).

whether documents were prepared or obtained in anticipation of litigation."[200] Unlike the attorney-client privilege, an attorney does not override the work-product protection by divulging the work product to another party.[201]

The waiver from privilege only happens when the work-product materials are disclosed to others with the actual intention that an opposing party view the materials or under circumstances that substantially increase the opportunities for the opponent to seek the disclosure.[202] Like the attorney-client privilege, an exchange of work-product materials between lawyers representing parties sharing a community of interest does not waive the protection allowed by the doctrine.[203] There is a mutual interest in disclosure when the parties are defendants in separate proceedings brought by the same opposing party for the alleged wrongful conduct, or when a party exchanges documents prepared for litigation with a non-party who is either threatened with similar litigation or has an interest in the outcome of the suit.[204]

### B. *Overlap of Criminal and Civil Proceedings*

The evidentiary rules and ethical responsibilities of lawyers also apply in the contexts of family law and care proceedings, both of which have occasionally overlap with criminal law trials. Under the English duty of

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200. *In re* Grand Jury Proc., 473 F.2d 840, 847 (8th Cir. 1973).

201. *See* United States v. Nobles, 422 U.S. 225, 238 n. 11 (1975) (explaining the work product doctrine is both "distinct from and broader than the attorney-client privilege"). *See generally* Genesco v. Visa, 302 F.R.D. 168 (M.D. Tenn. 2014); *In re* Experian Data Breach Litigation, No. 8:15-cv-01592, 2017 WL 4325583, at *1 (C.D. Cal. May 18, 2017); *In re* Target Corp. Customer Data Security Breach Litigation, MDL No. 14–2522, 2015 WL 6777384, at *1 (D. Minn. Oct. 23, 2015). *See also* Benjamin A. Powell, Leah Schloss & Jason C. Chipman*, The 'Art' of Investigating: Responding and Investigating at the Same Time and Overseeing a Privileged Forensic Investigation, in* THE GUIDE TO CYBER INVESTIGATIONS 31 (Benjamin A. Powell et al. ed., 2019) ("Several recent cases have affirmed the privilege protections applicable to third-party forensic consultants after a breach."). The general rule for auditors under American federal law is that they are non-privileged. *See* David M. Greenwald, *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine*, 862 PLI/LIT 307, 417 (2011) (giving a list of cases wherein privilege is waived by disclosure to such parties).

202. FED. R. EVID. 502.

203. *Id.*

204. Avidan Y. Cover*, A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment,* 87 CORNELL L. REV. 1233 (2002).

confidentiality (Core Duty 6),[205] the duty to protect the client's confidentiality is an integral component to non-adversarial proceedings. Thus, if the defendant is adjudged as non-contentious then there is a responsibility on the lawyer to "enable 'full and frank' disclosure in family proceedings" in which a duty is imposed "to disclose all material that affects the welfare of the child."[206]

In *Re L* (A Minor) (Police Investigation: Privilege),[207] the House of Lords held the litigation privilege cannot be asserted in non-adversarial proceedings, such as care proceedings.[208] The court reasoned that the privilege has no place "in relation to reports based on the papers disclosed in such proceedings and obtained from a third party within them. Accordingly, all such reports must routinely be disclosed and served within proceedings; as should communications from any party with court appointed experts."[209]

A caveat to the above holding exists where the document subject to scrutiny was prepared for the purpose of a criminal proceeding, rather than for a simultaneous care proceeding. In this scenario, where there is an ongoing criminal proceeding, the legal professional privilege may be exercised to protect such information when discussing the contents of such documents with a care lawyer. For example, in *S County Council v.* B, the court held a parent could claim the privilege in a care proceeding in relation to the communications between the parent and medical experts "who had

205. *See* BSB HANDBOOK, *supra* note 14, at CD6 ("We must protect the confidentiality of each client's affairs, except for such disclosures as are required or permitted by law or to which the client gives informed consent.").

