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Commerce over care: exploring legal advice given in potential economic abuse cases

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ABSTRACT

This paper argues that solicitors are required to lawyer relationally when delivering independent legal advice (ILA) to (predominantly) women set to provide suretyship for their intimate partner's debts. Case law tells us that women providing suretyship may be entering the transaction under the coercion of their partner. Coerced debt is a form of economic abuse, which in turn is a form of domestic abuse. ILA in this context therefore provides an important intervention to potentially assist victims of abuse before entering (potentially more) debt at the hands of their abuser. To make ILA purposeful, solicitors must prioritise relational values/dynamics such as consultation, care, judgement, and empowerment; the anti-thesis of market-exchange lawyering which is characterised by the values such as objectivity and detachment. Market-exchange lawyering is also associated with ethical apathy as lawyers prioritise their client's means-ends above all else, therefore failing to consider the broader implications of those ends (in terms of their client's best interests and/or the public interest). Drawing on interview data with 22 solicitors, it is demonstrated that most interviewees provide tick-box ILA prioritising completion. That is, most interviewees prioritised values of commerce over values of care when acting for women who may be experiencing economic abuse.

KEYWORDS

Commercial lawyers; economic abuse; lawyers' values; relational lawyering; suretyship

Introduction

Economic abuse has been recognised in law in England and Wales for the first time within the statutory definition of domestic abuse in the Domestic Abuse Act 2021. Within the Act, economic abuse is defined as 'any behaviour that has a substantial adverse effect on B's ability to – (a) acquire, use or maintain money or other property, or (b) obtain goods or services.' Research has uncovered that economic abuse rarely occurs in isolation but forms part of a wider pattern of intimate partner violence, and the impact of economic abuse can make it even harder for victim-survivors to leave

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their abuser.[1] This destructive form of abuse is also a widespread problem; a 2023 survey shows that one in five women in the UK experienced economic abuse in the last 12 months.[2] Economic abuse can be perpetrated in various ways,[3] but this article is primarily concerned with coerced debt – a type of economic abuse incurred 'through consumer credit',[4] that can include 'forcing victims to obtain loans for the abuser.'[5] One way in which debt can be coerced is through a (re)mortgage of the family home.[6] This article focuses on the specific instance where a victim-survivor of economic abuse is coerced into (re)mortgaging the family home for the purposes of advancing monies to the abuser's business (or other 'sole' purposes). In such situations a potential victim-survivor would be legally required, in accordance with *Royal Bank of Scotland v Etridge* (No.2),[7] to receive independent legal advice (ILA) from a solicitor before suretyship is actioned. This article empirically explores how the delivery of ILA in this context is shaped by solicitors' values and ethics by drawing on data with 22 solicitors who deliver this type of advice.

Drawing on Dana Remus' relational lawyering model,[8] the main argument presented in this article is that the *Etridge* guidelines (and broader professional regulations) require ILA solicitors to lawyer (in part) relationally when advising surety clients. Where 'relational dynamics' are prioritised, an ILA solicitor would get to know their client as thoroughly as possible and empower their client to make a considered decision. What the data presented in this article shows is that most interviewees self-reported delivering ILA as a market-exchange; they prioritised providing information about the realities of the transaction and getting the transaction completed. This approach is, as will be discussed, problematic in numerous ways for surety clients who may be experiencing economic abuse.

This paper unfolds in seven parts. First, the development of the law in this area will be set out. In the second part, discussion on relational lawyering and market-exchange lawyering models is provided. This discussion will then inform analysis presented in parts three and four, exploring how Lord Nicholls' guidelines in *Etridge* and the Solicitor Regulation Authority (SRA) Code of Conduct *do* require solicitors to lawyer (in part) relationally when delivering ILA to surety clients. In part five, an explanation will be provided of the methods employed to collect the empirical data presented in this article. In the sixth and most substantive section, the interview data will be analysed through the theoretical lenses of relational lawyering, market-exchange lawyering, and the values associated with each model. In this section, the focus is on interviewees' accounts on how they deliver ILA in respect of providing a 'meaningful consultation'; exercising 'judgement'; and

[1]Harriette Drew and Katherine Dean, *The Price of Safety: The Cost of Leaving an Abuser and Rebuilding a Safe, Independent Life* (Women's Aid Report, 2024) <https://www.womensaid.org.uk/wp-content/uploads/2024/09/Price-of-Safety-Report-2024-Final-Version.pdf)> accessed 1 October 2024.

[2]See: <https://survivingeconomicabuse.org/news/5-5-million-uk-women-experiencing-economic-abuse/> accessed 9 December 2024.

[3]Nicola Sharp-Jeffs, *A Review of Research and Policy on Financial Abuse within Intimate Partner Relationships* (London Metropolitan University: Child & Women Abuse Studies Unit, 2015) <https://repository.londonmet.ac.uk/1482/1/Review-of-Research-and-Policy-on-Financial-Abuse.pdf> accessed 24 October 2024.

[4]Angela Littwin, 'Coerced Debt: The Role of Consumer Credit in Domestic Violence' (2012) 100(4) *California Law Review* 951, 953.

[5]ibid 954.

[6]Diedre Cartwright, 'Locked into a Mortgage, Locked Out of My Home': How Perpetrators Use Joint Mortgages as a Form of Economic Abuse and How to Stop Them (Surviving Economic Abuse Report, 2024) <https://survivingeconomicabuse.org/wp-content/uploads/2024/09/SEA-Joint-Mortgages-Report-2024.pdf> accessed 27 November 2024.

[7][2002] 2 AC 733 (HL).

[8]Dana A Remus, 'Reconstructing Professionalism' (2017) 51 *Georgia Law Review* 807.

their willingness to 'interfere'. In the concluding section, it will be discussed how this paper should function as a catalyst for further research on solicitors and their interactions with victim-survivors of economic abuse.

1. Legal background

Between 1985 and 2001 there was a deluge of cases reaching the appeal courts that involved wives who faced repossession of their homes after they had provided suretyship via the remortgaging of the family home for their husband's business lending.[9] These wives claimed that their husbands had unduly influenced them, and argued that their secured lending agreements should be set aside as lenders had constructive notice of their husbands' potential wrongdoing. This presented a quandary for the court; whilst the equitable doctrine of undue influence would set aside a transaction between influencer and victim, such suretyship cases involved transactions with a third 'innocent' party – the bank. In 2002 the House of Lords in *Etridge* set out to 'balance' the interests of the bank and the wife in outlining 'protections' to be afforded to the wife before she provides suretyship that, if completed properly, should leave the bank untainted by later claims of undue influence through constructive notice.[10]

Lord Nicholls, in his leading speech for the House of Lords in *Etridge*, set out that ILA should be delivered by a solicitor before the wife provides suretyship.[11] Lord Nicholls was very clear that ILA should not be treated by the solicitor as a mere formality.[12] Whilst Lord Nicholls outlined that a solicitor could not certify to a lender that the surety wife was entering the transaction free from undue influence, he said that ILA from a solicitor – in the absence of her husband – should afford the wife with the chance to have her interests considered.[13] Where this advice is provided, and the lender receives a certificate of ILA from the wife's solicitor, lenders can later rebut claims of undue influence through constructive notice and have an uncluttered ability to enforce the security.[14] The wife may have potential recourse against the solicitor – if the solicitor's advice was negligent – but she would still face repossession of her home or other assets.[15] If the bank failed to ensure ILA was delivered before a wife secured the debts of her husband, the transaction can be set aside.

Scholars have been critical of Lord Nicholls' view that ILA provides protection to women coerced into debt, and have argued that the *Etridge* guidelines chiefly protect lenders.[16] Belinda Fehlberg's 1997 study 'Sexually Transmitted Debt: Surety Experience and English Law' empirically attests to wives entering surety transactions

[9]Four undue influence cases reached the House of Lords in this period: *National Westminster Bank Plc v Morgan* [1985] AC 686; *Barclays Bank Plc v O'Brien* [1994] 1 AC 180; *CIBC v Pitt* [1994] 1 AC 200, and *Etridge* (n 7).

