

**The Globalisation of
Regulation of the Legal
Profession**

(Volume II)

by

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Chapter three - The future of international legal work

This chapter consists of four parts. The first analyses literature which has considered what international legal work might look like in the future. The second section moves on to discuss generally what interviewees predicted for the future of international work in their firms. Part three looks more closely at the prospect and reality of cross-national law firm mergers whilst the final section analyses the potential threat of the Big Five firms of accountants.

Part one - The literature

“What management sees in its crystal ball determines, to a great extent, how it prepares for the future. But because all the firms are dealing with hunches, guesswork, and old-fashioned intuition, even the most careful planning may do little to assure success.”

Stevens (1987)

What will the international work of the legal profession look like in the future? Will commercial law firms continue to increase in size and attract lucrative work? Or will other forms of practice grow in popularity? Certainly, prediction is not likely to be easy - to paraphrase Michael Shattock (1998), if people who are remarkably well paid to forecast the financial future can miss the collapse of the Asian Economic Miracle, one might ask how wise it is to speculate on what international legal work will look like in the future. Still, several writers have hazarded guesses here and their views will be considered first.

Nelson (1994) has argued that we cannot now predict the future of corporate law firms in the next century. Nevertheless, if certain assumptions are made, he does expect to see the growth of the corporate legal sector (1994:358):

“If present political and economic trends continue, so that our society experiences more trade with distant partners, and if we continue to follow relatively legalistic approaches to commerce¹, finance and corporate governance, we can expect the

¹ And as Dezalay and Garth point out (1996:209), the rule of law is not inconsistent with a strong rôle for personal relations in the regulation of economic activity. Following Jones (1994a), one could speculate whether some business, particularly in places like China, will use law differently (see also Dezalay and Garth 1996:262).

continued expansion of the corporate legal sector. Within that sector, we can expect that traditional status hierarchies among firms will persist.”

Apart from the above reference to trade, Nelson does not overtly address the international work of these firms and the structures it will take. However, Shapland argues, to the contrary, that the large American law firm might not dominate the market (1996:26):

“I suspect there will be a far more complex picture, but one in which the heterogeneity of corporate needs will parallel the heterogeneity of cross-national legal provision.”

She feels that it will be important to research where the power to choose legal service providers is located within business and whether business perceives any economic benefit in using a similarly structured law firm.

Lee tends to agree with this approach (1993:41):

“Unless a foreign office brings in a steady stream of work, however, it can prove a drain upon the partnership resources. It may be for this reason that, in the longer term, the trend will be towards networks of firms, and perhaps the MNP, rather than the individual international law firms. Certainly, where an international network includes a number of large firms in different jurisdictions, there may be considerable gains through cross-referrals.”

Flood, though, notes that there are as yet no established routines for international work; the struggles to dominate the international market will continue. It is impossible to say at present what will happen but the visions of lawyers are a vital clue (1996:189):

“A partner of one of the largest English law firms commented, “By the year 2000 there will only be a half a dozen big players in the international legal marketplace. We will be one of them.” Given present levels of knowledge it is impossible to say whether his prophesy will come true: world events have moved, and continue to move, rapidly. Nevertheless, he believed in his prophesy and was organising his law firm with that aim in mind².”

² As Harrington (1994:58) also argues: “In the competition over work, lawyers construct legal ideologies about the nature and boundaries of law.”

Two UK and US legal management consultants (of Altman Weil and Hodgart Temporal³) recently set out their views of what would “imminently emerge” as international legal practices. They believe there will be (Lindsay 1998d):

- a handful of global capital markets practices;
- a few dozen global corporate/commercial practices advising clients at the mid-market level;
- international transactional firms which will “fall short” of global practices because they will not be in all or most of the major marketplaces around the world;
- international boutiques which will specialise in niche areas or products;
- “domestic importers” - the firms that advise inward investors by developing referral networks;
- in-house lawyers in multinationals; and
- the Big Five accountants which already have the global infrastructure and brand name recognition to make them formidable competitors.”

In effect, there would be a diversity of legal service provision but it would be dominated “at the top end” by a few “global” practices. Legal personnel recruiter Gareth Quarry agrees that within the next five to ten years the provision of global services will become dominated by a dozen or so firms, at least two of which will be MDPs (multi-disciplinary practices) (Quarry 1998). He believes that the competition to be in this group will have a significant effect on lawyer mobility as lawyers move to firms which they believe will be successful. A more corporate culture will become the norm, lawyers treating moving firms as a means of advancement. Hence, uncertainty will prompt young lawyers to take career decisions based on shorter term considerations than in the past so, for instance, they will be less patient with lockstep⁴. Indeed, he argues that those City firms that still have lockstep in place will be “laying themselves open to pillage by Americans and MDPs in particular” who can offer the highest earnings⁵. This in turn will mean that English firms will increasingly embrace

³ Others who have entered the debate on the future of law firms include Mayson 1997 and McRae 1996.

⁴ Lockstep compensation is the system in which partners’ seniority is rewarded by higher profits. The contrary system, which lawyers use the hunting terminology of “eat what you kill” to describe, involves lawyers being rewarded for the work actually generated.

⁵ Gordon (1998), a partner at the US firm Mayer Brown & Platt, agrees. He feels that lock-step compensation systems are best suited to firms which are particularly financially successful and

“American salaries” for their “star lawyers”, and this will force the following actions (ibid):

“The first step is to demand an increase in productivity. The second is to differentiate between the stars and the merely highly competent. Third, commodity work and, in particular, commodity aspects of lawyering must be driven down to the lowest possible level of operative.

Increasing use will be made of contract lawyers and paralegals to ensure that fixed costs are minimised and flexibility of costs and pricing is maximised.”

Hence, this argument assumes a move to greater hierarchy within firms and an increasing exploitation of non-core staff, such as contract lawyers and paralegals. As such, it bears out Lash and Urry’s (1994) discussion of core and peripheral workers existing within the same nation⁶. Implicitly too, the idea that lawyers will take more active control over the management of their careers and firms confirms Lash and Urry’s belief that globalisation leads to greater reflexivity.

Visions of the future are bound to differ, given the uncertainty and speed of change. One is again reminded of Waters’ (1995) thesis, that globalisation does not imply grand narratives, but relativisation; a number of different stories, outcomes, may unfold. Bearing this in mind, the interviews with lawyers will now be considered.

have relatively homogeneous partnerships. A highly productive partner in a lock-step firm must make enough money so that s/he does not begrudge transferring wealth to less productive partners. He believes that in the US, lockstep tends to be maintained only by a handful of successful New York firms that concentrate on “big-time transactional and securities work.”

⁶ Indeed, I mistrust Quarry’s painting of a rosy future for contract staff and firms - such as higher salaries for contract staff than if they were in full-time employment and a lower cost base for firms - although as a recruitment consultant, his vested interest in promoting this option is obvious. He does not consider the costs of an uncommitted, and possibly resentful staff, of the inequity of extreme hierarchy and insecurity. Moreover, “star lawyers” may be earning so much anyway (and may be relatively happy in their firms) that the additional gains in remuneration which may accrue from moving will not be considered to be worth the risk. Lawyers may therefore choose not to maximise their earnings, setting this off against the bonus of working in a firm whose culture they find less competitive.

Part two - Future work

“[I]t is difficult for the leaders of law firms to plan objectively about the firm’s practice because they are themselves so strongly identified with certain fields or clients.”

“[M]arket planning is very difficult for law firms, both because there are few systematic sources of information about potential demand and because firms cannot always assemble an appropriate group of specialists to service a new field.”

Robert Nelson (1988)

Part one of this chapter noted the difficulty of predicting the future but did state that the opinions and actions of ‘actors’ in this field does help shape and build the future (Flood 1995). The views of interviewees should therefore be instructive.

The London interviewees

I asked interviewees to tell me what they thought the future of international work in their firms would be.

A US partner interviewed summed up his firm’s position this way:

“We are doing well, but we don’t have a lot of foresight in these matters ... It isn’t often that lawyers spot a trend!”⁷

Although some US firms had various planning and review processes from time to time, there was little sense of having a ‘grand plan’ that would shape the future direction of their practice. Most would leave that down to an amorphous sense of “going where the opportunities take us,” thus blurring the boundaries as to how far their work would be proactive and how far it would be reactive. Several of the largest English firms did, however, have broad strategic plans for the future (some of which had been drawn up by management consultants) which were subject to review processes from time to time.

⁷ This reminds me of a comment made by Lavinia Greenlaw (1998), former poet-in-residence at the London law firm Mishcon de Reya. When commenting upon the poetry workshops she organised at the firm, she noted of the participants that: “If anything, they were the opposite of the typical workshop. They were comfortable being analytical and less used to being imaginative.”

However, firms did think that they would expand their international work, although they differed as to how they thought this would occur. Some US firms felt that they were already represented in all the jurisdictions they wanted to be in and so would consolidate their work in existing foreign offices. Others thought that they would open up new offices. Again, much was determined by the nature of the firm's work and the prevailing notion/s of culture and risk aversity - the firms primarily involved in capital markets work tended to adopt the former, consolidatory approach. This bears out the analysis of differences between firms, seen at the end of the last chapter.

The English firms also differed in how they planned to expand internationally. One provincial firm interviewee stated that the firm's first priority was to consolidate its domestic base. The other provincial firm lawyer stated that his firm would be targeting niche areas of practice and geographical regions. Others (of "first tier" firms) felt that they would open other foreign offices, usually by organic growth and limited lateral hiring (again, confirming their expansionary strategies, as discussed in the last chapter). One interviewee, from a City firm just outside 'first-tier' ranking, felt that his firm may also develop by merger as they had too limited a number of partners to expand totally organically.

It was felt that there would be a "conventional basket" of services that commercial clients would demand, particularly those operating in the developing/majority world. Areas such as capital markets work and project finance were thought to be important.

Few areas of the world escaped attention as potential areas for business or the expansion of business. The one exception to this was Africa, where there were great doubts as to the ability of most countries there to stabilise sufficiently to support their work, certainly in the near to mid-term future.

As regards competition for legal work, most lawyers believed that they would continue to compete for work with the same firms they competed against at present. Competitors obviously differed from firm to firm and from specialism to specialism. Competition would be “stiff” and there might be some contraction in the number of US firms overall which were successful in London.

A couple of lawyers felt that some continental firms might organise on a scale large enough to compete internationally with the larger firms, but most lawyers thought their future competition would be Anglo-American.

The Frankfurt interviewees

Interviewees differed on what they thought would be growth areas of work in the future, believing that the areas they were already interested in would grow. This appears to confirm Nelson’s view (which opened this section) that lawyers find planning difficult as they are so strongly identified with certain fields/clients. Thus, for example, those engaged primarily in M&A and capital markets work would state that work in those areas would increase. Most interviewees felt that work in the area of IT would expand.

Nevertheless, several interviewees noted the difficulties in knowing what the most highly paid areas of work would be in the future, as change was so fast. One English partner commented on the future of work as follows:

“I expect you will see an ever-moving line of value-added, as securitisation and buy-outs become almost commodities and the know-how seeps down to everyone. And there’ll be an ever smaller number of firms actually managing to add real value-added, with premium pricing - and a lot of people stuck in the middle finding they are providing semi-commodified services, basically looking for differentiation based on product delivery or pricing.”

It will be seen in the next section that firms held different opinions about whether or not they would merge. Yet all the interviewees stated that their firms would grow. The strategies of German firms differed - some would open more foreign offices but others felt that they were already represented in the jurisdictions they

were interested in. Again, much depended upon the work undertaken by the firms, their resources and their cultural willingness to support the risks of expansion.

Interviewees' responses also differed to the question of who would be their competitors in the future. Opinions on the Big Five will be considered later. In relation to law firms, the US and UK firms were most likely to believe that they would be competing with the same law firms in the future as today. This to some extent reflected their views that they were already positioned in the markets they wanted to be in and so the issue was more one of intensifying their efforts in these areas.

By way of contrast, the German firms were more uncertain about their future competitors. This also related to the issue of how future work would be undertaken. For instance, in reply to the question "*Who do you think your competitors internationally will be in the future?*", two interviewees replied that they were not sure whether their firms would be able to compete internationally in the future. This issue will be explored next in the section on mergers. However, those firms which believed that they would not open more foreign offices thought their competitors would be the same as at present.

Comment

Second guessing what the future of legal work will be is likely to be an imprecise art, particularly as changes in the business world are occurring so quickly. Formulating strategy to govern international work will be particularly difficult as the generalisation is that risk increases with distance. If one adds to this the poor reputation lawyers have as managers (Mayson 1997) and the huge costs of international expansion (figures will be given in the next section), it is perhaps unsurprising that this was an issue which many interviewees seemed to be particularly worried about.

That law firms often decided on different strategies is a reflection of the difficulty of knowing what is the most appropriate policy to pursue and also the differences which exist both within and between law firms of different nations, as discussed earlier. Such differences will be returned to again in the next part of the thesis, which considers the issue of cross-national law firm mergers.

Part three - Mergers

Will there be mergers between US and UK firms?

“We believe that by the year 2000, there will be a relatively small group of law firms who have mastered the art of providing internationally integrated legal services to major clients.”

“There are big opportunities elsewhere and clients want big international firms, ones which have experience of international work.”

English solicitors in London

I asked the lawyers in London whether they thought there would be mergers between US and UK law firms in the future. One of the reasons for asking this question was that a major trans-Atlantic merger between one of the UK and one of the US global mega-firms might bring about an increased emulation of the practices of the Big Five firms of accountants.

Before their responses are considered, it is worth setting out Sheldon’s summation of this issue, to provide some sense of the difficulties which lawyers might perceive such link-ups might bring. Sheldon (1994:59) lists the potential problems of mergers as follows:

- “1. On any model of a merger, and there are several, it is likely that there would be permanent and irreversible cultural and constitutional changes to one or both of the firms involved. The “culture” of a law firm is something that you tamper with at your peril.
2. It would require a very long lead-time, huge effort and very substantial resources of management, manpower and money to initiate and establish an integrated merged firm. There would inevitably be substantial adverse impact on the short to medium-term financial bottom line - and compensatory financial benefits would by no means be certain and likely to be a very long way ahead.

3. It would be a formidable and continuing task to integrate and manage the merged firm in a way that was cohesive rather than divisive. Any imbalance in profitability and differences between tax regimes might necessitate the running of two separate operations, which would render the job even more difficult.
4. There would be obvious difficulties in identifying, and negotiating with, a willing and appropriate counter-party - particularly since, in these media-hungry days, it would be quite difficult to negotiate the terms without the secret getting out.
5. There would be an increase in instances where each firm was barred from work because of increased possibilities of conflicts of interest.
6. Each firm would (almost certainly) become financially liable for claims against the other.
7. Finally, a merger might call into question, and possibly de-stabilise, relationships with major clients that had existing close ties with other law firms in the foreign country of the chosen counter party. There would also, of course, be an inevitable decline in, or elimination of, referral work from these other law firms - which might or might not be a significant factor.”

Effectively, mergers might engender cultural problems, a dilution of profits, managerial difficulties, additional conflict of interest clashes and ultimately destabilise client relationships. Bearing in mind the potential magnitude of such problems, how did the interviewees view mergers?

Most lawyers interviewed admitted to being fearful of such mergers. The dismal failures of certain law firms to merge successfully in the past probably had some part to play in this response. Mirroring Sheldon’s analysis, the potential problems seemed great:

“Most people instinctively shy away from mergers and alliances as they seem to be so complex and full of dangerous issues.”

“Most of the past attempts at mergers have not come to anything, mostly as firms are not sure who is going to swallow whom⁸.”

Such dangerous issues included how to split clients and work - firms have different specialisms and that might make it hard to consolidate the delivery of

⁸ Kelly also argues (1994:218) that a threat to the organisational integrity of law firms is opportunism, “the pursuit of immediate, short-run advantages in a way inadequately controlled by considerations of principle and ultimate consequence.” He believes that certain forms of opportunism would be almost instantly lethal, such as ill-considered mergers that unravelled both merging firms, or attempts to co-opt partners threatening to leave with compensation arrangements that demoralised the other partners and undermined the firm’s sense of itself and its character.

service to clients. The concept of culture again raised its head. It was felt that the economics of US and UK practice were very different and it would be difficult to marry the two. One particular problem would be how to work out acceptable financial compensation for lawyers, especially if one firm was founded on lockstep and the other was not (as noted by Sheldon above). Other potential problems included conflicting out clients and working out decision-making processes, particularly if one firm had been traditionally run in a more democratic, collegial way⁹. Decisions would be rendered more difficult due to the nature of partnership and the necessity of reaching a consensus¹⁰. Alternatives to mergers may seem more attractive to some firms, such as umbrella agreements for sharing clients.

One solicitor felt that it was the US firms which were more interested in a merger:

“They want a UK presence - their ability to generate work in Europe has often been less successful than they wanted it to be. Europeans are more comfortable with UK firms and are suspicious of someone who tells them how to do something (and US lawyers try to do things in a US way). Some will have to merge as they won't get enough people otherwise.”

This comment suggests that US law firms have not been able to dominate the UK and European market (as Dezalay 1995 argued) and that US firms do not necessarily practise in a fashion which is popular with local clients. It implies that UK firms are more culturally sensitive to the needs of clients within Europe, although the interviewee, as an English solicitor, had an obvious vested interest in this matter. Indeed, as has been seen above, US firms have increased their recruitment of English solicitors since 1995, so the last remark that they are unable to “get enough people” may have less force these days.

⁹ A further discussion of the problems of merging professional service firms is to be found in the article by Greenwood, Hinings and Brown (1994).

¹⁰ Robert Cox (quoted in Stevens (1987) argues that: “An organization crawls at the pace of its slowest members.”