206. Delahunty, *supra* note 70 at 9; *see also* Mary Young, *On the Rebound: How to Clawback From a Divorce,* KINGSLEY NAPLEY (June 11, 2021) ("The Court of Appeal decisions of *Robinson v. Robinson* [1982] 1 WLR 786 and the House of Lords in *Livesey (formerly Jenkins) v. Jenkins* [1985] 1 AC 424 confirm that a breach of the obligation of full and frank disclosure renders a consent order in divorce proceedings invalid and capable of being set aside.").

207. *Re L* (A Minor) (Police Investigation: Privilege) [1996] 1 FLR 731 (HL) (Eng.).

208. In the U.K., council can apply for a "care order" pursuant to the Children Act of 1989, if it believes a child is "suffering or at risk of suffering significant harm." *If Your Child is Taken Into Care*, GOV. UK, https://www.gov.uk/if-your-child-is-taken-into-care.

209. *Re L* (A Minor) (Police Investigation: Privilege) [1996] 1 FLR 731 (HL) (Eng.); *see also* Delahunty, *supra* note 70 at 11 (explaining if an attorney in the U.K. "become[s] aware [of their] client . . . contact[ing] an expert outside of the Part 25 Procedure . . . then [the attorney has] a duty to tell the parties and the court of that conduct and to produce all communication . . . despite the fact that unauthorised disclosure of confidential evidence may place our client in contempt").

been instructed solely for the purposes of criminal proceedings."[210] Moreover, this privilege "is absolute and the duty of full and frank disclosure which arises in care proceedings does not override that privilege."[211]

In *Re L*, discussed above, the court stated its holding "does not . . . affect [the litigation] privilege arising between solicitor and client."[212] Additionally, in *S County Council v. B*, the court ruled the *Re L* holding "preserved legal professional privilege in respect of communications between solicitor and client, and draft statements and discussions as to the relevant facts between solicitor and client for the purposes of proceedings under the Children Act 1989 [(1989 Act)]."[213] Thus, these cases infer that both the litigation privilege and the legal professional privilege apply to communications between the client and its lawyer in family proceedings.

A dilemma presents itself where the interest of the court in protecting the welfare of the child, is adverse to the interest of the client. Like care proceedings, family proceedings are deemed to be non-adversarial in nature.[214] As such, communications between a client and his lawyer remain privileged in family proceedings. However, there are limitations to the client's privilege against self-incrimination in family proceedings. In October 2013, a new Protocol and Good Practice Model was issued ("2013 Protocol"), which provides guidance on information disclosure issues in cases of alleged child abuse and linked criminal investigations and care proceedings.[215]

Occasionally, circumstances arise where a client "seeks to withhold information which is likely to be relevant to the court in determining the child's welfare, and may even be detrimental to the child."[216] The lawyer in this situation is faced with resolving the conflict between its duty to the court and its duty to protect the clients confidentiality, which implicate myriad

210. S County Council v. B [2000] 2 FLR 161 [174C-E] (Eng.).

211. *See id.* ¶ 173B-D, 183E–185H.

212. *Re L* (A Minor) (Police Investigation: Privilege) [1996] 1 FLR 731 (HL) (Eng.).

213. *See* Delahunty, *supra* note 70 at 10 (citing S County Council v. B [2000] 2 FLR 161 [179E-F] (Eng.)).

214. *See* Delahunty, *supra* note 70 at 10.

215. *See* 2013 Protocol and Good Practice Model (Oct. 2013), https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/protocol-good-practice-model-2013.pdf [https://perma.cc/7JGP-3EAQ].

216. *See* Delahunty, *supra* note 70 at 10.

issues relating to the legal professional privilege and the litigation privilege. Articulating this point, the court in *A Local Authority v. PG,*[217] stated:

> Lawyers have a professional duty not to mislead the court, and plainly cannot conduct the parent's case in a manner which is inconsistent with any admission made to them. However, lawyers cannot, without the consent of their clients, breach or waive the privilege. Thus although lawyers may advise their clients to be open and honest with the court, they are also entitled, without breaching professional standards, to advise parents in care proceedings that, subject to section 98(1) of the [1989 Act], they are not bound to co-operate with the court's investigation. They should, however, . . . advise their clients that anything they say to an expert witness in the context of the latter's investigations, is protected by section 98(2) of the 1989 Act.[218]