[10]In *Etridge* the language 'wife' is used when discussing the individual set to provide suretyship. In this article, the term 'wife' and 'surety client' are used interchangeably.

[11]*Etridge* (n 7) [74].

[12]ibid [66].

[13]ibid [54].

[14]ibid [78] (Lord Nicholls).

[15]ibid [75] (Lord Nicholls).

[16]For instance, see: Rosemary Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11 *Social & Legal Studies* 257; James P Devenney, Lorna Fox and Mel Kenny, 'Standing surety in England and Wales: the sphinx of procedural protection' (2008) *Lloyd's Maritime and Commercial Law Quarterly* 513, 535; Ellen Gordon-Bouvier, 'Analysing legal responses to coerced debt' (2024) 44(3) *Legal Studies* 537.

because they felt they had no choice but to do as their husbands instructed.[17] On this, Ellen Gordon-Bouvier argues that ILA as a legal response to coerced debt:

> … demonstrate[s] a distinct absence of understanding of the nature of coercive control and economic abuse, as well as ignoring the wider relational context in which choices are made. While the doctrine of undue influence claims not to be premised on the victim's lack of understanding … the remedying effect of independent legal advice presumes that once the advice is received, the victim is able to make a rational and self-interested choice. This assumption does not fit with the narratives of sureties who signed under pressure … [18]

In this article it is accepted that ILA as a legal response to coerced debt is inadequate. However, it is argued that solicitors should provide more than mere information about the proposed suretyship transaction to surety clients to be compliant with *Etridge* and broader regulatory guidelines, and that ILA could hold *some* value if delivered appropriately. Scrutinising how ILA is delivered is important because it is the only current form of intervention offered to women who may be being economically abused into securing an intimate partner's debts. There is no immediate reason to believe that the law surrounding surety protections is going to change in any substantial form,[19] so it is important to know if ILA is at least being delivered in line with the *Etridge* guidelines and the SRA Handbook and Code of Conduct.[20] We turn next to consider market-exchange lawyering and relational lawyering, as understanding these models and the ethics/values associated with them helps provide a clearer understanding of what is required of solicitors delivering ILA, and more broadly.

2. Relational lawyering versus market-exchange lawyering

Legal ethicists often refer to lawyers acting as 'hired guns' for their clients.[21] Lawyers who deliver services as 'hired guns' lawyer in accordance with a market-exchange model, as they have a preoccupation with 'extract[ing] the maximum advantage of the legal system for the interests of wealth.'[22] By performing their roles 'narrowly' – pursing their client's atomistic self-interests – market-exchange lawyers fail to embrace a 'more expansive understanding of their duties to the public good.'[23] Under the market-exchange model, lawyers remain disinterested in their client's ends, not interfering with their client's decision-making, prioritising their client's (assumed) autonomy.[24]

[17]Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Clarendon Press 1997) 172–3 and 181–5.
[18]Gordon-Bouvier (n 16) 549.
[19]There is the possibility that ILA will be required in broader circumstances as *One Savings Bank Plc v Catherine Waller-Edwards* [2024] EWCA Civ 302 has recently been granted leave to appeal (in September 2024). If the Supreme Court do find that the appellant should have received ILA because the lender was put on constructive notice to potential undue influence in this hybrid transaction context, there is also the opportunity for the court to make further clarifications on how ILA should be delivered.
[20]Solicitors Regulation Authority, Handbook and Code of Conduct 2011, Version 19 (amended 1st October 2017). <https://www.sra.org.uk/solicitors/handbook/v19/code/> accessed 9 December 2024. While the current regulatory toolkit appears in the form of the SRA's Standards and Regulations (introduced in late 2019), it was this version of the Code which applied to interviewees at the time of data collection.
[21]For instance, see: Russel G Pearce and Eli Wald, 'Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles' (2012) *Michigan State Law Review* 513, 515.
[22]Russell G Pearce, 'The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar' (1995) 70 *New York University Law Review* 1229, 1243.
[23]Pearce and Wald (n 21) 513.
[24]Stephen L Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities' (1986) 11 *Law & Social Inquiry* 613.

Whilst they may facilitate their client's wishes within the technical bounds of the law, market-exchange lawyers may not consider the wider ethical implications of their actions. Unsurprisingly, considering the types of clients and fees at play, market-exchange lawyering (and accompanying ethical apathy) is most identified in commercial practice.[25]

In recent years, American legal ethics scholars have advocated that relational lawyering (as opposed to market-exchange lawyering) is a functional way in which lawyers can meet their duty to the public good.[26] Relational lawyers 'advise and assist clients, colleagues, and themselves to take into account the well-being of others when contemplating and pursuing their own interests.'[27] Relational lawyers do not assume that economic benefit is the most important criterion for clients and do not see their legal services as a means to their client's ends. As Eli Wald and Russell Pearce put it: ' … a dialogue resulting in well-informed decision-making is the objective of a relational approach.'[28]

Remus contends that lawyering has not been completely reformed 'pursuant to market logic.'[29] She suggests that some lawyers still do practice relational lawyering by employing what she characterises as the '"relational dynamics" … which include trust, judgment, loyalty, empowerment and service.'[30] The ethical underpinnings of Remus' relational approach to lawyering is drawn upon a ' … rich literature, which spans many disciplines, [that] recognizes the importance of relational, as opposed to atomistic and individual, perspectives on society.'[31] Amongst other works, Remus cites Carol Gilligan's 'Ethic of Care' as informing her model.[32]

Gilligan's Ethic of Care was founded on interview data from girls and women on moral decision making in response to Kohlberg's 'Ethic of Justice' being established entirely from data on boys' moral decision making.[33] In brief, Gilligan uncovers that those who approach moral decisions in terms of an Ethic of Care want to know, in-depth, the particulars of the situation; consider the impacts of potential responses/decisions from multiple perspectives; and do not remain detached/uninterested about how their client is best to proceed.[34] Reasoning in terms of an Ethic of Care is 'holistic, contextual.. need-centred … [and involves an] extended communicative rationality.'[35]

[25]Richard Moorhead and Victoria Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' (2015) 42 *Journal of Law and Society* 387; Richard Moorhead and Rachel Cahill-O'Callaghan, 'False Friends? Testing Commercial Lawyers on the Claim that Zealous Advocacy is Founded in Benevolence Towards Clients Rather Than Lawyers' Personal Interest' (2016) 19 *Legal Ethics* 30; Steven Vaughan and Emma Oakley, ''Gorilla Exceptions' and the Ethically Apathetic Corporate Lawyer' (2016) 19 *Legal Ethics* 50.

[26]Thomas L Shaffer, 'Legal Ethics of Radical Individualism' (1986) 65 *Texas Law Review* 963; Norman W Spaulding, 'Reinterpreting Professional Identity' (2003) 74 *University of Colorado Law Review* 1; Susan L Brooks, 'Mindful Engagement and Relational Lawyering' (2019) 48 *Southwestern University Law Review* 267; Jill Howieson and Shane L Rogers, 'Rethinking the Lawyer-Client Interview: Taking a Relational Approach' (2019) 26 *Psychiatry, Psychology and Law* 659; Remus (n 8).

[27]Eli Wald and Russell G Pearce, 'Being Good Lawyers: A Relational Approach to Law Practice' (2016) 29 *Georgetown Journal of Legal Ethics* 601.

[28]ibid 622.

[29]Remus (n 8) 830.

[30]ibid 812.

[31]ibid 811.

[32]Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1993).

[33]Lawrence Kohlberg, *Stages in the Development of Moral thought and Action* (Holt, Rinehart & Winston 1969).

[34]Reasoning in terms of an 'Ethic of Care' is best exemplified through Amy's response to the Heinz dilemma: Gilligan (n 32) 26–31.

[35]Annatjie Botes, 'A Comparison Between the Ethics of Justice and the Ethics of Care' (2000) 32 *Journal of Advanced Nursing* 1071, 1072.