Notwithstanding this widespread sense of wariness of mergers, it seemed that firms would reconsider their options if a strong economic case for a merger could be made out at a particular time (“If there was a potential to make money, we would consider it”). Similarly, Nelson (1988:65) found when interviewing lawyers in large law firms in the States that the opportunities for tapping new client sources and providing additional services to clients were foremost in firms’ thoughts when considering mergers. He believes (ibid:67) that mergers occur so that firms can acquire the “personal referral networks” of lawyers, as lawyers bring their client contacts with them as (ibid:68):

“If access to new client sources were not controlled through referral networks, firms could freely compete for new business simply by developing expertise in a field, without having to penetrate a new network.¹¹”

However, lawyers felt that the arguments in favour of a merger would have to be strong. All the English solicitors believed that mergers would occur, although they tended to think that the “second tier” or medium and weaker firms would be more attracted by the notion in an attempt to compete with the larger firms. Still, this could rapidly change, due to ‘pack’ behaviour amongst law firms. As one solicitor posited:

“If one large (first-tier)¹² UK firm merged, there would be several others afterwards, as the others would be nervous about whether the firm was gaining a commercial advantage ... A boom in, for instance, takeover work could encourage thoughts of a merger, although the big firms seem to have put mergers on the back-burner at the present.”

And as Abel notes (1994:741):

“... competitive pressures inspire fear - even terror - of being left out of mergers. Law firms sometimes appear to be seized by the adolescent angst that all your friends are at a party to which you haven’t been invited - it is unbearable not to be there, even if you know you would have a terrible time.”

¹¹ Although it should be noted that a merger would provide instantaneous expertise.

¹² A smaller merger of a London and New York firm was announced in September 1998 (Rice 1998c).

MacDonald (1989:595), quoted in the first literature review, believed that as lawyers are not taught managerial skills, firms often adapted to business developments via trial and error and emulation. Hence they might not subject their own policies to rigorous analysis. Indeed, as noted in the section on methodology, interviewees often asked (once the interview was over) “Do other firms say the same thing?”, expressing great interest in others’ strategies and perhaps too some insecurity about their own firms’ decisions.

In March 1999, rumours circulated that the US firm of Rogers & Wells and Clifford Chance were in merger talks (Barrett 1999). The reason behind Rogers & Wells’ interest was said to be the fear that radical consolidation over the next decade in the “global law industry will yield a half-dozen international titans and a lot of also-rans with shrinking profit margins” (ibid). The firm would be able to offer its clients a European service if it merged with Clifford Chance, making use of its foreign offices (Dignan and Whalley 1999). In April, the rumours were stronger and Clifford Chance was also said to be in merger talks with the Australian firm Mallesons Stephen Jacques (Farrell 1999), although the talks with Mallesons were then called off (Townsend 1999) only to restart later (Farrell 1999b).

For Clifford Chance, mooted benefits of the merger (which was officially confirmed in July 1999 - Mason 1999) included the ability to use Rogers & Wells’ links with US investments banks, to tap into US international capital markets work¹³ and attract lawyers wanting to go to the US (Dignan and Whalley 1999). Rogers & Wells (with 83 partners as opposed to Clifford Chance’s 370 partners) is much smaller than Clifford Chance and so did not pose a great threat to the City firm’s “autonomy”. However, as the US firm was considered to be a “second tier” firm, the rationale for the merger might be less strong if another first tier City firm merged with a first tier US firm (ibid).

¹³ The interest of Clifford Chance in gaining access to the US firm’s capital markets expertise may suggest that they would gain credibility with clients if they had access to a large number of US lawyers, that it might take too long to build up such expertise organically and that capital markets work is still considered to be one of the most lucrative areas of practice.

This strategy might also be undermined by developments in finance work. For instance, some City analysts believe that finance work is becoming *less* global (Wilkins 1999a). There are said to be signs that the US and European economies are beginning to polarise, meaning that less joint Europe-US work may be undertaken in the future as debt may be raised and equity issued in one or the other market (so that most European companies and banks would raise finance “domestically” (ibid). If this is the case, then (ibid):

“Shearman & Sterling and Cleary Gottlieb, with fewer mouths to feed, would seem to be correct in sticking to high quality legal work, and turning away any financial transaction that requires volume lawyer attention to generate the right profit margins. Both firms still have around 700 lawyers and profits nearly double those of the big English global contenders. “Were they to prove to be a better global model in the medium to long term, the English strategy, which concentrates more on growth than profitability, will look seriously flawed,” comments another ex-Clifford Chance partner.””

Be that as it may, we still might wonder why this is happening now, when four years ago the law firms visited were extremely nervous about the idea of trans-Atlantic mergers. It is still the case that many of the perceived obstacles to mergers remain - such as potential cultural problems, aligning compensation structures and dealing with conflicts of interest. However, it may be that City firms have directed their attention more towards establishing their European profile in the recent past, and now feel that they are stronger, strong enough to contemplate merger with a US firm without feeling that they would necessarily be swamped in the new organisation. And, as will be explored further in the next section, the idea that “global businesses need global law firms” may have increased its popularity in the intervening period to such an extent that firms are afraid of the consequences of not acting.

This does not mean, however, that a rash of similar mergers will now occur. The most profitable US law firms have been reported (in the *New York Law Journal*) not to be interested in merging with City firms, having already decided on their

international strategies, and City firms such as Freshfields “are not willing to settle for second-rate U.S. merger mates” (Brennan 1999). Instead the City firms will expand their New York offices with lateral hires (ibid). In effect, firms may not see this as a “true mega-merger”, linking a very “top” US and City firm, as one managing partner of a London firm suggested (quoted in Brennan 1999):

““I don’t think this is the mega-merger,” he said. “Therefore its impact won’t necessarily mean that the magic circle firms will run around and try to get married. This will be a sit-back-and-watch merger. The first real mega-merger will lead to a bout of activity.””

The situation in Germany will now be considered.

Mergers between Anglo-American and German firms

“In Germany globalization is now regarded as the main threat to the Federal Republic’s post-war reconstruction of social order.”

Martin Albrow (1998)

“If an isolated lateral transfer is sinful and is conducted only under extraordinary circumstances, gobbling up an entire firm, especially one with 80 to 100 partners, is blasphemy.”

Stevens (1987)

Pondering the advantages and disadvantages of cross-cultural mergers has not remained an academic exercise for several UK and German law firms. Indeed, in 1997, 1998 and 1999 a series of link-ups and strategy announcements were reported in the press; German and Anglo-American firms have formed, or are considering whether to form, alliances or mergers with each other. This section will discuss these mergers, first analysing what the advantages (and disadvantages) of such alliances might be, before discussing more generally who or what is driving these developments.

To begin with, it is useful to set out ‘the story so far’. The chronology of events reads as follows:

- October 1997 - Allen & Overy announces that it is to double the size of its Frankfurt office (Unattributed 1997a);

- November 1997 - Bruckhaus Westrick Stegemann, one of the most highly regarded German firms, announces that it is to merge with Heller Löber, an Austrian firm. It is the first cross-border merger of a German and an Austrian firm¹⁴;
- January 1998 - Freshfields announces that it is to set up an alliance with the German firm Deringer, the intention being that they merge within four years at the latest. Freshfields' lawyers in Frankfurt will move to work in the offices of Deringer;
- January 1998 - Other firms rumoured to be in negotiations concerning possible link-ups are Shearman & Sterling (with Bruckhaus), and Pünder (with Arthur Anderson);
- February 1998 - Yet more firms are reported to be searching for German affiliates ("Everybody is talking to everybody" - Stewart 1998b) and certain British firms are believed to be considering opening up offices in Frankfurt;
- March 1998 - Linklaters announces that it is to split with its erstwhile German alliance partner, Schön Nolte, and link up with Oppenhoff and Rädler. Linklaters' lawyers in Frankfurt are to move to Oppenhoff's offices (Unattributed 1998b). Linklaters is also reported to be in preliminary merger talks with three leading European firms (Stewart and Lindsay 1998);
- March 1998 - Clifford Chance is said to be "rattled" by the recent German alliance of Freshfields, states that it plans to double its size in Frankfurt within two years, and its managing European partner states that "no one can exclude the option of a big international merger of top law firms" (Rice 1998b). The firm is reported to be in preliminary mergers talks with three leading European firms (understood to be firms in Spain, Germany and Italy), to double its number of lawyers in Europe (Stewart and Lindsay 1998);
- May 1998 - The German firm Graf von Westphalen Fritze & Modest (90 lawyers) links up with the Bristol headquartered law firm Osborne Clarke, forming a European Economic Interest Grouping which includes other firms from the Netherlands, Spain, Denmark and Italy. The Frankfurt offices of

¹⁴ Another cross-border merger occurred in April, when the German firm Schürmann & Partner merged with the Swedish firm Grönberg Advokatbyrå (Unattributed 1998k).

Osborne Clarke and Graf von Westphalen are in the same building (Unattributed 1998i);

- May 1998 - The English firm S J Berwin & Co and the Frankfurt law firm Knopf, Tulloch & Partner (a niche private equity advisory firm) announce their cooperation agreement (Unattributed 1998f);
- June 1998 - Boesebeck Droste is reported to be talking to both Hammond Suddards (the UK firm headquartered in Leeds) and Clifford Chance about an alliance leading to a merger (Unattributed 1998p);
- June 1998 - The German firm Gleiss Lutz Hootz Hirsch announces a merger with the continental firm Stibbe Simont Monahan Duhot (of Amsterdam, Brussels and Paris); it is said that a tie-up with an Anglo-Saxon firm will be the next priority and that the firm has been “practically besieged” by City law firms seeking mergers (Tyler 1998d);
- June 1998 - The German firm Beiten Burkhardt Mittl & Wegener votes in favour of a strategy to merge with law firms in France, Italy, Austria, the Netherlands and Spain before linking with a leading US or UK firm. They state that they do not want to be “swallowed up” by a large City firm (Unattributed 1998v);
- July 1998 - Linklaters announces the formation of its pan-European Alliance (consisting of its offices and those of Oppenhoff & Rädler (German), De Brauw Blackstone Westbroek NV (Dutch), De Bandt, van Hecke & Lagae (Belgian), and Lagerlöf & Leman (Swedish) (Unattributed 1998j). Linklaters & Paines is renamed Linklaters & Alliance, the firms committing themselves to move towards a full merger¹⁵. The firms will pool a proportion of their profits, ensuring that Linklaters subsidises the other firms but there is speculation that underperforming partners will be sacked (Tyler 1998c);
- September 1998 - Several partners from the German firm Graf von Westphalen (which began its formal association with Osborne Clarke in May) leave the firm to set up their own law firm;

¹⁵ However, Rice (1998c) in the Financial Times reports that “observers” believe that as an alliance Linklaters & Alliance will be unlikely to meet the demands of the market for a one-stop shop for cross border legal services, in the short term at least.

- September 1998 - The pan-European Pünder group finally collapses (Tyler 1998), firms having disagreed over the speed at which they should integrate;
- March 1999 - Gleiss pulls out of its proposed merger “at the eleventh hour” due to opposition from a small group of partners at its Stuttgart office (Unattributed 1999f);
- April 1999 - The German firms of Hasche Eschenlohr Pelzer Riesenkampf Fischötter and Sigle Loose Schmidt-Diemitz announce their merger to form the fifth largest German firm (with 220 lawyers, notaries and tax advisers) (Unattributed 1999i). The firm will join Cameron McKenna in an alliance which includes six European firms which aim to merge by 2003 (Farrell 1999a). Cameron’s managing partner stated “This is an integral part of Cameron McKenna’s strategy to meet client demands for integrated, transnational services” (ibid);
- April 1999 - Coudert Brothers merges with the eight partner Frankfurt firm of Fielder and Forster, the latter firm stating that the merger would benefit its clients which had overseas interests (Unattributed 1999h);
- June 1999 - The German firm of Beiten Burkhardt Mittl & Wegener announces a merger with three other continental European firms (from France, Switzerland and Italy), stating that “We don’t want to be an outer office of an English or American lawyer-factory, receiving directives from a foreign head-quarters” (quoted in Unattributed 1999j). However, in a different journal (European Counsel) the firms were stated to be open to offers from further strategic partners, including a possible link-up with an Anglo-Saxon firm (Unattributed 1999n);
- July 1999 - Clifford Chance is reported to be in merger talks with the German firm of Pünder Volhard Weber & Axster. Pünder’s partners voted in April to take the “quickest route to becoming a global law firm, through merger” (Farrell and Callister 1999). It is later confirmed that Clifford Chance, Rogers & Wells and Pünder are to merge, creating the world’s largest law firm in terms of both headcount and turnover (Mason 1999); and

- July 1999 - Lovell White Durrant is reported to be in merger talks with the German firm of Boesebeck Droste, Boesebeck having terminated merger discussions with Clifford Chance (Callister 1999b).

The reasons why Anglo-American law firms might be interested in mergers with German firms were discussed earlier in the chapter. It was stated there that “almost all my UK and US interviewees were considering the possibility of merging with German firms (or had already merged)”, as a response to the difficulties they had faced in establishing themselves in the ‘German ‘market’. Several are also likely to want to strengthen their international presence, as will be discussed towards the end of this section. Yet the German interviewees were much more cautious about mergers. Their views will now be turned to.

Three of the interviewees said that their firms would not merge with Anglo-American firms. They were keen not to lose their identity, one adding that “size is not all that is of interest to a client.” This point will be returned to below.

Several said that their firms were discussing the issue of possible mergers with a UK or US firm, but opinion was split in their firm about what to do. One partner’s response explained some of the doubts:

“We give a very high quality of service to clients and the fashion in which we practise law is something we enjoy and we don’t want to change that.”

This quote provides some indication again of the emphasis many German law firms place on quality; this appears to refer to the standard of advice given to clients and so emphasises the importance attached to lawyers’ knowledge base. The implication is that merging might lead to a dilution in the quality of the firm’s work, perhaps suggesting that their merger partner’s lawyers would not match their standards. Indeed, Rogowski (1995:126) suggests that the emphasis German corporate law firms place on the quality of their advice might be the reason for the slower growth of German law firms compared with firms from common law countries.

The cultural problems mergers could bring should not be underestimated, according to several interviewees. The usual issues of compensation, management structures and so on¹⁶ would need to be addressed, yet:

“Management is more hierarchical in the UK - in Germany, even in a large partnership, you are very independent.”

It seemed that this lawyer believed that the lower leverage ratios often seen in German firms and lawyers’ more independent ways of working should not be discarded lightly.

Moreover, nationality clashes could compound the problems:

“It’s hard enough to make national mergers work, when you share the same education and cultural background. An international merger would be very difficult. We are people-based firms.”

The point was also made by one German partner that merging with a UK firm (as opposed to a US firm) might be particularly difficult. Very few German lawyers had spent time in England - they were more likely to have spent time in the States (taking a LLM or undertaking work experience in a law firm there). Many actually knew less about English firms than they thought they did.

Behind much of this is the fear that a merger effectively would mean a “takeover” (and the ultimate fear of closure if the merger did not work out). Three firms mentioned that they would be more likely to seek mergers with other continental firms to become a stronger entity before considering seriously the prospect of merger with a UK or a US firm. In fact, the Bruckhaus/Heller Löber merger might itself be seen as a defensive measure, a bid to strengthen their market position and to gain time. As one Bruckhaus source quoted in *The Lawyer* said (Unattributed 1998b):

¹⁶ Loss of referral work was not explicitly mentioned by interviewees but this also might be an issue (see later).

“We wanted to be an interesting partner for whoever might approach us.”

Yet if the risks were so high, why would these firms even be contemplating merger? Certainly, only in 1992 Griffiths reported that (1992:27):

“Despite the influx of British and American lawyers over the last couple of years, they [German firms] have steadfastly refused to be seduced by Anglo-Saxon ways. And why should they? Frankfurt firms are successful enough already. They have no need to look to another model.”

Indeed, as noted before, in 1994 Rogowski stated that (1994:26) “The American and British law firms that have established offices in Frankfurt and in other German cities are not taken seriously by the snobbish German firms.”

To address this issue, we need to look at what the interviewees felt the international legal ‘market’ of the future would look like.

The consensus of interviewees (German, American and British) was that there was a strong likelihood that within the next decade there would be a smaller number of law firms who would be able to service “big ticket” international work¹⁷. As a partner at Oppenhoff and Rädler felt (Unattributed 1998b):

“My guess is that, in the not too distant future, we will have a Big Six or 10 of law firms at an international level. Either you will be part of a big player or you will be a smaller regional boutique.”¹⁸

Interviewees differed on how many firms would make up this global group - estimates varied from 3/4 to 10¹⁹. Beneath these firms would be a second tier of international firms with offices abroad and then national firms. The fate of

¹⁷ There were two exceptions to this consensus. One German lawyer felt that law firms would be pushed out of the market by Big Five accountancy firms - his views are shown later. Another (a German national working for a US niche firm) argued that there would be more niche firms and that the biggest German firms would not merge any more as they were tired of merging.

¹⁸ See also Scott (1998), Unattributed (1998c) and Bruckhaus’ statement upon merger (Unattributed 1997b): “We at Bruckhaus do not want to end up as a German niche firm, we want to be an international firm. We are starting from our home market, the continent.”

¹⁹ Only one lawyer believed that there would be more than ten firms in this ‘élite’ group - he was a lawyer in one of the smallest German law firms visited.

medium sized firms in Germany was disputed - some interviews felt that they would be squeezed out of the market whereas others believed that there would still be work for them.

Similarly, Alan Peck of Freshfields (quoted in Edwards 1999a) stated in 1999 that:

“At the end of the day, there should be only around six truly global firms ... This is the minimum needed to avoid conflicts, and that is all the market will need.”

Yet although these lawyers bandied around the term “global firm”, the concept was not used in a well-defined fashion. That estimates of the numbers of law firms belonging to this group ranged from three to more than ten is perhaps indicative of this imprecision²⁰. In fact, it did not seem that interviewees thought that a global firm should cover every continent. Instead, it appeared that global firms would be those with the highest number of foreign offices, although this would, of course, rule out the inclusion of some of the most profitable US practices within this global group. Hence, a “global firm” brought to mind a City practice following the Clifford Chance model. Perhaps then we should be unsurprised that it is the City firms which have promoted the idea of the all-conquering global firm, perhaps as one means to convince foreign firms that it would be a good idea if they merged with them?