Accordingly, Section 98(1) of the 1989 Act overrides the self-incrimination privilege in specified circumstances.[219] In *A Local Authority v. PG*, the court gave guidance of a barrister's obligations to the court where there are concurrent criminal law and care proceedings.[220] In its ruling, the court made clear that although "a legal practitioner is entitled to advise a client of (i) the provisions and import of [Section 98] and (ii) the ability of the police and/or co-accused to make applications for disclosure into the criminal proceedings of . . . documents filed in the care proceedings" it is wholly inappropriate[221] for a legal practitioner "to advise a client not to comply with an order made in care proceedings" or "to advise a client not to give a full, accurate and comprehensive response to findings sought by the court."[222]

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217. A Chief Constable v. A County Council [2002] EWHC 2198 (Fam).

218. *Id.* at 24–25; *see also* Children Act 1989, c. 41 § 98(1) (UK) (providing statements and admissions in Family Court proceedings are not admissible in criminal proceedings).

219. Children Act 1989, c. 41 § 98(1) (UK); 2013 Protocol, *supra* note 231. Notwithstanding Section 14 of the Civil Evidence Act 1968, which provides protection to oneself or one's spouse from self-incrimination in a civil matter. Civil Evidence Act 1968, c. 64 § 14 (UK).

220. *See* A Local Authority v. PG [2014] EWHC 63 (Fam). THE GENERAL COUNCIL OF THE BAR, *Disclosure of Unhelpful Material in Family Proceedings (Children),* https://www.barcouncilethics.co.uk/wp-content/uploads/2021/12/Disclosure-of-unhelpful-material-in-family-proceedings-children-December-2021.pdf [https://perma.cc/V4JS-JU9X].

221. It is also potentially a contempt of court. *Id.*; A Local Authority v. PG [2014] EWHC 63 (Fam).

222. A Local Authority v. PG [2014] EWHC 63 (Fam).

Thus, this implies that the barrister will be presented with an issue where professional ethics may potentially undermine professional privilege. In these circumstances he may have to resolve a conflict between its duty to the court, and its duty to protect and respect the client's confidentiality. However, as childcare cases often precede criminal prosecution, and are typically used to inform the decision by the police to indict clients, they must be informed by barristers to state the truth in the witness stand in the family court as compellable witnesses. This leads to a court ruling which is disclosed to the police. Thus, the clients in care proceedings cannot refuse to respond to questions on the ground of self-incrimination, which means they will be compelled to disclose facts which may incriminate them later.

## V. CONCLUSION

Legal ethics serve as a vital part of the profession. They enforce the honesty, integrity, and independence of the lawyers in their professional capacity. They ensure that they discharge it with the fiduciary relationship to the client and a duty to the court. There is a corresponding duty to the administration of justice which means that the trials need to be speedy, efficient, and fair in all the circumstances. This requires the advocate in a criminal trial to seek the assistance of the judge when necessary but to be otherwise independent in how to conduct the trial in terms of witnesses and in the summing up to the jury.

The conduct rules have been supplemented by the Criminal Professional Rules and the Practice Directions that have been regular and sequential to the previous codes that were adopted. The 2020 framework are a mechanism to assist the court in conducting fair trials and their overriding objective is the administration of justice. There is a duty to the court and to the client which the barrister must comply and to protect in order to enforce the procedure to be conducted with fairness at the trial.

The ABA has adopted the Model Rules of Professional Conduct 1983 which the states have promulgated in their framework of Model Rules that govern professional lawyers. The American framework is based on common law and has the overriding objective of keeping the faith of the public in the machinery of justice. It has developed strict rules governing the code of conduct of criminal defence lawyers such as not to represent co-defendants. However, the framework is flexible and allows the rule to

be waived if there is consent by the defendants that an attorney may represent them at trial.

The English Legal system has a comprehensive profession code of conduct that it renews periodically keeping in view the regulatory objectives set out in the LSA 2007. These have percolated into the Bar Standards Board to set out a framework and it has had an impact on the criminal law practicing barristers. A measure of its success can be adjudged by the small number of barristers who are disciplined for the beach of these codes and who have preserved the integrity, independence, and integrity of the profession.