Thornton outlines 'fictive feminine values' associated with an Ethic of Care as ' … consultation, conciliation, compassion, consideration and care.'[36] On the other hand, those that take an Ethic of Justice approach to moral reasoning prioritise 'fairness and equality, [and make decisions in accordance with a] positivistic rationality.'[37] Thornton conceptualises that 'imagined masculine values' associated with an Ethic of Justice morality carry 'more positive connotations – such as means-end rationality, objectivity, independence and strength.'[38] Thornton points out that 'imagined masculine values'[39] are being prioritised in lawyering 'as a result of new corporatism,'[40] which aligns with broader literature on market-exchange lawyering.

In this article it is argued that solicitors must inculcate Thornton's fictive feminine values to be able to lawyer relationally (i.e. prioritise Remus' relational dynamics).[41] For instance, Remus discusses how the relational dynamic of trust is often a necessary requirement in the lawyer-client relationship. She argues that the relationship can involve the sharing of 'uniquely personal … and sensitive information about personal, legal, and financial matters.'[42] In order to encourage clients to reveal uniquely personal and sensitive information, the lawyer must prioritise the fictive feminine values of 'consultation', 'consideration' and perhaps even 'compassion'. In relation to Remus' other relational dynamics, Thornton's fictive feminine values must also be fostered, as will be demonstrated in the sections that follow. By contrast, a solicitor who prioritises Thornton's imagined masculine values will lawyer more in accordance with the market-exchange model. As previously mentioned, market-exchange lawyers' approaches and ethics are shaped by individualism, meaning that lawyers view themselves as objective facilitators who prioritise their client's means-ends (an imagined masculine value in Thornton's conceptualisation).[43] It is of course flawed to insinuate that every lawyer's approach to delivering legal services will fall strictly within one of these two models; some lawyers will, in practice, be delivering services in a way that can be

[36]Margaret Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the New Corporatism' (1999) 23 *Melbourne University Law Review* 749, 766.
[37]Botes (n 35) 1072.
[38]Thornton (n 36) 765.
[39]The word 'fictive' in 'fictive feminine values' was purposefully used by Thornton '[t]o stress the constructivist meaning of the feminine and to avoid its conflation with biological women.' Likewise, the term 'imagined masculine' is used by Thornton to 'explain a cluster of characteristics likely to be ascribed to (benchmark) men.'
[40]Thornton (n 36) 765.
[41]Thornton's conceptualisations have not been widely drawn upon to discuss approaches to lawyering, with the exception – to my knowledge – of Lisa Webley's work, see: Lisa Webley, 'Solicitors as Imagined Masculine, Family Mediators as Fictive Feminine and the Hybridization of Divorce Solicitors' in Francesca Bartlett, Reid Mortensen and Kieran Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics* (Routledge 2010) 142 and Lisa Webley, *Adversarialism and Consensus?: The Professions' Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro Books, 2013).
[42]Remus (n 8) 849.
[43]Importantly, lawyers are very unlikely to ever be truly 'objective' facilitators. The fact that lawyers want to facilitate commercial client ends may be motivated, for instance, by the benefits they (the lawyer) will accrue from meeting their client's ends (satisfied client, personal gratification of getting the job done, impressing an introducer – a potential future client, receiving a fee and/or garnering repeat custom, to name a few). Here there is a clear need to theoretically explore in more depth what is meant by lawyer loyalty in accordance with the relational lawyering model and how professional loyalties (to the self, client, introducer, etc.,) may impinge on a lawyer's ability to lawyer relationally both in the ILA context and more broadly. This discussion is beyond the scope of this paper. For scholarship in the area of lawyer loyalty (that do not focus on loyalty as a relational lawyering dynamic in particular but may be helpful in unpicking it), see: Eli Wald, 'Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients' (2008) 40 *St Mary's Law Journal* 909, 951; Ronit Dinovitzer, Hugh Gunz and Sally Gunz, 'Unpacking Client Capture: Evidence from Corporate Law Firms' (2014) 1 *Journal of Professions and Organizations* 99; John Flood, 'Corporate Lawyer-client Relationships: Bankers, Lawyers, Clients and Enduring Connections' (2016) 19 *Legal Ethics* 78.

best described as a 'middle ground' between market-exchange lawyering and relational lawyering.[44] In this article, by drawing on the dynamics of Remus' relational lawyering model and the market-exchange model and the accompanying values associated with them, a clearer picture is formed of what is required of solicitors when they deliver legal services (and why they might not be meeting these standards).

Importantly, Remus outlines that effective lawyering involves the hybridisation of relational/fictive feminine values and imagined masculine values: 'tension between commercialism and professionalism cannot be resolved through an embrace of market forces any more than it can be hidden behind … commitment to the public good.'[45] Importantly under a relational lawyering model:

> [C]lients are not means to lawyers' ends – paying the bills, working on challenging cases, attaining status and power – but rather partners in a mutual exchange. The goal … from the lawyers' perspective is both to earn a livelihood and to educate and assist clients … Empowering clients in a relational manner requires getting to know them and their objectives.[46]

Next it will be demonstrated how relational dynamics/fictive feminine values and imagined masculine values are legal requirements, both in Lord Nicholls' guidelines in *Etridge* and within the SRA Code of Conduct.

3. *Values promoted in* Etridge

ILA is, at first blush, arguably the antithesis of relational/fictive feminine lawyering because it takes a relational problem (women being more concerned about preserving their relationship/keeping their intimate partner contented over their own individual economic interests),[47] and provides a 'masculinised' response – advising a wife on her individual interests.[48] However, Lord Nicholls' drive to separate the husband and wife and provide the wife with ILA is based on intrinsically relational objectives. The hope being that the wife who *is* being unduly pressured into entering a transaction may feel able to 'speak up' about the abuse they are being subjected to and/or feel empowered to say 'no' to the transaction going ahead. As outlined in the introduction to this article, coerced debt is a distinctive feature of domestic abuse.[49] There is a huge importance in private stakeholders being prepared to 'maximise spaces within which victim-survivors can speak out … [and] be supported.'[50] The solicitor meeting room is one such space which deserves closer attention.

Lord Nicholls' guidelines show that fictive feminine values and relational dynamics are required to be fostered in three principal ways when solicitors deliver ILA. Solicitors must: (i) provide a meaningful consultation with their client; (ii) use the information learnt from their consultation to pass judgement and advise the client in their best

[44]Hilary Sommerlad, 'The Ethics of Relational Jurisprudence' (2014) 17(2) *Legal Ethics* 281, 295.
[45]Remus (n 8) 814.
[46]Wald and Pearce (n 27) 616.
[47]Dina Bowman, 'The Deal: Wives, Entrepreneurial Business and Family Life' (2009) 15 *Journal of Family Studies* 167; Fehlberg (n 17) 172–3 and 181–5.
[48]Robert K Vischer, *Martin Luther King Jr. and the Morality of Legal Practice: Lessons in Love and Justice* (Cambridge University Press 2012) 10.
[49]Littwin (n 4).
[50]Nicola Sharp-Jeffs, *Understanding and Responding to Economic Abuse* (Emerald Publishing 2022) 16.

interests; and (iii) interfere where there are concerns that their client may be entering the transaction under coercion. Each of these relational requirements will be considered in more detail in the sections that follow.