Indeed, some continental firms may be becoming more convinced by the concept. Those interested in mergers are likely to agree with Terence Kyle of Linklaters (quoted in Boxell 1998) who argues that continental firms in general are becoming more willing to establish relationships with firms like his as:

“The firms in continental Europe have come to realise that if they are not big enough to pursue an independent line they would be better joining a larger organisation.”

²⁰ This uncertainty is mirrored in the phrase “big ticket” work, used to describe the type of work these law firms would carry out. The imprecision of the term may indicate the difficulties lawyers experience in defining what the most lucrative areas of work will be in the future.

And, to David Harrel's mind, (SJ Berwin's senior partner quoted in Rice 1998b):

“[T]he biggest single force for change in the European legal services market is that law firms in the European Union, and in Germany and Italy in particular, have decided they should not be afraid of the London law firms and that an alliance is a good way forward.”

An article in *Legal Business* magazine in March 1999 stated that “almost everyone” in the legal world believed that “it is simply too expensive to follow the all-encompassing global route Freshfields and Clifford Chance have taken” (Edwards 1999a). Analysts in the article estimate that the cost of setting up only five offices (in Frankfurt, Hong Kong, London, New York and Tokyo) would cost £26 million, spent over a three year period. Estimates of how much setting up, from scratch, the kind of practice Clifford Chance has (with 24 offices) range up to £500 million. Few firms have that kind of money at their disposal and, as has been seen, the German firms tend to have a smaller number of foreign offices than City firms. Consequently, the possibility of merging with these firms might be attractive for German firms which believe that numerous foreign offices are essential yet they cannot afford to open them alone. A merger would thus enable them to become part of a “global firm”.

Indeed, cross-national mergers so far have been primarily with UK firms, supporting the idea that German firms are hoping to gain greater global coverage by gaining access to the foreign offices of City firms (as US firms are more likely to have a limited number of foreign offices, as discussed before). One German interviewee commented:

“UK firms are far ahead of us in terms of marketing expertise, in terms of coping with the competition, and they are much better organised²¹. And we have to think about becoming European or even global and the British firms are ahead of us, they are bigger and so it is only logical to talk to them, to consider a future with one of those firms.”

²¹ This comment about the management of UK firms was dealt with in the last chapter, but it is interesting to note that this is also seen as a point favouring mergers.

The point about size, that UK firms “are bigger”, is a little ambiguous here, as it could refer to the foreign offices of City firms or their overall size. To take up the latter point, some lawyers argued that international cases are becoming increasingly complicated and that only firms of a certain (undefined) size will be able to undertake them²² and that is necessitating consolidation. As one German partner posited:

“Apparently clients²³ think that only firms of a certain size can do certain jobs efficiently and probably that is true.”

However, lawyers in niche firms disagreed with this²⁴ and it is certainly not a statement which my interviewees found uncontentious²⁵. That said, a large firm may appear more attractive to some clients, irrespective of whether that means the work is more effectively handled. Clients may choose large firms to take advantage of their reputation (Eccles and Crane 1988) and legitimacy (Reichman 1992). As a German partner commented:

“Everyone merges to become bigger, to look better, to look more important and to attract more clients, hopefully.”

Further, Rice believes (1998b) that German firms are losing out on transactions involving international money as these deals increasingly use Anglo-Saxon documentation and the German firms lack significant US and UK law capability (citing the Daimler-Benz/Chrysler deal in support of this²⁶). Jonathon Blake

²² See also the article “City firms get lion’s share of mega deals” (Unattributed 1998a), which suggests that only a few firms have the ability to advise on huge cross-border buy-outs.

²³ The rôle of clients in all this will be considered at the end of this section.

²⁴ It has been shown before, though, that interviewees largely discounted the relevance of networks as a vehicle through which to undertake work.

²⁵ Academics also disagree about why law firms grow - see, for instance, the work of Gilson and Mnookin (1985) and Nelson’s critique (1998, page 62 onwards).

²⁶ Here, although the merged company was structured as a German company, the US firm Shearman & Sterling were the chief advisors (using the German lawyers in their firm). The only German firm with a real rôle in the transaction was Bruckhaus (Rice 1998b; see also Unattributed 1998h).

(quoted in Rice 1998b²⁷), head of private equity at the City law firm S J Berwin & Co, has also argued out that the availability of capital markets work is one reason for the mergers. He comments that in the provision of legal services to the global financial markets, the primary flows of legal work are from the US and UK outwards. However, this does not mean that German law firms should necessarily merge with an Anglo-American firm - they could choose instead to work with lots of UK and US firms as the issue of loss of referral business should be taken seriously:

“It’s a brave move to link if you’ve got good relations with lots of UK and US firms²⁸.”

This is a difficult choice to make. The uncertainty of ‘global strategies’ is captured in the following quotes from German partners:

“Now people are seeing that the economies are becoming more and more global and so the lawyers think they have to follow, such as the accountants did before us and the banks before the accountants. Whether it is right or wrong, we will know in 50 years’ time, perhaps, but that’s the trend.”

“[In relation to the market in 10 years’ time] [o]ne possibility is that there would be a Big Six or Big Five of law firms. Another scenario is that this is not appreciated by the market and the clients will insist on absolute high quality firms in each jurisdiction, forcing law firms to focus on quality as a local player. And this of course would strengthen networks. It is very hard to say. You know, I think there could be disappointment with these mega-firms; big clients like Deutsche Bank might say after a deal, “Well, Germany was just spendid but the Spanish office was a catastrophe ...” So it depends a little bit on how sophisticated clients are. And it depends on the convenience of this one-stop shopping and going for the upmost quality ... Those big global law firms might become commodity providers whilst for the high premium work, clients might go to individual law firms, like Davis Polk or Cravath. This is pure speculation - it could go either way.”

In fact, two German interviewees felt that there would still be highly paid work available for a couple of “top” German national firms to be “happily supported by

²⁷ Only one German interviewee, however, mentioned that UK and US firms also enjoyed pre-eminence in certain areas of law, the fact that English and New York law is popular in many international transactions and the possible benefits of English being one’s native tongue. I had expected that these might be reasons explicitly given as to why a ‘legal Big Five’ might emerge.

²⁸ Although firms which rely heavily on capital markets work, where investment bankers are likely to make the decisions about counsel, may be less concerned about referral work.

German work” without merging²⁹. English firms were believed to be less fortunate as they were financial firms and could not rely on their home industrial clientele (and so “had to become global”), as was discussed before. One might add that if German industrial clients internationalised as predicted, then this view might still be valid if clients were not concerned about the limited number of foreign offices of their home firm.

It may be useful to discuss the case of the City firm Slaughter and May at this point. Slaughter and May decided to concentrate on providing English law advice whilst their peers were investing in foreign office and foreign law capability (Lindsay 1998a). This has meant that they have maintained their position as the most profitable firm in the country (see the table in appendix two), avoiding the international expenses of other firms³⁰. However, by the start of 1997, Lindsay (1998a) reported that there were (anecdotal) signs that the “best law graduates looking for jobs were starting to think of Linklaters or Freshfields before Slaughters because of its lack of international presence.” At that time, Slaughters decided to step up their referral relationships with a number of firms (which include Davis Polk & Wardwell, Cravath Swaine & Moore, Sullivan & Cromwell and Simpson Thacher & Bartlett in the States and Bruckhaus Heller Löber and Hengeler Müller in Germany), urging them to do joint tenders³¹. Similarly, Davis Polk and Hengeler³² have established a referral relationship for

²⁹ Although another lawyer argued that firms which remained national would not be able to attract the best lawyers: “The best people will go to the biggest firms.”

³⁰ Slaughters are also reluctant to hire foreign lawyers for cultural reasons, and at this point the discussion on lateral hiring found earlier in the thesis is pertinent. As Richard Slater, their head of banking, noted (quoted in Lindsay 1998a): “The majority of our lawyers come to us straight from university, they’re still being trained here ... That’s where we think our quality mostly arises from. With that goes an element of loyalty and commitment. It’s difficult to see that you can preserve those elements if you are doing a lot of lateral hiring”. However, Slaughters is increasingly laterally hiring assistant solicitors in London.

³¹ Thus, Slaughters could do work with a US equity tranche and in return the New York firms could pitch for project finance transactions which might be governed by English law.

³² The US firm of Fried, Frank, Harris, Shriver & Jacobson also set up a securities association with the City firm of Simmons and Simmons in 1998 (Lee 1998).

equity offerings, which enabled them to advise on the \$1.2 billion US offering by Bayerische Vereinsbank in 1997/8 (Forster 1998).

By 1999, Slaughters were reported to have taken further steps to consolidate this “best friends policy”. Hence, Slaughters and Hengeler Müller have established a steering group to oversee the practical elements of joint initiatives and this group meets every five or six weeks in London or Germany (Edwards 1999). The two firms have also taken steps to integrate some of their computer systems, have set up joint billing procedures and have held joint events in which law students from Cambridge University were bussed to London to hear presentations on the firms’ combined international strategy. Lawyers are also being seconded to the “best friend” firms (ibid). This strategy supports Cox, Clegg and Ietto-Gillies (1993:10) view, seen earlier, that:

“Where culturally-based economising relationships are in evidence, this would imply that firms need not themselves become large in order to capture economies of scale and scope, that is to say that the monolithic corporation need not be the culminating form of international business.”

Slaughters’ avowed reason for pursuing this strategy is that quality of service is diluted when a firm goes multi-jurisdictional (Edwards 1999). They believe that they are able to instruct the best firms in each jurisdiction. It is also probable that they want to retain their own cultural ethos, as seen before. One commentator has stated that he believes that this strategy now makes more sense for Slaughters as it is a strategy with no competition, as the firm’s four closest competitors in its home market have taken a different path (Pritchard 1999).

However, this does not mean, according to Lindsay (1998a), that Slaughters is trying to expand into international capital markets work, but rather to ensure that they can keep servicing existing clients - indeed, it seems that their capital markets and projects work appear to be “dropping off” (ibid). Instead, the firm has focused on M&A work at home.

Still, it does not appear that Slaughters is building upon its “pole position” for servicing blue-chip UK clients, taking market share from other top City firms (ibid). Linklaters, Freshfields and Clifford Chance have kept up with Slaughters on UK M&A work. As M&A work is volatile in nature, this might leave the firm somewhat vulnerable in the event of a recession. There is also the potential threat of those US firms in London which are expanding to undertake UK corporate law. Thus, the success of their policy will depend to some extent on the continued strength of the market for their work in the UK and also, of course, their clients’ needs and preferences.

To focus more closely on why consolidation is occurring at all raises the question of who/what is generating change. Is the development of a small number of one-stop “global firms” occurring at the behest of clients or are law firms themselves pushing developments? Effectively, is change client-led or firm-led?

To start with clients, the lack of research on clients’ views has been noted several times before. It is easy, then, for firms to say that clients want the convenience of one-stop shopping without this being easy to refute. However, the example of Shell has been noted before, whose lawyer stated that they felt perfectly able to choose the lawyers they wanted in each jurisdiction (Schraven 1994). Not all clients may want to use global firms for all or even part of their work.

Nevertheless, there are certain types of international work which might be more easily handled by firms with their own offices in multiple jurisdictions, such as massive cross-border M&A cases, where clients might appreciate the efficiency costs gained in using the same firm in different countries (for instance, in ensuring consistency in documentation, in the existence of the firm’s established internal communication structures, in billing from one source and - hopefully - using a cross-jurisdictional team which has worked together before)³³. There may

³³ Although, of course, individual lawyers in different firms can work together several times and thus build up a similar team, as seen in the discussion of Slaughters’ and Hengeler’s relationship, although there may still be greater transaction costs encountered (as in communication problems caused by the use of different IT systems).

also be some clients who will prefer using their favourite home lawyers in as many locations as possible. That may be due, for example, to a preference for their lawyers' ways of working, their native language skills, cultural background, and/or to the belief that a global firm offers greater assurance of quality and/or of knowledge of international affairs.

However, it is likely that the desire of certain law firms to expand their markets is also effecting change. There are a small number of City firms (and possibly a couple of US firms) which believe that there is lucrative legal work to be found 'on the continent' which they cannot immediately undertake without taking on board 'continental' firms³⁴. Some of these latter firms may be worried that they will lose valuable work if they do not merge (and do not want to risk becoming a "regional boutique") and so are more amenable than before to the idea of mergers. Hence some law firms are fearful that if they do not act now, they will lose opportunities to expand abroad and will not be able to compete with the global firms if the global strategy proves to be a great success.

Mergers can generate a momentum of their own. As was seen in the discussion of mergers between US and UK firms, there is a pack instinct to be considered. One German partner stated the position thus:

"It's merger mania on a European scale now. Bruckhaus and Heller Löber started it with a cross-national merger and other people will follow."

The market is also bullish, and lawyers are usually less cautious then. As John Griffiths-Jones (who is in charge of Denton Hall's international strategy and is quoted in Boxell 1998) believes:

"Once the market begins to change, it becomes self-fulfilling."

³⁴ It is continental European firms which presently seem to be foremost in these firms' minds. Although Clifford Chance is in merger talks with the Australian firm of Malleons, firms on other continents and in other countries (such as Latin America, Africa, Asia, New Zealand, and so on) do not appear to be seen as potential merger partners at present. Again, the concept of a "global firm" seems to be something of a misnomer.

However, I am not (yet!) convinced that all or even most types of international work will develop in the future so that they will *necessarily* be better served by a global firm. Several German interviewees were fearful, as seen above, that the quality of work would suffer if they merged with a UK or US law firm (although maintaining the quality of work was also cited as a reason for merging, to develop one's own foreign offices rather than using other firms³⁵). Similarly, Kay (reported in Hoult 1998a) argues that law firms should not assume that the global strategies used by the Big Five accountants will work for law firms. Globalisation develops in different businesses in different ways. The question of conflicts of interest is more salient for law firms³⁶ and clients might wish to choose the firm which they consider to be the best in a particular jurisdiction (as Schraven argued), rather than the foreign office of the same firm. -Conversely, clients of the Big Five firms of accountants may be less concerned about choosing the 'best' firm when choosing an auditor to perform the obligatory annual audit. Hence clients may become increasingly sophisticated, so that they realise when they would be better served by using, say, smaller international firms (with a smaller number of foreign offices) or niche firms (as opposed to a very large global firm).

Developments in IT may, in fact, mean that there are more opportunities for smaller firms to collaborate together (and achieve economies in scale in doing so) and challenge the global firms in some areas (see also Susskind 1998:xxviii and 230). Moreover, we might remind ourselves of Susskind's point, made earlier, that geographic location in the future might count for much less. There may be downsizing in the legal profession, as there has been in so many other areas of commerce and industry (ibid:249):

³⁵ If Clegg's (1993) work is recalled, he argued that service firms working internationally were aiming to ensure quality and availability. That law firms here could pursue a variety of strategies ostensibly in pursuit of these same goals highlights the limitations of Clegg's macro analysis.

³⁶ Although if, as Alan Peck suggested earlier, at least six global law firms form, this may provide some client choice.

“In the IT-based information society, it is hard to imagine carrying on as we do, clustering so intensively in but a few centres. Geographic focal points for face-to-face meetings, camaraderie, and court appearances, will remain important, of course. But we can safely expect some considerable spread and dispersal, as clients and lawyers alike recognize the potential savings and benefits.”

Finally, by way of a postscript, early 1999 saw two mergers in Germany which did not involve foreign firms. Gaedertz merged with Schön Nolte to form a firm of 200 lawyers and Wessing Berenberg-Gossler increased by almost a third in size (also to 200 lawyers) by merging with three smaller firms (Wilkins 1999). Other German firms are also rumoured to be in merger talks to grow to similar sizes. This raises the question of whether more German firms are now beginning to believe that a large share of cross-border European business may not need the London connection (*ibid*)³⁷. It may also be that the previous year’s mergers of German and City firms increased the market shares of independent German firms as the newly merged firms lost referral work (*ibid*) and this has provided some reason to consolidate.

Comment

This section has shown how the issue of US/UK mergers was discussed in a hypothetical fashion by interviewees in London in 1995; the question of Anglo-American/German law firm mergers had greater immediacy for interviewees in Frankfurt. Following the Clifford Chance/Rogers & Wells merger, however, it is likely that if interviews in London were carried out now (in 1999) the issue would be more to the forefront of lawyers’ minds.

Lawyers in both jurisdictions believed that cross-national mergers faced a number of obstacles, from cultural to managerial. Concern was particularly expressed about the prospect of being “taken over” by another firm and the German firms

³⁷ There are similar events occurring in some other European countries. Thus, for example, whilst the Dutch firms of Houthoff and Buruma Maris have merged, in part at least in response to competition from the likes of Freshfields and Linklaters & Alliance, there are rumours that Loeff Claey Verbeke (also Dutch) is restructuring “in order to woo an Anglo-Saxon firm” (Unattributed 1999p).

often specifically stated that they would not want to compromise the quality of service they gave nor their independence. Quality and independence appear to form the crux of what many German lawyers perceive their professionalism to be, although the next chapter will note that (contra Rueschemeyer, who believed that the identification of German lawyers with clients was limited) independence these days is likely to relate more to how work is organised rather than distance from clients' objectives.

Yet several Anglo-German alliances and mergers have formed, and this is one instance of lawyers responding to global pressures. Firms did, however, choose various strategies; hence law firms will continue to structure their international work differently, although the lure of the global firm appears to be particularly strong at present. How far this supports the ideas of the various writers discussed in part one of this chapter is not totally clear. There appears to be some truth in Nelson's (1994) belief that traditional status hierarchies amongst firms will persist, as the 'magic circle' of City firms appear to be strengthening their grip on the most remunerative (international) work. Nevertheless, whether the most highly reputed German firms, such as Hengeler Müller and Bruckhaus, will be able to retain their position as the 'top' German firms without merging and opening many foreign offices (in a similar fashion to several 'top' US firms) is less clear. If Shapland's (1996) point is taken, then there may be space for heterogeneity in legal provision, for a number of global stories to unfold (following Waters 1995).