(i) Meaningful consultation

In *Etridge*, Lord Nicholls requires solicitors to prioritise having a meaningful consultation (a fictive feminine value) when they deliver ILA, by stating that what advice should be given during ILA depends on each client's individual circumstances.[51] Such requires solicitors to build trust (a relational dynamic) with their client, show consideration (a fictive feminine value) and to be attentive (i.e. caring) to each client's circumstances. Lord Nicholls outlines that '[t]he solicitor should discuss the wife's financial means … [and] whether the wife or husband have other assets … '[52] He goes on to say that a solicitor should also obtain from the bank 'any financial information he needs [to be able to have a meaningful consultation with his client].'[53] The solicitor is therefore required to empower the client when delivering ILA. Empowerment, which is one of Remus' relational dynamics, 'is central to the lawyers' role in society,'[54] where 'they represent individuals and causes that might find no other support in society.'[55] This is very true of ILA and those surety clients who may be feeling powerless due to economic abuse.[56]

One way in which Lord Nicholls could have gone further is by outlining that the solicitor may want to ask about the health of the surety's relationship with her intimate partner in order to provide meaningful advice. In not speaking directly to this, Lord Nicholls may be encouraging solicitors to avoid providing a meaningful consultation, thus learning about their client holistically so to be in a better position to advise them. Instead, Lord Nicholls seems to promote family privacy when he discusses how it is not the role of solicitors to discover if the surety client has been unduly influenced:

> Many, if not most, wives would understandably be outraged by having to respond to the sort of questioning that would be appropriate before a responsible solicitor could give such confirmation. To require such an intrusive, inconclusive and expansive exercise in every case would be an altogether disproportionate response to the need to protect those case, presumably a small minority where a wife is being wronged.

The 'sort of questioning' Lord Nicholls refers to would likely involve a discussion about the emotional and economic health of the client's relationship. In outlining that 'intrusive' questions are not necessary because it is not for the solicitor to determine whether their client is being unduly influenced, Lord Nicholls may be unwittingly encouraging solicitors to avoid consultations about the 'personal' altogether, which are relevant considerations in being able to provide advice catered to their client's circumstances. As Gordon-Bouvier puts it, the problem with promoting 'illusions such as family privacy

[51] *Etridge* (n 7) [65].
[52] ibid [65].
[53] ibid [67].
[54] Remus (n 8) 858.
[55] ibid 858–9.
[56] Ellie Butt, *Know Economic Abuse* (Refuge Report, 2020) 48 <https://refuge.org.uk/wp-content/uploads/2020/10/Know-Economic-Abuse-Report-2020.pdf)> accessed 2 September 2024.

and state [and lawyer] restraint [is that they] create conditions in which coerced debt and economic abuse can flourish.'[57]

Importantly, Lord Nicholls stressed in *Etridge* that ILA lawyers were not to view their meeting with the client as a formality,[58] i.e. 'as a means to an end' – an imagined masculine value strongly associated with market-exchange lawyering. In other words, Lord Nicholls did not intend for solicitors to view ILA as a mere box-checking process to go through to facilitate the transaction.[59] This is linked with Remus' relational dynamic of loyalty. Here, Lord Nicholls was clear that the solicitor should refuse to act for the client if they feel there is a conflict of interest (that is, if they are more concerned with securing the lending for the husband and/or protecting the interests of the bank).[60] In requiring loyalty towards the surety client, Lord Nicholls was also clear that the bank 'is not intended to have any knowledge or control over the advice the solicitor gives the wife.'[61]

(ii) Judgement

As well as passing judgement on what needs to be covered with each individual client, Lord Nicholls set out that a solicitor should form a judgement about whether it is in the wife's best interest to enter into the transaction.[62] Such an obligation, in line with Remus' reasoning, 'requires lawyers to employ reasoned judgment in applying expertise to the particulars of a client's case.'[63] In relation to ILA, Lord Nicholls' messaging is clear: a solicitor should not prioritise objectivity and should not refrain from interfering with their client's decision making (i.e. they should not prioritise values associated with market-exchange lawyering). This notion that ILA solicitors must pass judgement speaks to the debate in legal services and lawyering scholarship about whether providing legal information alone constitutes legal advice.[64] Eekelaar and others have, for example, argued that passing judgement and forming a recommendation on a course of action is required to constitute 'legal advice'.[65] With regards to providing at least some level of protection to clients, it is clear that ILA requires judgement.

(iii) Interference

Whilst a wife is 'not precluded from entering into a financially unwise transaction' after receiving contextual advice whereby the solicitor passed judgement, Lord Nicholls does state that ' … where it is glaringly obvious that the wife is being grievously wronged … the solicitor should decline to act further.'[66] The fact that solicitors must only decline to

[57]Gordon-Bouvier (n 16) 538.
[58]*Etridge* (n 7) [66].
[59]ibid [66].
[60]For more focussed discussion on the relationship between lenders and ILA solicitors see: Eleanor Rowan 'Independent Legal Advice in (Re)Mortgage Transactions 20 Years on from RBS v Etridge (No. 2).' (2023) *Conveyancer and Property Lawyer* 2, 166–83.
[61]*Etridge* (n 7) [77] (Lord Nicholls).
[62]ibid [61].
[63]Remus (n 8) 853.
[64]Leanne Smith, Emma Hitchings and Mark Sefton, A study of fee-charging McKenzie Friends and their work in private family law cases (University of Cardiff, University of Bristol 2017) <https://orca.cardiff.ac.uk/id/eprint/101919/1/Astudyoffee-chargingMcKenzieFriends.pdf> accessed 9 December 2024.
[65]John Eekelaar, Mavis Maclean and Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Pub Limited 2000) 74.
[66]ibid [62].

act in exceptional circumstances demonstrates that the client's individual right to non-interference is prioritised in most circumstances. Importantly though, lawyers, in accordance with Lord Nicholls' conception of ILA, should not avoid interference *entirely*. Out of consideration and care (fictive feminine values) for the wife, the solicitor should not provide a certificate of ILA to the lender where they view their client as being 'grievously wronged' (such as where the client's circumstances/history indicates economic abuse). What remains unaddressed by Lord Nicholls is whether the solicitor has an obligation to inform the lender why they refused to act. If the surety client's solicitor did not inform the bank that they thought the surety client was being 'grievously wronged', the client could go on to see another – potentially less caring – solicitor who might then certify ILA. This issue will be discussed in more detail in part six of this paper where interviewees' accounts on interference are discussed. First though, a brief outline of the values promoted in the SRA guidelines is provided.

4. Values promoted in the SRA guidelines

Lord Nicholls' guidelines in *Etridge* provide a set of requirements for ILA in particular. Alongside those guidelines, all solicitors in England and Wales must also adhere to their professional regulator's obligations; found primarily in the SRA Handbook and Code of Conduct.[67] The Code, part of the Handbook, details ten principles which are 'all pervasive.'[68] These principles include requirements on 'upholding the rule of law and proper administration of justice' and 'maintaining the trust of the public'; thus requirements which are more relevant to the relational lawyering model, compared with the market-exchange model. For instance, one of Remus' five 'relational dynamics of lawyering' is 'service'. Remus states that 'the profession's rhetoric to public service may have value and force even while it remains aspirational.'[69] As such, it could be argued that relational lawyers must pay consideration (a fictive feminine value) to broader public interests to ensure their actions are compliant with the rule of law and the proper administration of justice.[70]

Whilst imagined masculine values are sometimes required in lawyering, lawyers cannot prioritise them in every case. To demonstrate this point further – that relational lawyering is legally required as a matter of professional regulation – the SRA Competency Statement (which sets out the standards expected of a 'day one' competent solicitor and is also used as a framework for continuing standards of competence) states that a solicitor must: 'Develop and advise on relevant options … [u]nderstanding and assessing a client's commercial and personal circumstances, their needs, objectives, priorities and constraints.'[71] To do this, the solicitor must adopt a relational approach to lawyering, even if the SRA does not use this language or framing explicitly. The solicitor must, for example, provide a meaningful consultation to learn about their client.

[67]Here the 2011 Handbook is referred to because it is the version in force at the time of data collection.
[68]Solicitors Regulation Authority (n 18).
[69]Remus (n 8) 862.
[70]Richard Moorhead, Steven Vaughan, and Kenta Tsuda, 'What Does It Mean for Lawyers to Uphold the Rule of Law?' (Legal Services Board Report, 2023) <https://legalservicesboard.org.uk/wp-content/uploads/2023/11/FINAL-LSB-Lawyers-and-ROL-Report-2023.pdf)> accessed 20 September 2024.
[71]This is the wording in the 2019 SRA competency statement.