Much will depend upon how clients 'vote with their feet' - which type of firm clients prefer and when. Yet this does not mean that clients have dictated consolidation amongst firms. Here we are led back to the debate about how far lawyers create demand, as discussed when analysing the reasons behind the opening of foreign offices. There is evidence in the above accounts to suggest that some law firms are entrepreneurial, keen to expand proactively their markets (as Dezalay (1995) suggested), as witnessed by the desire of City firms to find German merger partners. Still, some clients may prefer global firms, and this too

may be driving some of the consolidation as firms try to respond to what they think clients want. There is some uncertainty in these strategies, however, and this relates partly to the uncertainty of knowing how clients will respond to developments. Lawyers may not be effective strategy makers and implementers in the first place and clients could frequently change their policies on the purchase of external legal provision (following the implications of Harvey's (1989) thesis).

Finally, whilst Anglo-American firms have not entered Frankfurt and taken over the local legal profession, it seems that the desire of some of these foreign firms to merge has catalysed German firms into formulating more clearly their own international policies. For some, this has resulted in the decision to ally themselves with their Anglo-American contemporaries although many firms have yet to take this route (and may not do so). Instead, there is likely to remain some diversity in legal provision although the potential success of the various strategies is difficult to predict.

Whether consolidation is a 'good thing' or not (and for whom) will be discussed in the conclusion but first the 'threat of the Big Five' will be considered.

Part four - The threat of the Big Five

"Legal advice is different from accountancy. There is a benefit in having multi-jurisdictional knowledge so that you can do the accounts of international firms. [But] [i]t is rare even in international transactions to need legal expertise in many jurisdictions."

Stephen Fiamma of Jones, Day, Reavis & Pogue (quoted in Lee 1997)

The Big Five firms of accountants have already made significant inroads into the practice of law within certain European countries. Big Five firms have set up, or linked themselves with, various law firms, finding ways of evading bans on multi-disciplinary practices³⁸. An Economist survey noted in 1992, for instance,

³⁸ For example, the Big Five are technically restricted from practising law by the New York State Bar Association but they do undertake tax work and employ more tax attorneys than most big New York firms (Parsa 1999).

that Fidal (the legal arm of KPMG in France) was continental Europe's biggest supplier of legal services (Economist survey 1992:8)³⁹.

It has been seen earlier that Abbott (1989) emphasised the importance of looking at how professionals compete with others. Hence interviewees' thoughts about Big Five firms might be particularly interesting; the views of lawyers in London will first be considered.

The London interviewees

Some interviewees felt that the Big Five firms would compete in specific legal practice areas, such as tax, whilst others felt that they would tend to specialise at the "low-tech end of things" and would not make the heavy investment necessary to compete for the most complex and lucrative types of legal work. Consequently, interviewees tended not to believe that the accountants posed a major threat to their work - other US/UK firms were the competition to watch.

Further, there was some reluctance to believe that one-stop shopping would work, as will be discussed later. The consensus was that clients wanted independent firms. Thus, as a solicitor stated:

"If you put accountants and lawyers together, I am not convinced that the whole is greater than the sum of the parts."

Perhaps at this point, however, some thought should be given to the significance of the types of law firm in question. Morris (1998:54), for example, notes that the "very top firms" feel they have little to gain by merging with a Big Five firm:

"The so-called Magic Circle - Allen & Overy; Clifford Chance; Freshfields; Linklaters & Paines; and Slaughter & May - have a seemingly unbreakable lock

The European Commission and the American Bar Association also appear to be moving towards allowing multi-disciplinary practices (Unattributed 1999m).

³⁹ In 1997, Forbes magazine also reported that Arthur Andersen had a network of over 800 lawyers, located in 30 countries, on 4 continents (Banks 1997).

on the best corporate, M&A, capital markets, and finance work, and their profits are generally markedly higher than firms just down the list in size. All but Slaughter and May have substantial overseas practices. Noone expects any of these firms to marry an Andersen or Price Waterhouse in the foreseeable future. Below that level, however, most firms find themselves facing vicious competition in a domestic market which isn't growing⁴⁰. The common wisdom in London is that Andersen and its peers are shooting for a firm between number six and number ten. And, lore has it, many firms from 11 on down would eagerly entertain such a proposal⁴¹."

Yet Flood thinks that the Big Five pose more of a threat to the 'top end' of mega-law firm practice than these firms realise. He notes that the audit provides an invaluable *entrée* into other areas of client work (1995:156) and the Big Five's internal hierarchies are more stratified and highly leveraged than those of law firms, enabling them to extract more rent from staff (1995:157). Similarly, Hanlon and Shapland (1997:117) argue that as management advisers lawyers suffer from two disadvantages. Firstly, they are lower down the 'food chain' so clients tend to go first to other professionals when they have a problem. Secondly, as the Big Five are much bigger than the largest law firms, it is financially easier for them to encroach on legal work than for lawyers to expand out of legal work⁴². As Flood notes (1995:157):

"Even the largest international law firm pales into insignificance against the size of the Big Six. The largest accounting firm in the world, KPMG, the result of a merger, has 5,540 partners and an annual revenue of \$4.13 billion; the smallest of the Big Six, Arthur Andersen, has 2,016 partners and an annual revenue of \$2.82 billion⁴³ (*Economist* 1989). Even Skadden Arps, one of the most successful

⁴⁰ The reference to "a domestic market which isn't growing" supports the idea that the British national market is mature, which was one of the reasons given why City firms have expanded overseas.

⁴¹ Hault (1998) also notes that Ernst & Young would like to acquire a law firm and have employed a former partner at Denton Hall to find a law firm for them to enter into an alliance with.

⁴² Indeed, Rogowski (1995:126) argues that German corporate law firms have an interest in not provoking the Big Five firms into developing aggressive market expansion strategies as they would not have similar resources with which to retaliate.

⁴³ By 1997, Arthur Andersen had 58,000 employees in 78 countries and revenue of \$5.2 billion (Morris 1998).

mega-law firms, generated only \$400 million in gross revenues in 1988 (Brill 1989) and \$500 million in 1990 (Brill 1991).⁴⁴

Flood poses the question of whether it is possible for lawyers to maintain a separate rôle as competitors in international business markets from accountants and investment banks (1995:160). He answers:

“Probably, but it may well be a localised one (cf Fitzpatrick 1989). As long as lawyers are tied to particular conceptions of the role of law and operate within particular legal systems, others in the international financial field will compete aggressively and not feel bound by the ideological and cultural constraints that lawyers impose upon themselves.”

To take the point about the operation of lawyers “within particular legal systems” first, this raises the issue again of the national character of lawyering. Flood argues (1995:161) that possibilities of escape from the confinement of national systems lie in the development of structures such as international commercial arbitration⁴⁵ and the development of EU law. However, he does acknowledge that the fundamental “problem is the nature of law itself” (ibid):

“Historically, it has been grounded in diverse cultures and has rarely been deployed across them in the same manner as accounting or business principles.”

Similarly, it has been argued before that law is primarily bound to a particular nation although there are possibilities for (suitably qualified) lawyers to undertake work on other nations’ laws. Nevertheless, such work is unlikely to generate sufficient opportunities so that lawyers can operate to the same extent globally as accountants. And, as has been seen above, lawyers are too low down the ‘food chain’ to naturally pick up on other areas of business advice work.

Moving on now to the “ideological and cultural constraints that lawyers impose on themselves”, large law firms labour under externally imposed rules, such as

⁴⁴ See also Susskind (1998:273), who believes that the accountants could dominate parts of the legal market.

⁴⁵ See, for example, Dezalay and Garth 1995 and 1996.

those on conflicts of interest⁴⁶ and publicity, which can limit their work. “Cultural constraints” might also be seen in the reluctance of law firms to expand their practices, to take on local lawyers, to open foreign offices or to merge with other firms. Indeed, although many of these firms are increasingly moving away from internal collegial modes of internal organisation, there is still some way to go. Staff are not as hierarchically structured as those in the Big Five firms, although there have been developments within some City firms recently to create new staff levels between partners and associates (see, for instance, Fennell 1995a)⁴⁷.

In effect, it may only be a question of time before the Big Five are in a position from which they can challenge the supremacy of the ‘top’ commercial law firms in a greater number of jurisdictions than at present (whilst law firms are unlikely to be able to expand into the accountants’ areas of work). In the meantime, however, it may take some time to recruit the lawyers they need, particularly in jurisdictions like England and Wales where lawyers (from the richest firms) presently seem to prefer working in the organisational setting of a law firm.

The Frankfurt interviewees

In Frankfurt, responses did differ to the question of how far the Big Five posed a threat to their firms although these interviewees generally took the threat of the Big Five much more seriously than the London interviewees. The nationality of the firm or interviewee seemed to have little bearing upon what the response

⁴⁶ Flood views the rule against conflicts of interest as a cultural constraint (1995:158): “This exemplifies the continuing imposition of a relational ideology on what has become a transactional business. In other words, the diminution of long term relationships between law firm and client in favour of the short-term transactional relationship has not been mirrored in the rules that govern these practices. So as the ideology of business gains ground, the strains between it and the sacred forms of professionalism intensify and the role of the lawyers begins to change.

Some law firms are also recognizing the need to loosen ties. Baker & McKenzie’s non-American offices are largely staffed by local lawyers; this has earned the firm the reputation of being a franchise law firm.”

⁴⁷ The merged firms of Clifford Chance, Rogers & Wells and Pünder Volhard will be run as a limited liability practice with a “plc-style governing board” (Farrell 1999b).

would be - instead, this was an issue which in part at least revealed the degree to which individuals could contemplate major change to the status quo⁴⁸.

That these lawyers took the plans of accountants more seriously might be partly due to the greater prominence of the Big Five since the British interviews took place⁴⁹. In this regard, one important event was the link-up of the major Spanish law firm Garrigues with a Big Five firm (see Fennell 1997⁵⁰), although the proposed merger of Arthur Andersen with the City law firm Wilde Sapte fell through. The merger between Cooper & Lybrand and Price Waterhouse in 1998 also brought together over 1000 lawyers (or possibly up to 2500 - see Unattributed 1997c).

In contrast with the views of the London interviewees, the majority of interviewees in Frankfurt felt that the Big Five would move into 'high margin' areas of work, although what was high margin work was constantly changing:

“What is premium business today is commodity tomorrow.”

(German partner)

The consensus was that the Big Five would become a major competitor; they already had a lot of information on how others have provided legal services and:

⁴⁸ I had wondered whether German lawyers in German firms would be more positive about the possible benefits of multi-disciplinary practices as many of their firms employ accountants. However, nationality did not appear to influence responses in this way.

⁴⁹ Indeed, it was noted in a 1997 report for the Law Society, which was based upon interviews with large firm lawyers, that accountancy firms would increasingly emerge as competitors for legal business (Lewis and Keegan 1997:4).

⁵⁰ Morris (1998) also discusses the merger (after interviewing both firms' senior partners) and reports that Garrigues merged due to the pressures of "globalisation" - their networks were not integrated enough to provide the services demanded by clients and they feared the arrival of City firms in Spain. Also: "For some younger Garrigues lawyers, meanwhile, the merger looked like a convenient way to shake up a firm that had fallen behind competitors in compensation and steered too much of its profit to senior lawyers."

“They will receive a constant training on an involuntary basis from us, if they copy the documentation they find in the files of their clients⁵¹.”

(US partner)

However, the Big Five’s ambitions would be slowed down in the short to medium term as “the German legal market is conservative” and they still faced difficulty in persuading major law firms to join them⁵²:

“In Germany, lawyers are still very independently minded and have difficulties considering becoming the legal arm of a major international accountancy firm, but that certainly will change.”

(German partner)

Hence, again there is some indication of the importance German firms attach to their ‘independent’ ways of working and also the conservatism of some German clients.

One German lawyer believed that the “huge financial resources which the Big Five can concentrate on particular projects” might eventually tempt some firms to join them. Another added:

“The problem is that the accountants are just not perceived in Germany as law firms and to get a reputation as a top firm takes time. What could happen is that accounting firms will buy law firms ... [Are accountancy firms attractive to German law firms as merger partners?] It is hard to say; I think for the moment it is not attractive but that would change if one firm did it⁵³.”

Yet opinions as to how far clients themselves were interested in ‘one-stop shops’ differed. Two lawyers felt that clients would be attracted by accountability for the project being vested in one source. Another felt that the main advantage of a one-stop shop was that the professionals were used to working together.

⁵¹ As Flood notes (1995:160), such knowledge cannot be patented, so its active life is short.

⁵² The collapse of the Arthur Andersen/Wilde Sapte merger reveals some of the difficulties in pulling off these mergers (see Lindsay 1998f).

⁵³ This last comment again indicates lawyers’ ‘pack instinct’.

None of the interviewees mentioned (as a reason not to merge with a Big Five firm) the possible loss of referral work from other Big Five firms.

More common, though, was the view that clients would be more discriminating. They might, for instance, like combined legal and accountancy services in company acquisitions but, on the other hand, may also be wary of concentration in the market and would like a choice in whom to instruct⁵⁴.

Of course, this argument can also be applied to concentration in the number of big law firms (through mergers). That the interviewees were more cautious about the benefit to clients of accountancy/law mergers (as opposed to cross-national law firm mergers) might reveal how easy it is to use the justification of serving client needs rhetorically to disguise what is actually inspired by self-interest. Lawyers might inwardly be most concerned about the perceived threats that Big Five mergers with law firms might herald for lawyer autonomy, yet outwardly state that client interests would not be served by such mergers.

Nevertheless, it is conceivable that clients might not want to use a multidisciplinary practice in all or some cases. As Morris notes (1998:54), multidisciplinary services could be a selling point in areas such as employee benefits, and companies which need to coordinate employment policies, register intellectual property rights, incorporate or license new subsidiaries or plan tax strategies across Europe may find real efficiencies in dealing with one adviser worldwide. However, some clients may prefer independent advisers, in part as there may be potential conflicts when using lawyers affiliated with auditing firms. An example would be a company expecting to sell their business in the future - they might not use Big Five lawyers for fear that the potential buyer could be a client of the firm's accounting wing (ibid).

Still, most doubted that mergers would mean the end of the independent law firm. The only dissenter was a German lawyer who predicted radical change in the world of mega-lawyering, as a result of Big Five ambition:

⁵⁴ One English partner argued that joint accountancy/legal practices may be tempted to sell clients services they did not need.

“I don’t think that there’ll be a Big Six or Big Ten of law firms because I don’t think that the lawyers will be able to do what the accountants have. The legal market perhaps not in ten but certainly in twenty years will be dominated by conglomerates, led by the accountants. If you look at Clifford Chance, they have about 2000 lawyers world wide. That’s nothing - Arthur Anderson has 120,000 people world-wide, so Clifford Chance is not a global firm. They are a very large British firm with a number of good outposts. That’s nothing compared to Arthur Anderson or Ernst & Young - they cannot make that difference up. The accountants, as the banks in the past, will be the main competitors.”

Comment

Although interviewees in England and Germany weighed the challenge of competition from the Big Five differently, all the lawyers expressed doubts as to the benefits of one-stop multi-disciplinary shopping. Previously, fewer doubts had been expressed about the merits of one-stop multi-jurisdictional shopping.

The pull of culture here is particularly strong - mergers with accountants are perceived to compromise the cultural integrity, above all the independence, of law firms much more than inter-law firm mergers. It is also likely that the most profitable law firms do not believe that the quality of the work they undertake or the profits they make would improve if they linked with the accountants.

This is not to say, however, that the potential threat of the Big Five to ‘high margin’ areas of legal work is not real. The Big Five’s economic strength, size and their extensive contact with clients cannot be easily dismissed. These companies, propelled by the opportunities presented by globally active clients, work extensively around the world (see Hanlon 1994). Lawyers also appear to be more bound to their nation state than accountants (Halliday and Karpik 1997). Even the fabled proactive US attorney is likely to be lower down the ‘food chain’ than a Big Five accountant.

Hence, if the Big Five increasingly encroach upon the most highly paid types of legal work, independent law firms may be, as Flood suggests (1995:161), “a

potentially endangered species.” In effect, competition from the Big Five - ignited chiefly by forces fed by globalisation - may redefine the boundaries between these two professions and radically alter how work is undertaken. The response of clients to such developments will, however, also be key to how legal services evolve in the future.

Perhaps the last words in this section might usefully be left to Richard Susskind. He argues (1998:250) that the future strength of law firms will not be based on rigid adherence to structure and stability, but will instead be grounded upon flexibility, adaptability and success in managing change⁵⁵. There will be less obsession with market share and more concern with creating new markets for innovative products and services and (ibid):

“Crucial also to continuing success [of the law firm] will be greater respect for its people, not as components of a hierarchy but as individuals with their own individual career aspirations and plans. And the threat of professional negligence litigation may also bring a shift - towards the incorporation of legal practices, which itself will bring still further upheaval as lawyers wrestle with the demands of shareholders, the prospects of aggressive take-overs by other professional services companies, the ever more onerous obligations of directorships and the altogether less clubby corporate culture which is likely to develop.”

This ends the discussion of the future of international legal work. The analysis of the regulation of this work, and the future of regulation, will now begin.

⁵⁵ One vision for the future of work in general, commissioned by the RSA, is summarised in Buckingham 1998.

Susskind’s emphasis on flexibility mirrors the work of others such as Lash and Urry (1994) and Harvey (1989), although he does not explore too deeply the downside of his prediction. For instance, Simon notes (1996:180) that outsourcing can have effects on quality, commitment to a market, employee motivation, and also raises the issue of how to protect know-how and differentiation. Some of these points will be picked up again in the conclusion.

Chapter four - The regulation of international legal work

In the introduction to this thesis, one question posed was the following:

“Are lawyers let loose upon the world stage, unfettered by national constraints, to follow their own stars? If they are, should we care?”

This chapter considers this question. In so doing, it will survey literature in this area and outline the regulatory regimes governing the work of the lawyers investigated. This, in turn, will highlight the following issues (amongst others), also set out in the introduction:

- the ethical tensions of large law firm practice;
- whether the formal regulation of professional associations impacts at all upon large firm lawyers' work;
- the limits of national regulation when stretched to govern global practices; and
- whether international lawyering should be regulated and, if so, how.

These questions, and others, will first be considered in a second literature review. In part two of the chapter the law and codes regulating the international legal work of the lawyers investigated is considered. This section is founded upon empirical work which includes material drawn from interviews with lawyers and regulators. The final two parts of the chapter examine prospects for the establishment of a supra-national regulatory agency for lawyers and reform.

Part one - Literature review, section two

A variety of writing is drawn upon in this literature review, to attempt to contextualise the later analysis of the empirical data. A spectrum of issues will be outlined, beginning with an analysis of the nature of regulation, discussing the meaning of regulation and types of regulation. This leads to a discussion of legal training and codes of conduct, seen as forms of regulation, and self-regulation. The specific institution of the large law firm is then considered, together with the

ethical and conduct issues this form of practice might raise. The regulation of international practice is next examined, by questioning whether practice should be regulated and how regulation may be evaded. The literature review ends with an examination of the legitimacy of international lawyering.

The meaning of regulation

“The expression ‘regulation’ is frequently found in both legal and non-legal contexts. It is not a term of art, and unfortunately it has acquired a bewildering variety of meanings.”

Ogus (1994)

To start with the basics first, the above quote notes the complexity of the term regulation. Writers attach three main meanings to regulation, namely:

- Regulation as targeted rules - here regulation refers to the promulgation of an authoritative set of rules, accompanied by some mechanism (typically a public agency) for monitoring or promoting compliance with these rules;
- Regulation as direct state intervention in the economy - this potentially takes in all instruments directed towards the achievement of economic and perhaps social policy ends; or
- Regulation as encompassing all mechanisms of social control, by whomsoever exercised - this even broader definition extends not only to government instruments but also to mechanisms which are not part of any institutional arrangement, such as the development of social norms (Baldwin, Scott and Hood 1998:3).

My understanding of regulation leans to the latter approach; hence I have attempted an inclusive analysis of what might be seen as regulation. For the purposes of this thesis, this meant that my conception of regulation as it might apply to lawyers (and their firms) would cover the following:

- legal provisions (which govern matters such as recognition of qualifications overseas);
- professional codes of conduct;
- formal provisions within firms which deal with conduct matters (such as computer programmes for conflicts of interest checks); and
- socialisation/cultural constraints within firms.

In effect, lawyers' education and prior approval of practice, socialisation and praxis in carrying out work, relationships with clients and interaction with the codes and legislation affecting their work should all be considered.

Those potentially interested in, or affected by, regulation would then break down into the following categories:

- lawyers and law firms engaged in international work;
- the courts;
- national and international organisations with some interest in regulation;
- clients of lawyers;
- third parties affected by international legal work; and
- governments.

These broad, heterogeneous groups may obviously hold conflicting interests within and between themselves. This is one reason why literature which discusses theories of regulation will be looked at - it may help to clarify and understand the tussles, and forms of co-operation, that occur within the regulatory arenas described in later sections of the thesis.

Theories of regulation

“Just as the origins of life and the universe are fundamental questions in natural science, the genesis and change of regulatory regimes attract a range of explanatory theory.”

Baldwin, Scott and Hood (1998)

The opening quote again notes that the area to be discussed is contested - the origins and development of regulation are subject to competing ‘explanations’. The first theory to be developed, usually labelled public interest theory, will next be considered.

Public interest theory - This attributes to those responsible for the design of regulation a desire to pursue collective goals. Regulation is seen as a corrective to the perceived deficiencies of the market and aims to improve economic and social welfare (Ogus 1994). Thus this theory supports the notion of a benign Hegelian state. The following are examples of non-economic goals which can be pursued by regulation:

- distributional justice (ensuring that market processes are altered if they effect unjust outcomes);
- paternalism (which overrides individual choices by referring to the good of those being coerced and broader societal goals); and
- community values (which improve the social, intellectual or physical environment in which people live).

This school of thought has been subjected to much criticism. It has been said to understate the extent to which regulation is the product of clashes between different interest groups or the extent to which regulatory regimes are established and run in the interests of the economically powerful (Baldwin et al 1998:9). It is also difficult to validate the assumption of altruism - the study of motivation is necessarily elusive⁵⁶. Hence, finding the intention behind some regulation,

⁵⁶ Sheinman (1997) and Shapland and Sorsby (1996) also discuss this within the context of professions.

particularly when expressions of intent conflict or there is the risk that the stated objective hides some ulterior motive, is bound to be difficult. Regulators instead may be adept at pursuing their own ends, their own self-interest and so regulation may not effect public interest outcomes.

This criticism led to a backlash which established the following alternative explanation of regulation, an explanation which proved to be particularly influential in inspiring de-regulatory movements in the US and Britain in the 1970s and 1980s:

Economic theories (or private interest theory) - This suggests that law making processes can be used by private interest groups to secure regulatory benefits for themselves⁵⁷. Regulation is seen as a response by politicians to the demands of interest groups who will gain benefits from the measure. As Ogus states (1994:71):

“Given the advantages ... of homogeneity of interest and relatively low organisation costs, producer groups will typically be able to exert more influence than those representing consumers or ideologies. Hence the central thesis is that ‘as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit’⁵⁸.”

This is, however, very much a thumbnail sketch; other writers have developed the model. Makki and Braithwaite (1995), for instance, have examined and redefined what regulatory capture might entail. Capture to them is a multidimensional entity comprising of three empirically distinct forms - identification with the industry, sympathy with the particular problems that regulated firms confront in meeting standards and absence of toughness. Consequently capture is “a situational problem that requires situational solutions” (ibid:61). This will again be referred to when discussing self-regulatory agencies.

⁵⁷ George Stigler’s (1971) article was particularly important in establishing this school.

⁵⁸ Abel (1988) tends to view regulation of the legal profession in this light, as will be seen later.

The revisionism of the economic theory of regulation bears a striking resemblance to the reaction of market control theorists of the professions to functional analyses, seen in the first literature review. We might recall that Abel's thesis then focused on a form of capture, or "social closure", by which means professionals secured their monopoly power. That Abel will later argue for the de-regulation of international legal practice should not therefore come as a great surprise.

Just as Abel's analysis proved contentious, so too has the economic theory of regulation. The theory is based upon the assumption that those engaged in political trade are motivated by self-interest which is usually narrowly defined as wealth maximisation. Other motivations, such as altruism, are not accounted for. Indeed, parties may not hold determinate preferences on political or regulatory issues (and informational deficiencies may prevent regulators acting in a self-serving way), they may behave altruistically in important respects (perhaps in identifying with legislative objectives) but may behave differently in different contexts. The interest group process may affect regulation in a manner uncontrollable by private preference realisers and regulatory bureaucracies may have a life beyond the sum of lives that make up their parts (Baldwin et al 1998:11). Finally, empirical studies do not always confirm the predictions made by these theorists⁵⁹ and the experience of deregulation is particularly problematic (Pelzman 1989).

The point made above about the importance of the life of bureaucracies themselves is taken up by Hancher and Moran (1989). Their work questions notions of regulatory capture and the idea that regulation is driven by clashes

⁵⁹ To give a similar illustration, Abel's conception of the indeterminacy of rules is not supported by an analysis of the work of the Kutak committee, which reformed the ABA rules. Participants did not understand themselves to be engaged in a public relations charade which would legitimate the bar's tradition of self-regulation but have no regulatory bite (Schneyer 1992:142), but neither did a functionalist theory fit (which might assume that participants worked either to protect an unsophisticated clientele from professional exploitation and incompetence or to protect society from the overzealous pursuit of client aims). No single grand theory could explain the process in which the Model Rules were developed.

between public and private interests. Instead, they believe that it is more revealing to examine the relationships between and within regulatory organisations and how they come to share “regulatory space”; these relationships determine the scope of regulatory issues. Thus, in order to understand the extent and nature of regulation, one should examine the cultures of these organisations, their standard operating procedures, the customary assumptions which govern their interaction and the resources at their disposal. These phenomena are in turn influenced by external factors, from the general political attitudes and legal traditions existing in any community to the place of organised interests in the policy process (ibid:278).

Effectively, when regulatory space is dominated by large hierarchical bodies, regulation inevitably becomes a co-operative matter, as it is only by such means that regulation can be formed (ibid:286)⁶⁰. Yet this should not obscure the way these organisations may be riven by competition and conflict (ibid):

“Indeed the essence of regulatory politics is the pursuit of institutional advantage: the pursuit of advantage in the market place, measured by indices like market share and profit; and the pursuit of command over the regulatory process itself, as measured by the right to make rules and to command their means of implementation. Regulation - and the rules and distribution of power through which it operates - is always a ‘stake’ of industrial or political struggle.”

Later in the chapter, interviews with regulators in the UK and Germany will be reported. The customary assumptions underpinning their work will be examined, as will relationships with other regulators, in an attempt to understand both how regulatory policy is formed and how it is enforced in practice.

Examining these often competing and conflicting theories begs the question of whether some form of synthesis might be possible, to generate a meta-theory which might explain regulation more insightfully. Here, Baldwin, Scott and

⁶⁰ One instance of this is the copying of regulatory design internationally which often occurs co-operatively (Hancher and Moran 1989:285): “Copying is obviously an economical way of solving the problem of regulatory design. Since regulation typically is begun under pressure of time, or in conditions of crisis, the incentive to imitate is great. The result is that ‘early’ regulators often provide a model for countries following later along the regulatory road ...”

Hood (1998:13) help by warning against some form of pick ‘n’ mix approach to regulatory theory. Such an approach would ignore the familiar trade-offs that have to be made in choosing among ways to explain social phenomena:

“The broader the thrust of a theory, the more it provides a frame for understanding, but the more it requires refinement to explain particular circumstances. The narrower the range of an account the sharper its thrust in relation to the focused-upon topic, but the poorer its capacity to serve as a frame for general understanding.”

Their advice (ibid:14) is to “develop a nose for the kernels of truth in varying theories, a sense of the limitations of, and the assumptions underpinning, such theories and an awareness of the information necessary for applying and testing them.”

I shall attempt to follow this advice, to keep the underlying premises of various theories in mind when analysing the data. This will raise issues such as what rôle organisations such as the Law Society play within the regulatory process, whether codes of conduct are purely a smokescreen behind which lawyers pursue projects of self-advancement, whether EU legislation regulating the legal profession has been designed to protect the public or whether the regulatory process been captured by sectional interests, and what non-economic goals regulation of the legal profession should pursue. The next section touches on the last question.

Types of regulation

Regulatory literature mainly deals with two types of regulation, social and economic. For the purposes of this research, the former is most relevant as it deals with such matters as consumer protection (whereas economic regulation is applied mainly to industries with ‘natural’ monopolies, such as water companies).

The public interest justification for social regulation focus upon two types of market failure which affect the ‘proper’ functioning of activities (Ogus 1994:4):

1. asymmetry in information between the suppliers of goods and services and consumers; and
2. externalities - these exist when market transactions have spillover effects, adversely affecting individuals who are not involved in the transaction.

When considering the regulation of lawyers, the first point would imply an information problem - that regulation is needed when lawyers' clients are not as well informed as their lawyers. For instance, clients might not know in advance what quality of service to expect and this might lead to 'demand generation' where the lawyer provides services which fully informed clients would not have wanted (Ogus 1993:317). This is most likely to be the case when considering private (individual) clients as opposed to corporate clients, although lawyers do serve a broad range of businesses, with varying degrees of sophistication. Other "agency problems" include representing conflicting interests in the same matter or overbilling⁶¹ (Wilkins 1992).

Applying the second point to the context of commercial lawyering, this could apply to transactions lawyers facilitate which have adverse effects on third parties. One example might be deals which are later proved to be fraudulent. In such situations, regulation might, for example, impose 'whistle-blowing' obligations on lawyers.

In fact, regulators can choose from a range of regulatory instruments to deal with these problems, two of which are standard setting and prior approval to practice (devices of common use when regulating the legal profession). These will be considered next.

⁶¹ As frequent consumers of legal services, corporate clients may have more power than private clients to prevent overbilling (Wilkins 1992).

Legal education and prior approval of practice as forms of regulation

The entry requirements to the legal profession may be seen as attempts to meet the public interest concerns seen above (of asymmetry of information and externalities), to protect clients and third parties before any losses have been inflicted (Ogus 1993:318). However, the main problem here is that this assumes a strong correlation between the criteria for entry to the profession and the quality of performance as a lawyer yet an individual's ability to complete a course of training at the outset of a career may provide little evidence of capacities within a specialist area and obviously does not guarantee general competence many years later (*ibid*)⁶². Even the Law Society's continuing education requirements are limited as they require only attendance at courses without the need to prove that knowledge was gained (*ibid*). It will be seen later that Germany's continuing education requirements are not subject to verification and the position of US lawyers working overseas is even more problematic.

Perhaps instead legal education and approval to practice might be seen more generally as a means by which future lawyers are socialised into the behavioural (including ethical) standards befitting of the profession, and that this raises standards of performance more generally. However, such an explanation is less convincing when there is great diversity not only in the provision of legal education but also in the types of environment in which lawyers will subsequently practise. For instance, whilst there is greater homogeneity in Germany than in the States (and the UK) between different levels of education (Rueschemeyer 1973:66) and writers do agree that legal education has some

⁶² Twining further argues (1994:165) that the choice of "core" subjects is arbitrary and so cannot be rationally argued to provide the essential basics, the foundation, of future practice: "[F]irst, the list of subjects is quite arbitrary, with a distinct bias towards the problems of the propertied classes: why is knowledge of Torts or Trusts to be considered more important than Human Rights or Civil Liberties or Local Government or Welfare or Labour or Family Law? Why are theory, context and history excluded from the core? Why should a law degree focus solely on English law (with a smidgen of EC law) in today's world? And, most important of all, can the "core" of a discipline be defined solely or mainly in terms of coverage of subject matter?"

socialising effects⁶³, legal training is primarily oriented toward the education of future judges (and practice as a Rechtsanwalt/Rechtsanwältin is marginalised). Further, it is still rare for German law students to learn overtly about professional conduct.

By way of contrast, whilst the provision of legal training in the US is much more diverse, American law schools train lawyers primarily for private practice (Rueschemeyer 1973:107), although private practice in itself is extremely diverse (Heinz and Laumann 1983). Several US writers have also commented upon the inadequacy of ethical training, stating that it does little to encourage reflective judgement (much the same could be said for training in England and Wales and Germany (Blankenburg and Schulz 1995)⁶⁴). Ethics are defined narrowly, as Gordon and Simon note (1992:236):

“Contemporary efforts to teach professional responsibility are ill suited to encouraging reflective judgement and indeed often inimical to doing so. The efforts of the past two decades have gone a long way toward collapsing that subject into that of disciplinary rule enforcement. The professional responsibility of bar examinations are exclusively concerned with testing the knowledge of disciplinary rules.”

Such scepticism might fuel the arguments of those such as Abel (1988) who see entry requirements as a means to restrict supply to enable the profession to earn extra profits⁶⁵. However, empirical evidence relating to solicitors is not

⁶³ Although these ‘effects’ are often viewed negatively as writers agree that legal training turns out conformist, conservative lawyers. Blankenburg and Schulz (1995:115) have argued, for instance, that exams are marked rigidly and that final oral exams have been described as a “conformity test”. Traditional training omits even an elementary exposure to philosophy, sociology, economics or political science. Law students in Germany have been persistently shown to be more conservative than those in liberal arts or social sciences.

⁶⁴ Dahrendorf (1968:237) also believes that: “There is probably no other discipline in German universities in which one hears as many complaints about the “barrenness” and “boredom” of the courses as legal science.” Similarly, Blankenburg and Schulz (1995:99) argue that university teaching in Germany consists mostly of lectures and concentrates on imparting knowledge of legal codes and their application to hypothetical cases.

⁶⁵ Abel argues (1988) that no domestic professional exam or aptitude test has ever been shown by empirical research to improve the quality of subsequent lawyering.

supportive of such a conclusion⁶⁶ and his views find even less support from the experience of countries such as Germany where the profession's influence on the production of lawyers is limited.

Perhaps, then, legal training works less as regulation ensuring quality of performance as a lawyer (or as a means to restrict supply) than as a means of creating and validating 'cultural capital' (see, for instance, Dezalay 1995)⁶⁷. The first literature review showed that the largest law firms recruited from the most prestigious universities in Britain and the States. We have also seen that these lawyers tended to come from upper middle class homes. Some practitioners themselves might, for instance, feel that their sense of ethics has been influenced more by their upbringing than their professional training⁶⁸.

What conclusions can be drawn from this discussion? It should first be noted that the question of what legal education achieves or aims to achieve is controversial and is likely to vary between jurisdictions⁶⁹. Twining, for instance, argues that (1994:52) in modern industrial societies, two main conceptions of the rôle of the law school have competed for dominance - that of the law school as a service

⁶⁶ Ogus (1993:319) states that until the recession of 1990/1, there was an admitted shortage of solicitors but entry requirements do not seem to have been responsible for this - instead: "The main problems seem to have been general demographic trends and the inability of polytechnics to increase the intake of non-law graduates and mature students for the one-year training course." Burrage (1996:52) also does not believe that the primary goal of entry requirements has been that of limiting the number of entrants to the profession - rather, the professions were more concerned with creating and maintaining status.

⁶⁷ Thus, for power élites in Germany, specialised competence is a major factor legitimating élite status, both in the judgment of the population and in the professionals' own eyes (Rueschemeyer 1973:85).

⁶⁸ For example, Freidson (1975:124), when studying community doctors, found that ethics seemed to be unproblematic to them and related less to being a doctor and more to being a properly brought up middle class person: "Ethicality was "pretty much common sense"... was learned "when you are brought up by your mother"... To most of the physicians the word seemed to refer to the norms of decency and honesty that were expected of all proper middle-class people and that had not and need not have been taught to students in medical school. There was nothing about the principles of ethicality guiding the doctor which was esoteric, known only to the professionally trained."