Whilst the Code of Conduct cannot be analysed exhaustively in terms of relational (fictive feminine) and market-exchange (imagined masculine) values/dynamics in this paper, it is worth noting that, like *Etridge*, the SRA details how a solicitor should act if there are grounds for believing a client's instructions are affected by undue influence. In the SRA Handbook, a series of outcomes and indicative behaviours (IB) are detailed. In the section entitled 'You and your client', subsection 'Accepting and refusing instructions', IB (1.28) states:

> Acting in the following way(s) may tend to show that you have not achieved these outcomes and therefore not complied with the Principles: … acting for a client when there are reasonable grounds for believing that instructions are affected by duress or undue influence without satisfying yourself that they represent the client's wishes.

This demonstrates that there is a lack of symmetry between the *Etridge* guidelines and the Code of Conduct on when a lawyer should 'interfere'. Lord Nicholls outlined that ILA solicitors should interfere only where it is 'glaringly obvious' the client is being 'grievously wronged', and that personal questions should not be asked to ascertain if the wife is being coerced, as '[m]any, if not most, wives would understandably be outraged by having to respond to [such questions].'[72] The SRA rulebook sets out that where there are '*reasonable grounds* [author's own italics] for believing the client's instructions are affected by undue influence' then the solicitor must satisfy themselves that the instructions represent the client's wishes. We turn below to the purchase of these possibly in tension norms on solicitors that deliver ILA. Before that, the methodology of this empirical study is set out.

5. Methodology

This study set out to understand how ILA was being provided in practice; if or to what extent the guidelines set out by Lord Nicholls in *Etridge* were being followed. An initial and significant methodological hurdle – and one not commonly seen in studies of lawyering – was identifying whether certain 'types' of lawyers tended to deliver ILA to surety clients. Despite the help of a gatekeeper, analysis of post-*Etridge* case law (noting the names of solicitors that delivered ILA and then searching for their specialisms), and the deployment of an online survey, it became apparent that there was no one 'type' of lawyer who delivered this advice. Instead, the picture unfurling showed that a range of solicitors in multiple specialisms were so engaged. As a result, 237 solicitors were contacted who worked in one or more of the following specialisms: 'Commercial property'; 'Family – general'; 'Insolvency and restructuring – business'; and 'Litigation – general'. To do this, a search was undertaken using the Law Society's 'Find a Solicitor' application for solicitors who specialised in each of the four fields within a 25 miles radius of Birmingham.[73] Emails or letters were sent to randomly selected solicitors, which outlined the study in brief and detailed that those with *any* experience in delivering ILA (however infrequently) were sought for interview. Through this process, 22 solicitors were recruited for interview. 21 out of 22 of these interviewees specialised in commercial

[72] *Etridge* (n 7) [53].

[73] This was a strategic decision to keep costs and travelling times low. Because of interviewee referrals, some solicitors were also interviewed outside of the West Midlands (East Anglia (= n1)/Greater London (= n1)/ North West (= n2)).

fields (the remaining solicitor specialised in conveyancing, probate, and wills). 21 out of 22 interviewees were also male. Interviews took place in 2018.

A semi-structured interview schedule was used, and vignettes were posed towards the end of the interview – including a 'crying client vignette' that will be explored in the latter part of this paper. Vignettes can reduce the effect of social desirability because of the 'distancing effect … between the participant's real lives and vignettes.'[74] The idea is that when interviewees are talking hypothetically, they may feel more comfortable revealing their attitudes and values. For this reason, scholars investigating moral reasoning/ethics tend to adopt vignettes in their research.[75] Vignettes can be 'constructed from a number of sources … [including] previous research findings, literature reviews or real life experiences.'[76] The 'crying client' dilemma is based on Fehlberg's finding that two of her surety interviewees were 'obviously upset about signing [the surety transaction in the presence of a solicitor]',[77] and on a story told at an event organised by the charity Surviving Economic Abuse. At this event, a victim-survivor spoke about how her ex-partner forced her to empty her bank account as soon as she got paid at the end of every month. She talked about how visibly upset she would be whilst all her earnings were withdrawn by a bank clerk. She posed the powerful question: 'How obvious must abuse be before someone in a position of power intervenes?' This issue felt especially relevant to ILA.

Most interviews were conducted face-to-face in the solicitor's law firm,[78] and interviews were recorded using a voice recorder.[79] On average interviews lasted for 46 minutes and interviews were transcribed by a professional transcription service. Transcribed data was thematically analysed: data was read repeatedly and coded using NVivo to 'allow the theory to emerge from the data.'[80] During coding, the overwhelming narrative emerging from the data was that interviewees delivered ILA as a market-exchange. It is this narrative that is discussed next; placed in contrast and set against the requirement (discussed above) that solicitors should deliver ILA (in part, at least) relationally.

6. Interview data: values in ILA practice

This section engages in analysis of interview data from solicitors who have experience delivering ILA through the theoretical lenses of relational lawyering (characterised by Remus' dynamics and Thornton's fictive feminine values) and market-exchange lawyering (characterised by Thornton's imagined masculine values). As outlined in section 2,

[74]Rhidian Hughes and Meg Huby, 'The Application of Vignettes in Social and Nursing Research' (2002) 37 *Journal of Advanced Nursing* 382, 384.

[75]Hugh Gunz and Sally Gunz, 'Hired Professional to Hired Gun: An Identity Theory Approach to Understanding the Ethical Behaviour of Professionals in Non-professional Organizations' (2007) 60 *Human Relations* 851; Richard Moorhead, Steven Vaughan and C Godhino, *In-House Lawyers' Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Hart Publishing 2018); Vaughan and Oakley (n 25) 50.

[76]Caroline Bradbury-Jones, Julie Taylor and Oliver Herber, 'Vignette Development and Administration: a Framework for Protecting Research Participants' (2014) 17 *International Journal of Social Research Methodology* 427, 431.

[77]Fehlberg (n 17) 180.

[78]One interview was conducted over the telephone and one interview was conducted face-to-face in the University of Birmingham Law School.

[79]Consent forms were signed by all interviewees.

[80]Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Ground* (Citeseer 1998) 94.

ILA lawyers are required to: (i) provide a meaningful consultation with their client; (ii) use the information learnt to pass judgement and advise the client in her best interests; and (iii) interfere where there are concerns that their client may be entering under the coercion of her intimate partner. Each of these relational aspects of ILA will be considered in turn.

(i) Meaningful consultation

All interviewees were asked what was usually covered during an ILA meeting with a non-commercial surety client. In response 17 (out of 22) interviewees referred to going through a 'checklist' *sent by the lender* involved in the transaction. This was a common way of discussing this approach:

> I go through all the steps in terms of the checklist [sent by the bank] making sure that they understand what the document is, what it means, what the practical effect is, what is going to happen if the bank calls upon it, so that they fully understand. [P21]

Similarly, P15 said:

> … I give them a copy of the guarantee … I then go through the tick list in terms of explaining the risk and the nature of the document and the fact that they are primarily liable.

P21 and P15's responses (alongside 15 other interviewees' responses of a similar vein) indicated that they were not focussed on learning about the client at the start of their meeting (as a relational lawyer would do), but instead focussed on the automated process of following a checklist that was sent by the lender which details what should be covered when delivering ILA.[81] The fact that lenders are sending checklists is troubling. Lord Nicholls stated explicitly that the lender 'does not have, and is not intended to have, any knowledge or control over the advice the solicitor gives the wife.'[82] This speaks to the relational dynamic of loyalty; the ILA solicitor should be focused on serving their client and not the lender who would commercially benefit from issuing the loan. One interviewee – P4 – did make it clear that banks always include within their checklists that advice given ultimately depends on the solicitor's professional responsibilities towards their individual client. However, in providing a 'checklist' that can easily be referred to, discretion and responsibility is clearly minimised due to ease of process 'and just having a checklist to go through' [P4].

More encouragingly, in terms of their legal requirements, five interviewees discussed providing more relational ILA during interview. For instance, P12 said that he would ask personal questions about his client's financial means during ILA:

> First, I want to go through their background, the nature of the transaction, what their means are now … I need to know that if someone's coming in and they're on social security for example and they're trying to guarantee somebody, I know it's not realistic … I like to get background knowledge.

Here, unlike the interviewees discussed above, P12 (the only non-commercial lawyer interviewed) discusses prioritising consultation. P12 reveals that he is cautious and caring about his client's situation by making sure the transaction is 'realistic', considering

[81] For more detailed discussion on lenders practices post-*Etridge* see: Rowan (n 60).
[82] *Etridge* (n 7) [77].

the context of the individual client's decision and her financial means. Consequently, P12 details providing ILA where the fictive feminine values of consultation, consideration, care, and compassion are prioritised, as opposed to providing routinised advice prioritising the client's means-ends.

Only two interviewees discussed raising the health of the surety client's relationship. P14 told me that: 'Inevitably one of the things I also ask about is the relationship [between the client and her husband].' Moreover, in answer to the follow-up question: 'What questions do you ask about their relationship?', P14 said:

> Well one of the questions I ask about the relationship is … 'Are you comfortable that the relationship is where you want it to be?' … if you just do it in the cold light as a commercial transaction, you're missing out on a whole swathe of factors, which arguably are just as important.

Arguably this is as Lord Nicholls intended – solicitors using their discretion and understanding of their client's individual circumstances to inform what they cover during ILA. On the other hand, questions about the surety client's relationship might be the types of questions Lord Nicholls considered too 'intrusive'.[83] Here, P14 is prioritising the relational dynamic of trust. It is heartening that P14 believes that asking such questions is 'arguably just as important' as asking questions about the financial aspects of the transaction. This is demonstrative of a more relational lawyering approach whereby the lawyer can learn more about the client's individual circumstances and therefore whether they should be advised against providing suretyship. It is telling however that only two out of 22 interviewees discussed raising the emotional health of their client's relationship. As Thomas Shaffer writes: 'It is much easier for a lawyer to behave as if he were a clerk in a driver's-license office than to behave as someone who invites trust … and then charges by the hour for it.'[84]

(ii) Judgement

To explore if interviewees were willing to pass judgement and advise surety clients against entering the proposed transaction, interviewees were asked directly if they had ever advised a surety client not to proceed. In response, P2 spoke of how he felt that there was ambiguity about whether a solicitor was required to provide 'real advice'[85] during ILA:

> Some people say, 'Your duty is just to tell them what a guarantee is,' and other people will say: 'No your duty is to advise them on the whole circumstances: is the guarantee right in their circumstances?'

Most interviewees answered this question less ambiguously. In fact, 15 interviewees asserted quite emphatically that it was *not* their job to pass judgement when delivering ILA. The following responses were typical:

> I don't see it as our job to tell them whether to proceed or not. If somebody wants to do a deal, to sign an agreement or whatever, that's their decision. [P8]

[83] *Etridge* (n 7) [53].
[84] Shaffer (n 26) 984.
[85] Debra Morris, 'Surety Wives in the House of Lords: Time for Solicitors to Get Real'?' (2003) 11 *Feminist Legal Studies* 57.

No, it's their decision to make. [P18]

These interviewees demonstrated that they prioritised the imagined masculine values objectivity and independence; they believed clients should make their own decisions without their solicitors passing judgement. To assist victim-survivors, the ILA lawyer should form a judgement (after learning about the client's circumstances) and not prioritise non-interference in their bid to remain 'objective', because interestingly the very decision not to pass judgement may in fact be a demonstration of bias and misdirected loyalty (to the lender and/or the client's intimate partner) – resulting in the lawyer not being objective at all.

Interestingly, P19, in asserting that it was not his place to make that decision, referred to it as a 'commercial decision': this being a decision where the family home is potentially at stake, in situations of possible economic abuse. Similarly, P22 states that entering a suretyship transaction was a 'commercial' decision for the client to take alone: 'Effectively at the end of the day it's a commercial choice to enter a personal guarantee; it's not really for me to say whether they should, or they shouldn't.' To view such a decision as a 'commercial decision' demonstrates the lack of understanding these interviewees have about the relational motivations behind suretyship in the non-commercial context. P20 went as far to say: 'I can't, I really, really can't think of a situation where I would have any doubts about signing off such a certificate and withholding … access to the money.' P20, like most other interviewees, seemed to be prioritising the client's means-ends rather than their protection against undue influence. In framing this as a commercial decision, it could be argued that interviewees are assimilating ILA with their other work where they act for commercial clients and remain indifferent to and non-interfering about their chosen ends (i.e. lawyering in accordance with a market-exchange model.)

Scholarship on commercial legal practice demonstrates that commercial lawyers conceive and perform their roles narrowly,[86] 'disinterested in any further "public-regarding ethical dimension" to their practice.'[87] As Donald Langevoort highlights, in commercial lawyering, the typical trope is: 'Clients are in charge: full stop.'[88] And that the commercial lawyer role is to facilitate, not frustrate, client's ends.[89] As a result, the market-exchange model of lawyering becomes the norm in the commercial context. For the most part, scholars have highlighted that commercial lawyers are not concerned with the ethical implications of their commercial client's legal ends.[90] The problem with framing suretyship as 'commercial' is that this is most likely not a commercially motivated transaction – it is often relationally motivated and/or driven by abuse. In framing it as a commercial decision and remaining non-interfering in refusing to pass judgement, economic abuse could go unchecked and unimpeded. In failing to pass judgement, most interviewees demonstrated that they went directly against *Etridge* guidelines and the SRA Code of Conduct.

More encouragingly, five interviewees told me they would *theoretically* advise the client against entering the transaction. That said, only two interviewees said they have

[86] Joan Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge University Press, 2011) 131.
[87] Donald C Langevoort, 'Gatekeepers, Cultural Captives, or Knaves: Corporate Lawyers through Different Lenses' (2019) 88 *Fordham Law Review* 1683, 1685.
[88] ibid.
[89] ibid 1687.
[90] Vaughan and Oakley (n 25) 62.

previously advised a client against entering the transaction. For instance, P12 said: 'I might well say it is not in your interest to do it.' Similarly, P14 stated: 'I don't have a problem with saying to someone: "I think you're mad."' Whilst the wording of this response lacks compassion (a fictive feminine value), P14 is not preoccupied with remaining impartial and non-interfering at the cost of his client's best interests. For the most part though, and in line with their other commercial lawyering practices, most interviewees told me that the client's decision was paramount; that it was not their role to pass judgement on the surety client's course of action.

(iii) Interference

ILA is, by its very nature given the context, a situation where 'messy human problems'[91] may surface. ILA solicitors must, therefore, deal with emotional difficulty and not simply react by distancing themselves from the 'personal'. Six interviewees volunteered how they had felt uncomfortable dealing with 'human complexities'[92] that had arisen between a surety client and her intimate partner when delivering ILA. All six of these interviewees demonstrated that their instinct was not to interfere, and not make any further enquiries about a client's (or her intimate partner's) suspect behaviour. Therefore, demonstrating that they do not deliver ILA responsively as a relational lawyer would do and that they do not take their role seriously in potentially assisting women who may be suffering from economic abuse.