⁶⁹ Indeed, there is no universally accepted view of the purpose of higher education in general (Allen 1988).

institution for the profession and that of the law school as an academic institution devoted to the advancement of learning. The difficulty of knowing what legal training (carried out in often very different law schools) is trying to achieve has been witnessed again recently, as academics have tried to design benchmarks for undergraduate legal education (Bell 1999).

Thus at this stage the (rather unhelpful) conclusion is that the diversity of lawyers' education and the diversity of forms of practice make it difficult to generalise about what regulatory effects legal education has. Whilst legal education may impart useful substantive knowledge⁷⁰ and skills, it may be difficult to estimate or measure how far this improves lawyers' legal practice. Legal education does, however, create and validate cultural capital, as seen in the success of Oxbridge graduates in gaining employment with City law firms.

The subject of lawyers' socialisation within work settings has yet to be discussed and this may reveal more clearly how and why lawyers operate as they do. First, however, the impact of codes of conduct will be considered.

Codes of conduct and their significance

This section looks at the regulation of lawyers' behaviour through codes of conduct, focusing upon their strengths and weaknesses.

One advantage of disciplinary codes is their ability to provide sanctions for offenders whilst not necessarily intruding on an individual's moral space (Sampford and Parker 1995:15)⁷¹. They also limit the danger of tyranny by a

⁷⁰Yet the specialist areas of practice of lawyers working internationally may not have been studied at the academic or vocational stage of legal education/training; this might mean that the impact of substantive education is weak and/or difficult to measure.

⁷¹ Menkel-Meadow (1995:39) argues that this is part of a social contract in which lawyers, by agreeing to follow the rules, are entitled to pursue their individual self-interest and that of their clients within the limits set by the rules.

“moral majority” of lawyers. However, the disadvantages of a disciplinary code are that it (ibid):

“... focuses on the lowest common denominator of conduct beyond which lawyers may feel they should not bother to go. It also concentrates on the unethical actions that should be avoided rather than the positive ends that should be sought. Finally, it encourages a ‘legalistic’ concentration on the text of the code and legalistic arguments that some dubious action does not fall within the prohibition⁷².”

One specific critique of codes which has gained in popularity in the States focuses on what might be termed ‘the hired gun’ mentality. The idea is that codes foster the over-zealous representation of clients’ interests and do not encourage lawyers to look beyond their clients’ interests. This literature was certainly fuelled by the soul-searching engendered by the Watergate affair (Sheinman 1997) although discontent has been traced much earlier.

The professional rôle of a lawyer is defined in the ABA code as follows⁷³:

“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of law ... In our government of laws and not of men, each member of our society is entitled ... to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.”

This largely assumes that the lawyer’s function is simply to defend, not judge, the client (Rhode 1985:618). The logical corollary of this is argued to be that counsel assumes no moral responsibility for the ends to which her/his services are put (ibid). This formulation has been said to be based upon the desire for zealous criminal advocacy (Luban 1984). Luban argues that this rationale has been misapplied to cover the whole of the legal system and so has unacceptably allowed lawyers in the States to disregard morality. His opinion is that lawyers

⁷² Economides (1998:xx) similarly states that: “We also know that professional regulation based on codes of conduct can only achieve so much, especially when the regulated group is by definition expert in manipulating and, where necessary, avoiding rules.”

⁷³ The American Bar Association’s original Canons of Ethics date back to 1908 (Vagts 1996:250).

must be morally active - that they have substantial moral responsibilities to parties other than the client (1995:955).

Luban's argument is, however, subject to the criticism that it does not take account of provisions such as those in the New York Code which allow lawyers to consider their own morality (as will be seen later when the New York Code is discussed in detail⁷⁴), although it may be that lawyers are not in a position to do so (as will be discussed later when ethics and large law firm practice is considered). It also conflicts with Abel's thesis that codes are too vague and indeterminate to give lawyers any real guidance (Schneyer 1992:103). Nevertheless, it is worth pursuing Luban's reasoning further, partly as the thesis does provide a foundation from which later critiques of large law firm practice take off.

Luban believes (1995:978) that arguments used by lawyers to justify their "social irresponsibility" are merely excuses. Here are a couple of these "excuses":

- "Why me? Why does the burden of social responsibility fall on lawyers rather than other professionals such as accountants, investment bankers, or clients themselves?"

To this, Luban replies why not? If lawyers could pass the buck, then so could others and no one would be responsible for their actions. Although he acknowledges the realities of modern workplaces where the division of labour often leads to a fragmentation of moral responsibility (as will be discussed later), he still argues that this should not lead to a denial of moral responsibility - "if a single individual would be morally culpable for performing an action, how can merely adding an accomplice transform the situation so that neither is culpable?" (ibid:975)⁷⁵.

⁷⁴ Although the New York Code states that "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not the lawyer."

⁷⁵ Hence (ibid:976): "[T]he objector owes us an explanation of why, if the excuse "why me?" is accepted, it does not apply to everyone and yield the counterintuitive result described above: the

Nevertheless, I do find this places extremely high demands on the practitioner, particularly on young associates competing for partnership in large law firms (who may also not have full information on what the case is about, due to the division of labour), and for senior lawyers dependent on the work brought by clients, where the pressure is on to conform, or not to rock the client's boat. This is, however, probably more an argument in favour of attempting to manage law firms differently than a case for dismissing Luban's point outright; to appropriate Rhode's words, the issue "is not whether legal practice is uniquely inhospitable to moral oversight, but how it can be made more accommodating" (1985:636).

Still, the doubt still remains that lawyers often cannot work out what the consequences of the client's actions would be. Luban deals with this next.

- "I didn't know. I couldn't know whether the effects of my actions would be good or bad."⁷⁶

Luban acknowledges that the large-scale effects of many people performing similar actions are "very hard to figure out." Also, given the immense uncertainty involved in macro-economic forecasting, it would be preposterous to hold the lawyers morally responsible for "getting it wrong". Rhode similarly states (1985:618) that "[p]ure victims and villains are hard to come by; factual uncertainties, extenuating circumstances, and normative dissonance confound all but the rarest cases." However, Luban does think that there are three occasions where the "excuse" is too weak:

- a) Where the action the lawyer is helping the client to perform is unlawful; "the presumption should be that if the conduct is unlawful, it is wrong"⁷⁷;

complete annihilation of moral responsibility, so that responsibility can be eliminated simply by enlisting accomplices."

⁷⁶ A third excuse, "if I didn't do it, some other lawyer would", is discussed later in the section at the end of this chapter on reform, when 'whistle-blowing' is considered.

⁷⁷ The assumption seems to be of a benign system of justice.

b) Where the lawyer suspects that her/his actions are socially harmful and is confronted with daily evidence that those s/he is working with are indifferent or hostile to questions of social responsibility; and

c) When “common sense and honesty” do not permit the lawyer to plead ignorance sincerely. He argues that “[i]ronically, lawyers who pride themselves on their common sense practicality, and who usually have no patience for philosophical abstractions and paradoxes, suddenly embrace a wildly implausible standard of knowledge as Cartesian certainty - roughly, equating knowledge with infallibility - whenever “knowing” something would prove inconvenient” (ibid:980). Lawyers also go to great lengths to remain ignorant of inconvenient facts which might tie their hands in servicing clients effectively. Rhode agrees (1985:619):

“In many instances, lawyers know, or ought to know, the merits of their client’s claims. And in any case, to concede the uncertainty of legal and factual assessments by no means establishes that counsel should be relieved from all responsibility for making them⁷⁸.”

She adds that when acting in legislative or judicial capacities, lawyers frequently assume that the general public can conform in its conduct to indeterminate directives involving issues such as conscionability, due care and fair dealing - to argue that lawyers should be absolved from responsibilities that others routinely bear requires further justification (ibid). Hence to decline to take a moral stance is in itself a moral stance and requires justification as such. To concede the indeterminacy of ethical analysis does not establish its futility (ibid:623)⁷⁹.

I agree with Rhode that morality (to some extent) should be ‘put back into’ civil legal practice, and I also affirm her comment that to acknowledge the

⁷⁸ However, she does not totally condemn lawyers (1985:629): “Much of what is problematic in legal practice springs not from venality but from factual or normative uncertainty, together with a tendency to resolve all possible doubts in a single, client-oriented direction.”

⁷⁹ She also argues that lawyers’ distance from organisational incentive structures may permit a more disinterested perspective than that of corporate officers - but, I would argue, that underestimates the pressure on commercial lawyers to go along with clients’ wishes. However, she does later acknowledge the significance of dependence upon clients and bureaucratic structures in law firms (1985:627).

indeterminacy of ethical analysis does not establish its futility. Nevertheless, Sheinman (1997:151) also persuasively argues that if we are not careful, individual lawyers are left to do battle with their clients, their consciences, their pockets and their superiors. This topic is picked up and expanded at the end of the chapter, when the issue of reform is considered.

Self-regulatory bodies are the next topic for discussion.

Self-regulation, its weaknesses and application by lawyers' professional bodies

Self-regulation usually refers to the situation whereby rights to practise and rules of conduct for professional occupations are determined by bodies drawn exclusively or predominantly from members of the profession. It is, however, increasingly difficult to find a pure form of professional self-regulation existing today - for instance, the Law Society is not solely responsible for formulating rules as changes in the conduct rules governing solicitors in England and Wales at present go before an advisory committee in the Lord Chancellor's Department⁸⁰ (which also advises on legal education and training - Sherr and Webley 1997:136). Solicitors' investment business is also subject to rules made by the Securities and Investment Board (Allaker and Shapland 1994:12) and solicitors may fall foul of criminal provisions, such as those against money laundering. Actions against solicitors are not always handled by the Law Society; for instance, in alleged cases of negligence, solicitors can be taken to court.

Nevertheless, and as will be seen later, the professional bodies analysed later do have some autonomy, so the nature of self-regulation and its perceived value will be outlined here.

⁸⁰ This may change as the Access to Justice Bill proposes to abolish this committee, and may give the Lord Chancellor direct powers to intervene to change the professional rules of the legal profession.

In relation to the US legal profession, Soloman argues that self-regulation forms part of a “regulative bargain” between the profession and the state (1992:171):

“The monopoly over the practice of law the bar enjoys is the result of a “bargain” between the state and the profession in which the bar provides competence and access to legal services to the public, but refrains from partisan politics, and avoids the excesses of the market. In exchange the state grants the bar the right to establish the rules by which it restricts its market (including entry into the profession and the disciplining of its members) and allows it to extract monopoly rents.”

Ogus outlines possible reasons why a SRA (self-regulatory authority) might be a cheaper and more effective rule maker than a public, independent agency (1994:107):

“First, since SRAs can normally command a greater degree of expertise and technical knowledge of practices and innovatory possibilities within the relevant area than independent agencies, information costs for the formulation of standards are lower. Secondly, for the same reasons, monitoring and enforcement costs are also reduced, as are the costs to practitioners of dealing with regulators, given that such interaction is likely to be fostered by mutual trust. Thirdly, to the extent that the processes of, and the rules issued by, SRAs are less formalized than those of public regulatory regimes, there are savings in the costs (including those attributable to delay) of amending standards. Fourthly, the administrative costs of the regime are normally internalized in the trade or activity which is subject to regulation; in the case of independent, public agencies, they are typically borne by taxpayers⁸¹.”

Applying this to the case of the Law Society would raise the following questions for the empirical research:

1. Does the Law Society have greater expertise and knowledge of the practices of lawyers than an independent agency might, so that it is cheaper for them to formulate standards, monitor and enforce them?
2. Do commercial lawyers interact with the Law Society in an environment of mutual trust?

⁸¹ This fourth point on internalised costs is broadly accurate in the case of the legal professions researched, although actions against lawyers can also be pursued in the courts.

3. Are the processes and rules of the Law Society less formalized than those of public regulatory agencies (so they can be amended more easily)?

Similar questions will be posed in the work on German regulators.

There are, unsurprisingly, many criticisms of self-regulation. It can be seen as an example of ‘corporatism’ (or regulatory capture⁸²) whereby power is acquired by groups which are unaccountable through conventional constitutional channels⁸³. Also, as in the case of the Law Society which presently has functions including the interpretation of the rules, adjudication and enforcement⁸⁴, there is a breach of the separation of powers doctrine.

An economic criticism of SRAs is that they might exploit their regulatory powers to establish anti-competitive conditions and thus generate extra profits for practitioners. Barriers to entry can be created by imposing stringent qualifications for a licence to practise and, under the guise of “professional ethics” and “quality control”, restrictive ongoing conditions can be prescribed which distort competition and inflict unnecessary costs on consumers (Ogus 1994:108). This point will be mentioned again, when the regulation of lawyers in a host state is considered.

Similarly sceptical are those who might be broadly described as ‘market control theorists’, as discussed in the first literature review. Abel is particularly critical of lawyers’ professional bodies. He believes that professions do not appear to perform their regulatory functions very effectively (1988:29). Self-interest often

⁸² As has been seen, Makki and Braithwaite (1995:61) argue that there are three forms of regulatory capture - identification with the industry, sympathy with the particular problems that regulated firms confront in meeting standards and absence of toughness. It may be that some self-regulatory bodies can be criticised on all three grounds.

⁸³ Even the internal functioning of professional associations may be unaccountable to the membership. The Law Society’s election procedures for members of the Council, for instance, came under great scrutiny in 1995 as they were alleged to lack democratic legitimacy.

⁸⁴ The office formerly known as the Solicitors’ Complaints Bureau (now the Office for the Supervision of Solicitors) performs this function in relation to English and Welsh solicitors.

quells reform and ethical rules are deliberately drafted vaguely to maintain professional power through their very indeterminacy. Indeed, he states (1989) that surveys often show that lawyers are ignorant of many rules and fail to internalise those they do know. Hence many rules aim to effect market control rather than protect clients⁸⁵. Moreover, enforcement is weak (1988:29):

“And the object of ‘self-regulation’ often appears to be protecting the inept within the profession rather than the society they ostensibly serve ... One reason for systematic non-enforcement is that control of misconduct and incompetence readily becomes an arena for intraprofessional conflict, which threatens the very community self-regulation purports to express. Consequently, self-regulation may be more comprehensible as an assertion of status rather than as a form of social control ... There is a danger, however, that the visible failure of self-regulation may lead to attempts to assert control by clients ... and external agents such as courts.”

Indeed, the Law Society has been attacked in the media in the last two years (by the Consumers’ Association and in a documentary for Channel Four, broadcast in December 1998) for its alleged weakness in dealing with errant solicitors. The Consumers’ Association has called for an independent regulatory body⁸⁶.

Nevertheless, the idea that regulation by the professional association is more to do with status than social control is less convincing when analysing the subject

⁸⁵ Burrage (1996:56) similarly argues that the status of the profession will be harmed if discipline is too vigorous. Freidson (1989:428) takes the following stance: “Formal codes of ethics are often promulgated both to demonstrate concern with the possible abuse of privilege and to provide guidelines for evaluating and taking action against it ... The claims of professions are rarely, if ever, matched by their actual performance... There can be little doubt that the greater the public perception of gross deviation of professional performance from professional claims, the less can professions resist pressure to weaken their monopoly ...”

Grabosky and Braithwaite (1986) have also argued that prosecution by regulators is less frequent when regulators and regulatees are close in social background.

⁸⁶ Hancher and Moran contextualise this by stating (1989) that the political culture of the past in the UK was marked by a deferential attitude on the part of the public towards authority and a preference for informal regulation. This is now changing: “In the last couple of decades the deferential and secretive character of the political culture has been subjected to some strain, as a result of the combination of government policy failures, changes in social structure and wider alterations in the character of popular values. One of the most important consequences - illustrated to perfection by the experience of the financial services industry - has been the invasion of regulatory space by organisations (such as central departments of state and highly organized pressure groups) previously excluded under the assumptions of a deferential and secretive culture.”

matter of this research, lawyers in large law firms. I would agree with Burrage (1996:72) that the status of commercial lawyers depends less on collective action or the policies of the Law Society than on their educational qualifications, their perceived expertise, the kind of work they perform, their firms and their individual commercial success. Thus it is now time to unpack these points and look at law firm practice itself.

On the ethical and conduct issues of (international) lawyering in large firms

The client is the most important person ever in this office. The client does not depend on us; we depend on the client. The client is not the nuisance of our work; he is the mainframe of it. We are not doing him a favour by having him; he is doing us a favour by giving us the opportunity to have him. The client is not someone to argue with. Nobody ever wins an argument with the client. The client is the person who brings us the bonus and it is our job to give him anything and everything he wants.

**Sign hanging in the Tokyo office of Barings bank, prior to the bank's collapse
(quoted in Hunt and Heinrich 1996)**

The literature to be reviewed here contains work which examines specifically the problems of ethics and large law firms. Writers have attempted to analyse those features of law firms (and those characteristics of their lawyers) which may pose problems when attempting to establish ethical practice. The approach taken will be to separate these features and consider them in turn.

It should be noted at the outset, however, that this review draws largely on work written on the US legal profession. As has already been noted, there is little work on the German profession. Literature in the UK is growing (as witnessed in the publications of Cranston 1995, Sheinman 1997, Economides 1998, and Nicolson and Webb 1999) but this still is a relatively young body of work. The dangers of drawing on the US literature when discussing the professions in England and Germany include the risk of ignoring or misrepresenting national differences. Nevertheless, I still believe that there are useful insights to be drawn from this

literature, particularly as large law firms in different countries do encounter some common issues. It is further hoped that the empirical work in part two draws out various differences and similarities in the practice and regulation of the law firms considered.

- *Commercial lawyers' individualistic perspective*

Large law firms are likely to take on an 'élite' set of graduates, as seen in the first literature review, from high socio-economic groups and with prestigious academic qualifications. Entrants to these firms are, to some degree, self-selecting and are likely to frame issues in individualistic terms (as do many lawyers - Seron 1996). Hanlon comments that Big Five accountants are "mostly upper middle class" and have a belief in individualism - for instance, if they fail to progress in their firms, they perceive it as their failure and not that of the firm (1994:147). The upshot of this may be that lawyers are unlikely to pay much attention to third party interests⁸⁷ or to consider the social needs of a wider community⁸⁸. We are back again to the idea that lawyers are ready and willing to act as 'hired guns'.