For example, whilst P4 started off by saying he was 'better at handling the personal side of things' when having 'the husband and wife in', he then went on to show how he was preoccupied with what the husband thought about P4's involvement. P4 said he would always 'reassure the husband' that he was not going to 'talk the wife out of it,' but that he will 'have to take her aside' without the husband being present. This is of concern. P4 should, of course, not be reassuring a client's husband that he will not tell their wife not to enter the transaction before a proper consultation with his client – the wife. P4 also recounted a specific encounter where 'the wife was very keen in the meeting with her husband' but then when he 'got her in another room, she was asking lots of questions about what could go wrong … showing a whole other side.' Rather than discussing feeling perturbed about the complete change in his client's behaviour in the absence of her husband, P4 said that because 'she wasn't saying she didn't want to do it' he signed off on the ILA certificate required by the lender. He then went on to say that when they returned to the husband 'she was almost making out that I had been keeping her, almost to try and save face with the husband.' Again, P4's client's behaviour with her husband after being 'independently' advised raised concerns about coercion and potential abuse being at play. In accordance with the SRA Handbook (IB 1.28),[93] P4 should have privately asked his client more questions to satisfy himself that the wife did not feel pressured into entering this transaction. That said, worryingly, P4 was likely compliant with Lord Nicholls guidelines in *Etridge* because it was not 'glaringly obvious' that his client was being 'grievously wronged.'

[91]Lynn Mather and Craig A. McEwen, 'Client Grievances and Lawyer Conduct' in Leslie C. Levin and Lynn Mather (eds), *Lawyers in Practice: Ethical Decision Making in Context* (The University of Chicago Press 2012) 63.
[92]Andrew Abbott, 'Status and Status Strain in the Professions' (1981) 86 *American Journal of Sociology* 819, 824.
[93]Discussed above in Section 4.

Like P4, P17 also demonstrated that he tried to 'save face' with the husband who accompanied the wife to her ILA meeting. After saying that ' … the balance of power may not be equal' between the husband and wife, he recalled the following event during ILA:

> … once when I was trying to give advice, the husband was poking his head through the door … It was really awkward; I was just sort of thinking this has to be face-to-face [without the husband]. And how am I going to do that with you [the husband] saying: ' … can I come in and sit and watch?'

P17 continued:

> I did get the husband out of the room, but it was a bit embarrassing … And you feel tremendously under pressure because you're trying to facilitate something and they're probably thinking you're being overly formal and pedantic.

Contrary to the requirements on him in *Etridge*, and his wider professional obligations, P17 revealed that he saw his role as facilitating the transaction rather than ensuring the wife was advised in her best interests to mitigate against undue influence/economic abuse. P17 was more concerned with how the husband was perceiving him as opposed to being concerned that his client had an overbearing and potentially controlling husband. Similarly, P19 was concerned with how he would be perceived by the husband:

> It would take a feisty person … to come back to their partner and say, 'sorry I haven't signed it'. [Their partner is likely to say] 'What, you haven't signed it? Who was that solicitor you saw? I'm going right round to see him now, bloody troublemaker.

The problem here is that a lawyer's egocentric concerns can prompt self-serving bias.[94] Take for example P4, who stated that he will normally say to the husband (before he advises the wife separately) that he will 'not talk the wife out of it.' In such a situation, it is likely that P4's delivery of ILA is going to be tainted by egocentric bias. Despite what the wife tells P4 about her situation, it is unlikely that he will independently and loyally advise the wife in her interests only (especially where those interests might suggest that the wife should not proceed with the transaction). As Langevoort states: 'Ego desensitizes the mind to information that might otherwise be disillusion and prompts self-serving inferences and decisions that protect and enhance the self-concept.'[95] It is unlikely that, after effectively saying to the husband he will 'not upset the applecart', P4 would do just that and advise the wife against entering the transaction.

These findings also relate to Sida Liu's argument (drawing on Abbott's concept of professional impurity)[96] that dealing with a client's emotional needs can be an assault on lawyer's professional purity.[97] Liu observes that 'clients are a major source of impurity in professional life as they constantly bring dirty work to professionals.'[98] Therefore, it could be said that interviewees (such as P4, P17 and P19) may resist dealing with messy human problems that arise in this context – such as coercion and/or economic

[94]Donald C Langevoort, 'Ego, Human Behavior, and Law' (1995) *Virginia Law Review* 853.
[95]ibid 859.
[96]Andrew Abbott, 'Status and Status Strain in the Professions' (1981) 86 *American Journal of Sociology* 819.
[97]Sida Liu, 'Professional Impurities' in Elizabeth Gorman and Steven P Vallas (eds), *Professional Work: Knowledge, Power and Social Inequalities* (Emerald Publishing Limited 2020) 147, 150–2.
[98]ibid 154.

abuse – as dealing with such issues challenges their professional purity as commercial solicitors who typically facilitate client's means-ends. [99] Emma Jones argues that there is a need for 'institutional change [in the legal profession] … [to] foster an acknowledgment and understanding of emotions.'[100] She goes on to suggest that:

> This can be achieved, at least in part, by integrating emotions into both the law degree and the forms of vocational training undertaken by lawyers … [and] statements of professional values could explicitly refer to emotions … intentionally develop[ing] a discourse which acknowledges the importance and relevance of concepts around care and connection.[101]

As Jones points out, care and connection (fictive feminine values linked with relational lawyering) are important in lawyer-client interactions. One way in which the SRA could demonstrate to regulatees that dealing with emotions is a required part of the job, is by referring to values such as Thornton's fictive feminine values and Remus' relational lawyering dynamics within their statements of professional values. Prioritising such values is particularly prevalent in ILA: avoiding dealing with emotions that arise in this context could leave victim-survivors of economic abuse with little to no assistance during a particularly perilous point in their lives.

Interference: a vignette

To further explore whether ILA solicitor interviewees would interfere where there were potential signs of coercion, interviewees were asked how they would most likely respond to the following scenario:

> Your client has left the room after a meeting where you felt satisfied that she understood the risks in securing the debts of her husband. That client is then seen to be visibly upset as she left the building with her husband. Your colleague tells you what they have seen. This client already signed the documentation necessary to confirm the lending transaction with the bank.

Out of the 12 interviewees who were asked to respond,[102] seven stated that they would most likely proceed with confirming ILA to the lender without getting back in contact with the surety client. Six of these interviewees had curious reactions to this hypothetical, including:

> I'd possibly give my colleague a smack round the face for telling me … [P22]

This demonstrates just how strongly P22 wanted to avoid dealing with – to adopt Liu's terminology – 'dirty work.'[103] Amongst these interviewees, to justify not interfering, and their decision to confirm the ILA with the lender without getting back in contact with their client, seven participants mentioned that as they had completed their role before the client left they felt they could proceed.

P15, for example, demonstrated little concern or compassion for his client (which would be hallmarks of more relational lawyering):

[99] Shaffer (n 26) 984
[100] Emma Jones, 'An Emotionally Vulnerable Profession? Professional Values and Emotions within Legal Practice' (2024) 26(2) *Legal Ethics* 238, 255
[101] ibid.
[102] Only 12 interviewees answered this vignette due to interview time constraints.
[103] Liu (n 97) 154.

> Can you re-open something? Again, based on the checklist [sent by the lender] and based on them signing it off and nobody else being in the room at the time … I think I'd proceed really.

Similarly, P5 told me: 'If I have advised them properly and they understood what I've told them and they've signed up, I think that's the end of my involvement … none of my business I think.'

Six interviewees suggested to me, in a curious interpretation of the facts, that the client could be crying over something different other than the suretyship transaction:

> It could be completely innocent – it could be that their dog has died or something whilst they have been in there. [P1]

> I'd probably document it. I'm not sure I'd call them back … they could be crying over anything. They could have hay fever! [P12]

> Oh God, you know, what was she crying about? … It could be completely unrelated. She could've just had some bad news from somebody. [P22]

As Ziva Kunda explains, psychologically motivated reasoning allows people's directional goals to affect their reasoning, which ultimately means that 'people are more likely to arrive at those conclusions they want to arrive at.'[104] More recently, behavioural ethics researchers have referred to 'the innate psychological tendency for individuals to engage in self-deception' as 'ethical fading'.[105] Ethical fading causes individuals not to 'see the moral components of an ethical decision, not … because they are morally uneducated, but because psychological processes fade the "ethics" from the dilemma.'[106] In other words, it is possible that interviewees dismissed the seemingly obvious and logical conclusion that the client's emotional state was linked to providing suretyship by creating their own narratives that allowed them to do what they wanted to do: to remain disinterested in the effects of the transaction, facilitate the transaction, and earn a fee. As a result, those solicitors do not have to respond in a caring manner, keeping their imagined masculine persona intact – avoiding being recognised as members of a 'more feminine helping profession.'[107]

Most interviewees demonstrated an inclination not to interfere, even where the circumstances amounted to reasonable grounds for believing that their client may have been unduly influenced. Not one of the interviewees mentioned Lord Nicholls guidelines which stipulate that solicitors should refuse to act where it is 'glaringly obvious that the client is being grievously wronged.' That said, this very high threshold (and as discussed above, higher than the threshold set out in the SRA Code of Conduct) could – it is suggested – lead solicitors to deduce that conduct such as crying outside the meeting room is not enough to show that the client is being grievously wronged. In accordance with the SRA Handbook (IB 1.28), crying is likely sufficient to say there is an issue, or at least enough of an issue to warrant the solicitor making further enquiries with their client.