I would, however, argue that it is also vital to scrutinise the structures and cultures of large law firms when analysing what ethical issues might be encountered in large law firm practice - this might be more important in influencing conduct than an individual's background. Those features of large law firm practice which writers have deemed to be ethically problematic will occupy the rest of the section.

⁸⁷ For example, Kronman argues that (1993:307) the preoccupation of practitioners with money-making is both an obstacle to sympathy and makes detachment harder to achieve.

⁸⁸ Hutton, for instance, is particularly scathing when discussing public school alumni (1996:319): "The public schools turn out cohorts of Conservative supporters who staff the upper echelons of business and finance and are educated to believe in the superiority of the private, the self-regulated and the voluntary. They have little sense of the common weal or responsibility to their fellow citizens and they can be relied on to echo the general party line to the letter. The sense that civil society needs to be protected from 'bureaucratic' intervention and regulation is very strong. Any constructive suggestion involving public action or institution building is dismissed as 'socialist'."

- *The long hours worked*

“The pace of practice is so fast now with faxes, emails and mobile phones. Lawyers have lost the ability to control the way they work. When you add the demands of profit making, clients and the 24-hour-a-day, 7-day-a-week climate, you can understand how hard it’s become.”

Janet Gaymer of Simmons & Simmons (quoted in Hickman and Watkin 1999)

It is often difficult to contain the practice of law within strict office hours (Seron 1995), although the number of hours lawyers work can raise ethical issues, as the following section suggests.

Landers, Rebitzer and Taylor (1996) have argued that the organisational setting of a law firm encourages associates to work inefficiently long hours. Partners engage in income-sharing and this creates incentives to promote associates who work very hard and the most popular indicator of this propensity is the number of hours billed (see also Galanter and Palay 1991). This leads to a “rat-race” situation in which associates work too many hours⁸⁹. However, their thesis can be criticised in that the (potential) ability to bring business into the firm (“rain-make”) is perhaps just as or more important in the promotion decision and many firms have been increasingly moving away from lock-step systems of compensation.

My view is that the *perception* amongst associates may be that those who are in the office longer are more likely to make partner, although the partnership may encourage the working of long hours for several reasons. Willingness to work long hours may be used as one indicator of future earning potential whilst also, and more cynically, creating additional profits and discouraging a number of associates (who are alienated by an exploitative culture) from entering the partnership race, at a time when law firms are promoting fewer to partnership

⁸⁹ MacErlean (1998) also argues that lawyers believe that their commitment is partly measured by their willingness to work until 9pm or later.

(thus keeping the partners' profit pot larger). Still, there is some evidence to suggest that too many US associates are leaving firms (due to the pressure of work) earlier than firms would like (Parsa 1999).

Willingness to work long hours may also be used as a means of determining who fits in within a firm's often club-like atmosphere. Those who are likely to conform easily to a culture of working late at night are likely to be those who find it easier to cope with having few extra-professional interests. Stracher, for example, argues⁹⁰ (1999:126) that:

“There is a culture of work at big firms that keeps associates from imagining other possibilities. It begins with dinner in a conference room and ends with a shared car uptown at midnight. It's face time, but it's something else too. There's a homey feel to those conference room dinners, with their smell of takeout Chinese food and the leisurely banter between attorneys. The parents have gone to bed, and the associates are free to complain about arduous chores, tyrannical commands, and irrational moods. Ties and tongues are loosened, and stories are shared with a fraternal (and sororal) familiarity. Why rush home to a crazed family life or, worse, the loneliness of a studio apartment and an empty refrigerator? Better to slip inside the apartment when the two kids are asleep and gently kiss them on the forehead than deal with the messy after-bath before-bed tantrum. Better to share a meal with a semi-kindred spirit than slurp a bowl of cereal over the sink.”

Whether this situation is in the long term interests of firms is, however, another matter. Several writers, for instance, have suggested that the status quo keeps women from making partner as women are more likely to have additional responsibilities outside work (as they bear the lion's share of non-market activities in the home⁹¹) and they may not be able to participate in marketing initiatives (particularly those based around heavy drinking and sport) to the same extent as men.

⁹⁰ Rogowski also believes that recruits to large German commercial law firms (1995:120): “... who are mostly young males, consider long working hours a sign of high prestige which distinguishes them from other members of their cohort.”

⁹¹ A summary of recent European statistics on this issue is to be found in Travis 1998.

As long hours⁹² mean that those who are successful are likely to have few extraprofessional interests and commitments, it might also follow that they are “shallower people” (Kronman 1993:307). It could also follow that those who are left are so focused on doing well in the firm that they lose all sense of perspective and are more likely to act unethically. As Rhode argues (1985:635):

“... once habituated to collegial norms and practices, a lawyer may have increased difficulty in viewing them through moral lenses ... After a point, individuals can easily lose capacity to evaluate professionally accepted practices by publicly acceptable standards.”

Perhaps, too, the lawyers who stay the course are less likely to be able to think creatively, as they lead less stimulating lives. This might mean that they are not well equipped to think laterally at a time when the speed of changes in the workplace demands an innovative response.

Failure to mitigate work and private life conflicts does prove expensive to firms and their lawyers, by increasing employee absenteeism and turnover⁹³, impairing recruitment success, compromising job performance and jeopardising the well-being of employees⁹⁴ (Hagan and Kay (1995:198). The point about compromising job performance is particularly pertinent for our purposes - MacErlean (1998), for example, argues that consistently working long hours is usually a sign of poor time management and results in mistakes being made due to exhaustion.

This discussion will be continued when the interviews with lawyers are considered.

⁹² Some international lawyers may stay at work to service clients in several time zones and so may work even longer hours than their colleagues who service national markets.

⁹³ According to one survey, conducted by the recruitment consultants ZMB and The Times newspaper, 38% of assistant solicitors “are looking to leave the legal field altogether”, and firms with more than 80 partners are “saddled with the most unhappy employees” (Editorial 1997b).

⁹⁴ Cartwright and Cooper state (1997:15) that working beyond 40 to 50 hours a week results in time spent that is increasingly unproductive. They note that several studies have established a link between extended working hours and coronary heart disease (see also Argyle 1989:265).

- *Lawyers' reliance on a small number of clients and lack of consideration of other interests*

"A distinguishing characteristic of professional occupations, which justifies self-regulation by the professional group, is that they are committed not just to profits, but to public service as well. Lawyers, as officers of the court, are obligated to serve the public interest even as they advocate the interests of their clients. Hence, although large-firm attorneys represent the most powerful interests in American society and thus enjoy a tremendous advantage in the adversarial process over lesser foes, they represent themselves as independent professionals who can check the narrow self-interest of clients."

Robert Nelson (1988)

The glossary noted Galanter's (1983) analysis of the typical features of a 'mega-law' firm. The final point he made was that "clients have greater control; autonomy is absent from practice." Picking up on this point, Nelson (1988) has noted the reliance of individual lawyers on a small number of clients. Other writers have also talked of the interdependence of corporate lawyers and their clients. Abel notes (1994:749) that this is particularly worrying at an international level:

"Robert Nelson has demonstrated that *individual* lawyers in large American firms typically earn thirty to forty percent of their fees from a single client. Foreign branches are closer to the latter situation than the former ... This is likely to breed a worrying clientelism." (italics in original)

What the problems of this "clientelism" might be are not spelled out. Perhaps it means that lawyers are particularly keen to do whatever their clients want them to do, ethics (and third parties) be damned. Perhaps it also means that they do not take on a "mediating function" in the legal system, as Nelson argues (1988:232):

"My central thesis is that lawyers in large firms adhere to an ideology of autonomy, both in their perceptions of the role of legal institutions in society and the role of lawyers vis-à-vis clients, but that this ideology has little bearing on their practice ... The dominance of client interests in the practical activities of lawyers contradicts the view that large-firm lawyers serve a mediating function in the legal system⁹⁵."

⁹⁵ Painter (1994) similarly argues that often the ideal of lawyer independence becomes an ideology recited by lawyers whether or not they act independently of their clients. This distances lawyers from client conduct but does nothing to restrain client excesses. Lawyers embracing this

Hence, these lawyers do not control client excesses and do not provide the kind of disinterested service which functionalists would have had us believe - they are 'hired guns'. Effectively, then, clientelism is a problem encountered when lawyers' legitimate obligation to act in their clients' interests overrides other competing and equally legitimate obligations.

Kronman similarly comments that these firms focus on short-term, easily monetisable considerations (1993:307). This may be particularly worrying in an age where the volatility of the market for corporate control has brought to power in the States "... a new breed of portfolio managers oblivious to audiences outside the securities markets ..." (Gordon and Simon 1992:251)⁹⁶.

Further, Abel argues that the effects of competition in the international market for commercial legal services is likely to reduce the capacity or willingness of firms to undertake work for individual clients or pro bono work (1994:749):

"The race to bill hours makes the lip service firms pay to pro bono or deo activities even more hypocritical. As service to individual clients is driven out by more lucrative commercial work, firms lose the basic competence to represent ordinary people ... As far as I know, foreign branch offices perform no public interest work⁹⁷."

Dezalay and Garth (1996:63) agree:

"In order to coexist with the modern holders of economic and political power, international legal experts did not have to invent the notion of a "public" service entrusted entirely to legal experts. They needed only to propose their own

ideology do not become independent but succeed only in segregating their own moral beliefs from actions closely involved with their day to day work.

⁹⁶ Recent reports of investigations by the National Criminal Intelligence Service in London into alleged links between six big City law firms and organised crime (Mendick 1998 and 1998a) may bring this issue into greater focus. Firms stand accused of facilitating the laundering of money.

⁹⁷ Whilst it is unlikely that most foreign offices perform pro bono work, Abel does not raise the issue of whether lawyers in foreign offices are qualified for/capable of undertaking such work or whether the local profession carries out this work. Local lawyers may be employed in overseas offices and some forms of pro bono work may be possible, but this would seem to depend upon the law office and jurisdiction in question.

services, developed in national settings, to defend the legal interests of the new social operators in international economic relations.”

This is especially problematic for US writers, as can be seen from Nelson’s quote which begins this section, which states that lawyers (as officers of the court) are obligated to serve the public interest even as they advocate the interests of their clients⁹⁸. If lawyers do not consider the public interest, then the basis upon which the professional monopoly is granted (and the legitimacy of self-regulation) is in doubt. This discussion is expanded in the final section on the legitimacy of international lawyering.

- *The compliance of lawyers*

Concern has been expressed at how other features of law firm practice (nationally and internationally) might also reinforce lawyers’ partisan behaviour. Abel, for instance, believes that the effects of competition in the international market for the services of large firms are likely to make associates particularly compliant (1994:749):

“In the international market, where quality is difficult or impossible to gauge, firms are forced to compete on the surrogate indices touted by the new journalism, which are easy to calculate. These typically include billings or profits, ... size, and growth rates. In order to elevate these, firms must augment leverage by increasing either the ratio of associates to partners or billable hours or both. The heightened competition for partnership makes associates even more compliant and uncritical.”

Even away from the international arena, the position of junior lawyers can be compromised. Due to the leveraged use of staff, lawyers working on fragmented aspects of a substantial matter may feel little accountability for its ultimate consequences. Moreover, even if young lawyers have ethical concerns, it is extremely difficult for them to refuse work on ethical (or other) grounds. Indeed, junior lawyers may have little reason to decline an assignment until well into a

⁹⁸ Nelson and Trubek (1992a:7) further argue that the crisis of “professionalism” they note in the States is in part due to the entrepreneurial response of lawyers to markets such as the international market. Although the profession has experienced unprecedented wealth, there is also inequality of opportunity which has caused disquiet both among lawyers and the public.

case, when they acquire substantial information regarding client conduct - yet this is precisely the point at which disengagement becomes most difficult (Rhode 1985:634⁹⁹). Even at the outset of a case, pressures to accept an assignment may be substantial - passing judgement on a senior lawyer's choice of clients or tactics is unlikely to be a costless exercise (Rhode 1985).

Senior lawyers are not immune from client pressures either. While they may be more able to decline cases or challenge conduct, the costs of exit from a relationship can be high - power, status and profit shares may depend upon these alliances (Rhode 1985:635). And as discussed in the first literature review, international lawyers are likely to be close to capital (Sklair 1991 and Dezalay 1994).

Hence, and again, the charge is that lawyers do not consider the position of anyone other than their clients.

- *Large law firms are largely beyond the jurisdiction of professional associations*

If the previous sections indicate that there are likely to be ethical issues raised by large law firm practice, this section will illustrate how these firms are largely beyond the jurisdiction of professional associations.

Schneyer (1991) argues that as law firms grow, the potential harm they can inflict upon clients and third parties grows. However, in the US (and in the UK and Germany), proceedings against large law firms are rare. Some observers say this is due to an informal immunity from disciplinary scrutiny as they make up the most prestigious segment of the bar. Others point out that the most common grievances against lawyers, such as neglect of cases, occur more often in small

⁹⁹ Rhode 1985:634: "As the sunk costs and social ties involved in the professional relationship increase, the taste for moral reflection or confrontation may diminish."

practices¹⁰⁰. Others cite the reactive nature of disciplinary enforcement. Finally, the view that commercial clients rarely report complaints against their lawyers as they are more likely to take their business elsewhere, or pursue their case through the courts, implies that many of the regulatory concerns of professional associations are simply inapplicable to this form of practice.

It may also be difficult to assign blame to one lawyer when lawyers work in teams. If one lawyer was reprimanded, that lawyer may become a scapegoat. Indeed, the firm's organisation, policies and operating structures constitute an infrastructure that cuts across particular lawyers and tasks - so these infrastructures may have at least as much to do with causing and avoiding unjustified harm as do the individual values and skills of their lawyers¹⁰¹.

Lee believes that the driving force within large firms for meeting professional conduct standards, such as guarding against conflicts, overseeing staff's continuing education and accounting procedures, are likely to be the demands of good and efficient management rather than the mere fact of the practice rule (1992:43). This, in fact, returns us to the point made earlier that the status of large law firms is more dependent upon matters intrinsic to the firm and its lawyers (such as their education and specialisation) than codes.

The next section considers the question of whether international legal work should be regulated at all. However, and as a postscript, it should be noted that professional regulation often tends to be concerned with conduct matters which are narrowly defined. For instance, there is often much attention paid to matters

¹⁰⁰ Abel (1986:15) argues that if disciplinary sanctions and investigations continue to be focused disproportionately on lower status practitioners in the US, these processes may become suspect not only for their class bias but also on the grounds of racial discrimination.

¹⁰¹ Nelson and Trubek (1992b:199) also comment that the variety of professional values within the workplace ensure self-regulation's complexity: "Workplace contexts develop widely varying and often mutually contradictory "local versions" of professionalism. At least some of these are inconsistent with the professional ideals projected in the bar's official rhetoric. One of the implications of the diversity in profession vision one observes among lawyers at work is that the task of professional self-regulation is significantly more complex than most observers would allow."

such as fees but much less consideration of whether lawyers' responsibilities to the client might clash with other responsibilities. Even if large law firm practice were to be regulated, it is unlikely that the problems of national and international commercial law firm practice as set out in the previous sections would be tackled unless a much wider approach to regulation was adopted. These are issues which are discussed further in part two, when the coverage of codes is analysed, and in the discussion of reform in part four, where broader means of regulation are considered.

Should international legal work be regulated?

Abel (1994) believes that transnational lawyering should be *deregulated*. It seems that this position is to a large extent founded upon his market control thesis, the idea that regulation of lawyers is not there for good reasons, but rather to construct and maintain the monopoly position of lawyers.

To support this, he mainly focuses on those regulatory provisions which restrict lawyers' rights to practise and market their international work. He states that the economic reason for regulation, that there are informational asymmetries between producers and consumers, does not apply in the international arena. Consumers are large corporations or financial institutions who are well informed. Moreover, the branch offices of firms stand or fall on reputation¹⁰², and are likely to have a smaller client base than home offices, which will increase the consumers' bargaining power. All transnational lawyers have secured home qualifications, have undergone a rigorous selection process and have endured lengthy training (1994:762)¹⁰³.

I feel that this analysis is open to a number of criticisms:

¹⁰² Abel does not further analyse what he means by reputation. Presumably, firms could have reputations for criminality as well as legality.

¹⁰³ This statement seems to conflict with his well-known scepticism of the value of lawyers' educational qualifications.

1. Whilst it appears that the most lucrative forms of international work are undertaken by large firms whose clients are corporations, not all clients of international work are corporations. The potential of various types of private client work to cross national boundaries has been noted before - some examples could be custody cases, possibly immigration and disaster litigation¹⁰⁴, consumer cases, including some product liability matters, criminal prosecutions and the purchase of overseas property. These clients are much less likely to be the 'empowered consumers' Abel describes, and are more likely to use smaller law firms. His argument neglects to consider how the deregulation of international lawyering would affect these individuals.

2. Abel's assumption is that corporate clients have greater bargaining power than their lawyers in relation to international work. Yet this, at least partially, runs contrary to the notion often expressed by these lawyers that there is more client "hand-holding" at an international level (see also Shapland 1997) and also his earlier assertion, quoted above that (1994:749) quality is difficult or impossible to gauge in the international market¹⁰⁵. Clients here are likely to be more reliant upon their lawyers' advice. If international lawyering is likely to be transactional, which is the view of a London Business School (1994) report, rather than continuous then this *may* also weaken clients' power, as this *may* mean that they are not as experienced as Abel assumes.

¹⁰⁴ One example springing to mind is the Bhopal disaster, when US lawyers flew to India to tout for work.

¹⁰⁵ The final section of the article in which this is written somewhat surprisingly does not refer back to a previous passage (quoted above) where Abel suggests that (1994:749): "In the international market, where quality is difficult or impossible to gauge, firms are forced to compete on the surrogate indices touted by the new journalism, which are easy to calculate." The idea that quality is difficult or impossible to judge at an international level suggests that clients might not be as well informed as Abel later argues.