[104] Ziva Kunda, 'The Case for Motivated Reasoning' (1990) 108 *Psychological Bulletin* 480, 495.
[105] Ann E Tenbrunsel and David M Messick, 'Ethical Fading: The Role of Self-deception in Unethical Behavior' (2004) 17 *Social Justice Research* 223.
[106] ibid 224.
[107] Joan C Tronto, 'Does Managing Professionals Affect Professional Ethics? Competence, Autonomy, and Care' in Peggy DesAutels and Joanne Waugh (eds), *Feminists Doing Ethics* (Rowman & Littlefield 2001) 201.

It is important to highlight that, even if a solicitor considered it glaringly obvious that their client was being wronged, there is no indication in *Etridge* how solicitors can assist the surety client other than stating that the solicitor should 'refuse to act'. In such a scenario this leaves the surety client in a potentially dangerous situation – if her abuser thinks she is the reason behind the solicitor's refusal to act, he may cause her physical or economic harm.[108] Alternatively, the abuser may push for the surety client to go to another less caring solicitor to get ILA confirmation for the bank, without the bank knowing the reason(s) behind the first solicitor's refusal to act. Clearly more thoughtful and meaningful consideration needs to be given on how solicitors can assist surety clients who do speak up, or reveal information during their meeting, which raises serious concerns of economic abuse.

It is therefore acknowledged that delivering ILA to surety clients relationally presents several risks to solicitors. To repeat the point made towards the beginning of this article, ILA is not, alone, an adequate response to coerced debt. Solicitors who deliver ILA – no matter how seriously they take the requirement to deliver ILA relationally – will not be able to safeguard victim-survivors from (further) economic abuse in every case. In fact, as acknowledged above, through their involvement, ILA solicitors could make the situation worse for the victim-survivor. This will undoubtedly be daunting for solicitors, particularly those prone to delivering legal services in accordance with the market-exchange model. This is why better connections need to be formed between the legal profession and domestic abuse/economic abuse services and charities. Importantly though, the risks associated with delivering ILA relationally should not serve as an excuse to solicitors not to lawyer relationally. This speaks to Remus' relational dynamic of service – solicitors should, despite the risks, take seriously the duty they have towards 'the legal system and society at large.'[109] That is, solicitors should accept that they have an important role to play in the coordinated community response to domestic abuse.[110]

Conclusion

Against the backdrop of increasing awareness about the severe impacts and widespread nature of economic abuse, most interviewees' accounts on how they deliver ILA to women set to secure their intimate partner's debts are deeply concerning. The data presented in this article demonstrates that most interviewees who deliver ILA prioritise commerce over care; that they are principally concerned with the preservation of their self-image as facilitators and not frustrators of commercial transactions, over public good concerns – assisting women potentially experiencing economic abuse. In performing ILA as they outlined, most interviewees are failing to meet their duty under common law (as set out in *Etridge*) and the regulatory standards and requirements under the SRA Code of Conduct. ILA could empower women no matter their circumstances. Insights from interviewees in this article indicate the opposite is happening; that ILA is providing very little meaningful assistance to women but working to the benefit of lenders, and potential abusers.

[108]Mary Ann Dutton and Lisa Goodman, 'Coercion in Intimate Partner Violence: Toward a New Conceptualisation' (2005) 52 *Sex Roles* 743, 746–50.
[109]Remus (n 8) 857.
[110]Sharp-Jeffs (n 50) 103–8.

It has been suggested that a potential reason for interviewees' resistance to provide more relational and caring ILA is because this is not how they approach their wider work as commercial solicitors, where they principally prioritise values associated with the market-exchange model. Another issue is that the *Etridge* guidelines, whilst they do stipulate for relational lawyering in part, are not clear or in harmony with the SRA Code of Conduct on the extent to which lawyers should intervene where there is reason to suspect undue influence. Furthermore, Lord Nicholls' concern about pervading 'family privacy' lines and not causing the surety client 'outrage' by having to respond to intrusive questions, could have discouraged ILA solicitors from learning about the client's circumstances and providing *actual* advice (involving passing judgement). This is, of course, only part of a complex picture. Lenders have also played a role in distorting ILA procedures through sending tick-box checklists and, as has been discussed elsewhere, providing surety client referrals to 'compliant solicitors.'[111]

This paper also calls to attention the need for further research into solicitor interactions with clients who may be experiencing economic abuse. Whilst research has (rightly) focussed on the roles lenders can play in assisting victim-survivors,[112] secured lending agreements are one circumstance where financial service customers are outsourced to receive advice from solicitors before entering a transaction. As such, there is a clear need for a better understanding of victim-survivors' experiences of legal services. As this research demonstrates, there also needs to be broader awareness of economic abuse within the solicitor profession.[113] Considering some solicitors' prioritisation of values such as non-interference (especially in the commercial sector), it is likely that solicitors would feel daunted by the argument presented in this article that they have a role to play in assisting clients experiencing economic abuse. One potential way to increase solicitor confidence in providing relational and caring services is specialist economic abuse training.[114] Through training, solicitors could receive informed advice from experts in the field of economic abuse about how to have 'personal' and safe conversations with clients, and 'actions that should be taken [both legal and practical] following a disclosure.'[115]

Overall, this article highlights the need for the SRA, law firms and solicitors to take more seriously their role towards the public good. Remus' relational lawyering model (and Thornton's associated fictive feminine values) could be influential in unpacking how this can be achieved. Whilst further research is needed to explore *how* solicitors

[111]Rowan (n 60) 176.

[112]This large body of work (some cited in the introduction of this paper) has led to the creation of the 2021 Financial Abuse Code by UK Finance. This is a voluntary code which sets out ways in which financial services institutions can best assist victim-survivors of economic abuse <https://www.ukfinance.org.uk/system/files/2022-12/Financial-Abuse-Code-2021_Updated_2022.pdf.> accessed 9 October 2024. The Financial Conduct Authority (FCA) also speaks directly to economic abuse in their 2021 Guidance on the Fair Treatment of Vulnerable Customers <https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf)> accessed 9 October 2024 and in their 2022 Consumer Duty. For more information on the FCA's Consumer Duty see: <https://survivingeconomicabuse.org/wp-content/uploads/2023/02/Consumer-Duty-Briefing-economic-abuse-.pdf> accessed 8 September 2024.

[113]A search for the term 'economic abuse' on the SRA website yields no relevant results on how solicitors should be sensitive to issues of economic abuse when acting for clients.

[114]Finance UK's 2021 Financial Abuse Code (n 112) 7 outlines that voluntary participants should provide their staff with specialist economic abuse training.

[115]Standing Together Against Domestic Abuse (STADA), *In search of excellence: A refreshed guide to effective domestic abuse partnership work – The Coordinated Community Response* (STADA London, 2020) 47.

can be trained/required to lawyer more relationally, the hope is that this article has at least set out how the lenses of relational lawyering and fictive feminine values help us to understand in more depth what is required of solicitors both in the particular context of providing ILA to surety clients, and beyond.

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