Moreover, Lee suggests that not all clients are willing and able to take their business elsewhere if they are dissatisfied with the service they have received (1992:31):

“Most lawyers are familiar with clients - even large corporate clients - who are happy enough to leave decisions to them. Indeed, the freedom from such decisions is what they may wish to purchase.

Thus an agency relationship may develop between lawyer and client. Both parties may be happy with this, but it is not a model in which the parties typically trade. Client loyalty demonstrates that the agency relationship is often preserved past the point when one might expect the client to re-contract with another provider. Besides which, at any point in time, clients may have lengthy on-going legal matters with their chosen provider. Changing lawyers may itself be costly and informational asymmetries make it difficult to guarantee a technically better service. Moreover, client choices are narrow. The client may be able to acquire the services in another form, but this is not easy. Few other providers will possess the technical skill and knowledge. For corporate clients, in-house provision may be possible. However, as legal regulation becomes more pervasive and legal rules more complex, it is difficult to obtain the specialist services, especially where these are required only on an occasional basis. So it is to the law firm that the client turns, and the informational asymmetry suggests: ‘better the devil you know’ ...”

There is also a great diversity of business clients to be found seeking advice with an international element, from small clients, perhaps engaged in import-export businesses, to transnational companies. Even the latter, however, might have less knowledge of some areas of legal work than others.

This does not, of course, imply that such clients would go running to a regulator if they were unhappy with the service they received.

3. Finally, Abel spent some time in the article considering the ethical issues that were raised by large-firm international practice. He noted, for instance, that foreign offices were likely to be reliant on a smaller number of clients than the home office, breeding a “worrying clientelism”, and that international associations do not encourage pro bono work, support legal aid, ensure standards of competence or ethical behaviour, certify educational institutions or help to reform legal institutions or rules. He does not, however, suggest any measures that might attempt to deal with any of these concerns. It thus seems a little

strange that he argues almost unconditionally for deregulation and says nothing about how to tackle the ethical issues he raised.

Yet whether these criticisms provide sufficient grounds from which an argument for regulation of international practice could be constructed is another matter. Certainly, one should be careful as to what should be regulated, if anything, how and by whom.

To consider the issue of client protection first, and *remedies* for unsatisfactory legal work, Abel's view that the clients of transnational lawyers are capable of looking after themselves financially is appealing when applied to most corporate clients, however much their hands need holding. Even if some dissatisfied clients might be reluctant to take their custom away (as Lee suggests), one would imagine that if significant (lawyer-created) damage became apparent, most clients would pursue their erstwhile lawyers in the courts, if necessary - although it must be acknowledged that this question in itself would be a useful topic for further research and the lack of detailed research on clients makes it risky to divine what protection, if any, clients need.

Still, this does not necessarily imply a deregulatory response - some business clients will be more knowledgeable than others and some countries' regimes of client protection are better than others. There is a need to think more clearly about the circumstances in which clients might slip through the regulatory net and that would require empirical research across a substantial number of jurisdictions.

Certainly, one might argue that private clients do need some form of redress for poor international legal work. It may not always be the case that overseas bars or courts provide sufficient remedies for manifestly poor legal work carried out by a member¹⁰⁶. It might also not be clear who is liable for the faulty work, particularly when lawyers in more than one country or different types of lawyer

¹⁰⁶ One example of this is that, even within Europe, there are wide differences in the indemnity insurance taken out by members of the legal professions of different countries (Carr 1995).

are involved. There may be a need for some form of supranational regulatory authority to consider cases that were not dealt with at a national level (or could be better dealt with at an international level).

This, of course, does not consider third parties who might be adversely affected by the effects of lawyers' advice and actions. The section at the end of this chapter on reform considers in more detail what should be regulated internationally.

Turning now to the *prevention* of shoddy legal work, in relation to rights of establishment overseas and rules regulating promotion of work the need for regulation is less obvious. Standards and entry regulations aimed at discriminating against foreign firms can often be readily camouflaged as welfare oriented protection (Clegg 1993:100). Restrictions should be also justified as restrictions on otherwise important human rights and libertarian objectives - these include the 'right' of the individual to counsel of their choice¹⁰⁷ and freedom from discrimination on the grounds of nationality (McLachlan 1989:358).

However, the difficulty of determining the validity of arguments in this area is exacerbated by differences between countries which make it hard to judge in advance the effects foreign law firms will have upon the local legal profession¹⁰⁸. As Halliday and Karpik state (1997:361), the impact of globalisation in a national setting will be influenced by a national profession's ability to mobilise in ways

¹⁰⁷ This principle is currently under review in criminal cases - the Lord Chancellor is proposing to set up a Criminal Defence Service, which will represent defendants (Perkins 1999).

However, it may be a principle of significant importance in some international matters, as when human rights are at stake and the lawyer is not seeking a permanent right of establishment. For instance, eight Britons recently faced terrorism charges in Yemen and their British solicitor flew over to represent them. However, when the lawyer attended the trial, the judge asked him to leave the court after the prosecution objected to his presence alongside Yemeni defence lawyers (Wilson 1999). One could imagine that such a ban might prejudice the clients' case, particularly so if a fair trial is in doubt.

¹⁰⁸ As has been seen in the discussion in the thesis before on the effects of 'mega-firm' practice on continental Europe.

that resist, adapt or appropriate global changes in ways consistent with national or sectional interests. Consequently, Abel's belief that the onus of justifying the need for protective regulation should be on those proposing it avoids the issue of how the need can be proved.

Adamson does feel, though, that there might be some justification for regulation when foreign lawyers attempt to set up practice in host countries. Too hasty a relaxation of professional rules may risk damaging the long term independence of a national profession (1992:101)¹⁰⁹. Unfortunately, the strength of such an argument is difficult to weigh in the abstract. He may be implying that the entry of foreign mega-law firms can overwhelm the local profession, in a similar fashion to Dezalay's argument, and that these firms are not noted for their independence from clients, as we have seen, and they may not be sensitive to the local cultural environment. It may also be that Adamson is implying that local professions will suddenly have to deal with all the other problems that mega-law firm practice might bring (such as a lack of interest in pro bono work or other public interest work¹¹⁰, the difficulties of regulating their practice, and their potential to take the country's most highly qualified lawyers and most lucrative work, leaving other lawyers with fewer opportunities to develop specialised skills). Hence, too hasty a relaxation of rules might profoundly weaken the local legal profession, lessen its diversity and leave it unable to compete with the newcomers. This might mean that national clients would not then be served or would not be served by the best qualified national lawyers. This interpretation would support McLachlan's analysis (1985:(I)):

“The issues of practice mobility in the legal profession have long been contentious ... The reason is not far to seek. The freedom to practise must be balanced against a series of localising interests: the desire of local lawyers to maintain their assured market; the desire of local law schools to preserve the value of their degrees, and, most significantly, the need for the local society to have lawyers who are sensitive to the legal and cultural milieu within which they

¹⁰⁹ The assumption here is made, of course, that the profession acted in an independent manner prior to the arrival of the foreign incomers.

¹¹⁰ Assuming, of course, that local bars were interested in this before.

work. This clash of local and internationalist interests makes the issue a sensitive one ...”

Some of these tensions have been experienced in China recently. China has had to balance the potential benefits that the presence of foreign lawyers bring to the country - such as encouraging foreign investment and passing on expertise to certain Chinese lawyers through training programmes - with the interests of local bar associations and the threat of a brain drain of the most highly regarded Chinese lawyers from local firms to their foreign counterparts (Tyler 1998e). Adamson himself also points out that an excessively restrictive national regime may prevent that country's profession from developing so as to compete in the European/world market for legal services.

Nevertheless, and on the assumption that there are no fundamental objections to the notion of international business in the first place, these objections relate more to the way practitioner mobility is approached rather than to the idea itself (McLachlan 1989). This would mean that regulation should be devised which would attempt to deal with some of these issues.

This would not be easy, and it would require a variety of measures (which might also apply to other incoming professionals, such as Big Five accountants). Incoming lawyers would have to accept that the 'right' to work in another country brings with it the need to use that right responsibly. One suggestion which would aim to raise cultural awareness (which may, however, prove to be extremely impractical) would be for foreign lawyers to participate in a specially designed adaptation course which would introduce them (in a short time) to the special features of the host country's legal system (McLachlan 1985). EU directives governing requalification in host states, for example, do include mechanisms to determine lawyers' knowledge of the host states' legal systems, as will be seen in part two. They might also be obliged to train, or provide money for the training of, local lawyers, as in China, and to contribute to public interest work. Reasonable procedures could be developed to facilitate the requalification of

foreign lawyers in the host state¹¹¹. The issues of challenging 'clientelism', establishment rights in the EU and under the WTO and the possibility of a supra-national regulator are considered later in the chapter.

The potential difficulties of regulating internationally will now be further discussed by looking at how regulation can be evaded.

The evasion of regulation affecting international legal work and unregulated areas of practice

To preface this section it should be emphasised that those who believe that regulation is there for no good reason (or that regulation only aims to protect clients who can take care of themselves) will be unconcerned about the evasion of regulation. This section begins by analysing a quote by Abel in some detail. He argues that as the evasion of the regulation of international work is so easy, a de-regulatory response is justified.

Abel begins by stating that perhaps it is unsurprising that lawyers, skilled as they are in overcoming legal obstacles for clients, are able to evade regulation aimed at the establishing and promoting of their practice (1994:760). Such regulation is, however, diverse. In many countries, there is still a total ban on the establishment of offices by foreign lawyers, combined with monopolies of legal practice and advice for the local legal profession¹¹². Other means designed to restrict the operation of foreign lawyers include onerous registration and licensing provisions, as in Japan and, to a lesser extent, in certain jurisdictions within the

¹¹¹ Incoming law firms might also be licensed to carry out certain types of work (such as international commercial law, leaving domestic law to domestic lawyers) but this might not stop a 'brain drain' of local lawyers to foreign firms and might limit the opportunities of local firms to undertake or learn about the types of work the foreign firms undertake.

¹¹² The IBA General Professional Program Committee note (1994:33) that there are many jurisdictions (for instance, in Central and South America, in many countries in Asia and most US states) that provide no mechanism whatsoever for the establishment of foreign legal consultants.

USA¹¹³. Lesser restrictions used are those limiting the scope of activities which foreign lawyers can undertake (for instance, they may be prohibited from advising on local law) or those limiting the form of work (for example, they may only be allowed to practise in conjunction with a local lawyer).

However, Abel gives several examples of how such regulation may be evaded. One is that exclusion from areas of legal work reserved to a local (host) profession can be circumvented by using a local (host state) lawyer to nominally approve work undertaken by foreign lawyers (this, of course, assumes that host state rules allow the local lawyer to act in this fashion). Another is that foreign lawyers who cannot practice under the name of home firms can find numerous ways to inform potential clients of their affiliation. Strict rules against self-promotion can be circumvented, for instance, through seminars and using social networks. Finally, and perhaps most crucially, if regulations are unduly restrictive, lawyers may find other places to practice¹¹⁴.

There are also areas which remain unregulated, and this might be due to the difficulties of regulating. Abel outlines these areas in a passage which I have cut into sections for ease of analysis (1994:761):

“First of all, home lawyers can practice foreign law from home without any major restriction ...

¹¹³ As regards the US, a foreign legal consultant regime (for lawyers practising home law but based overseas) was introduced in New York to enable foreign lawyers to practise there under home title but subject to significant restrictions (Adamson 1998:171). However, the Court of Appeal in New York, which promulgates professional rules for lawyers, is said to be reviewing its rules on establishment rights for foreign lawyers (Unattributed 1998u).

Schemes similar to that in New York have now been introduced only in about 20 of the 50 states in the Union, although these locations include most of the cities where foreign lawyers might wish to practise (ibid). Still, the number of foreign law firms established in the US is relatively small and a large proportion are City firms in New York (ibid).

Lutz (1995:101) argues that the moves to create foreign legal consultant rules in certain US states were largely motivated by self-interest. They were not concerned with protecting consumers but rather with encouraging foreign countries to enter reciprocity agreements to allow US lawyers to practise in the host jurisdictions.

¹¹⁴ Although it must be said that that might be very inconvenient.

Supranational practice is virtually unregulated. Even Belgium acknowledges that it cannot regulate the practice of EC law, and the Commission itself has imposed minimal regulation.”

To take the first point about practising foreign law at home, the lawyers concerned will be subject to home state law and so they will be subject to possible sanctions for wrongdoing (such as the giving of incompetent advice, if that can be proved). One would also assume that although such work can be performed from home (especially in an age of ever more sophisticated IT) there are strong reasons why lawyers wish to be physically located abroad - otherwise they would not pay the huge sums necessary to establish foreign offices. However, I agree with Abel that regulators in, say, China would find it virtually impossible to prevent an English lawyer in the City advising on Chinese law (although it seems likely that regulators are much more concerned with regulating foreign lawyers who can be visibly seen on their territory).

The second point assumes that regulating international practice is simply too difficult. Yet I would not agree that this is necessarily the case - for instance, the Commission continues to generate regulation in this area, as the second part of this chapter shows. It may be more convincing to argue that regulation in this field is often not as comprehensive as the regulation for national practice, as regulators have yet to catch up with the practice of lawyers and they may feel that business clients can look after themselves.

“Although referral networks, including alliances, channel the vast bulk of transnational practice, they are equally unregulated, except by the market itself. Indeed, referral networks are too invisible for meaningful state regulation.”

Here Abel asserts (but does not empirically prove - that would be very difficult) that networks undertake most international work. These networks are primarily entered into by commercial firms, and so it may be more plausible to argue that regulators might not regulate them as they believe clients do not need their protection rather than assuming that networks are “too invisible for meaningful state regulation”. Further, as seen in an earlier chapter, associations will be subject to provisions on conflicts of interest and those which provide that the best

interests of the client should always prevail over the interest of lawyers in giving and receiving referrals (although it might be difficult to prove that breaches of such provisions have occurred)..

“House counsel is also virtually unregulated, even though corporate legal departments often consist of lawyers from many jurisdictions practising a wide variety of local laws in a number of different locales ...”

Is house counsel virtually unregulated? Presumably the supervision of, or collaboration with, colleagues provides some control of their practice, as will be similarly discussed when the empirical research on law firms is analysed. Lawyers would also be subject to their professional association’s regulation (however effective that may be). It may be, however, that professional associations are unwilling to delve too deeply into corporate affairs, believing that companies should order their own affairs.

“Finally, multinational accounting firms provide advice on the laws of many countries, primarily in the area of tax, but increasingly on other subjects as well. The fact that many of those lawyers are physically based in the countries where they are admitted is of little relevance in an era of advanced communication and transportation networks.”

To take these final points, several jurisdictions (England and Wales included) do not maintain a monopoly on legal advice-giving to lawyers and so accountants are entitled to give advice on law, so long as they do not hold themselves out to be a duly qualified member of the legal profession. The point about IT leads us back to the discussion of the statement “home lawyers can practise foreign law from home without any major restriction”. Regulation of lawyers, based on the location of the advice-giver, is bound to be increasingly arbitrary as IT develops, although there may be several reasons why regulators are more concerned with foreign lawyers practising host state law on their turf. rather than from home. These reasons have been discussed above, when commenting upon Adamson’s and McLachlan’s views on the regulation of foreign firms abroad. To recap, professional associations may be worried that, *inter alia*, foreign firms will overwhelm their legal profession and take away their most highly qualified local

lawyers from domestic practice. Hence, there may be good reasons why regulation is potentially needed.

Abel's work does not provide a comprehensive listing of what is regulated which is relevant to international work and all the gaps that remain (he focuses on the establishment of practice overseas), probably as that would require further research. I remain unconvinced that he has proved his de-regulatory case.

However, it may be that the innovative nature of some forms of international work mean that they are extremely difficult to regulate. Legal creativity can probe the limits of existing regulation (McCahery and Picciotto 1995:259) and regulators might not be sufficiently knowledgeable to deal with this. Indeed, national regulators may not have the expertise to deal even with private client cases which cross borders and would have to learn much more before they could do so.

Further, at present, there is no supranational regulator of lawyers' conduct, a "sovereign centre", "to act as a 'tie-breaker' in disputes and able to provide a fountain of legitimacy for the exercise of regulatory authority" (Hancher and Moran 1989:296) (although the work of the WTO will be discussed later). Such an entity might take on a variety of rôles including, for instance, establishing what should happen if different codes of conduct conflict and deciding which national professional authority should deal with a disciplinary case.

To sum up, there are ways in which the regulation of rights to practise, the scope of practice and promotion of practice can be evaded, although the rider must be added that some countries have been relatively successful in making life difficult for foreign incomers¹¹⁵. There are areas and forms of international work which may prove difficult to regulate. Finally, at present regulatory authorities may not have the expertise or the remit to regulate much international work. All this leads

¹¹⁵ Japan is one such jurisdiction (see Grondine 1994). Difficulties have also been experienced in certain states in India and the former Soviet Union.

to the present conclusion that the regulation of many forms of international legal practice is likely to be problematic, although it does not prove that efforts to regulate are necessarily doomed to failure.

This does not mean that lawyers are necessarily freer at an international as opposed to a national level, as Lash and Urry's (1994) thesis implied. Much will depend on what lawyers are attempting to do and where they are located. The later analysis of the Law Society code, for instance, will show that solicitors are deemed to be regulated both by their home regulator and by the host state regulator. This is not a field in which macro-generalisations can be accurately and easily applied.

The last major section of the literature review analyses the issue of legitimacy, as applied to the international practices of large law firms.

On the legitimacy of international lawyering

“As the large firm’s claim to professional independence has eroded, the legitimacy of the legal system is itself called into question. If the benefits of knowledge are sold to the highest bidder, untempered by the profession’s commitment to civic values, the distribution of justice will reflect little more than the distribution of economic power in society.”

Robert Nelson (1988)

Institutional legitimacy is an indispensable condition for institutional effectiveness (Freedman 1978). However, questions of the legitimacy of the legal profession and, in fact, of the system of law have usually been addressed at the national level. This brief examination of legitimacy will again draw upon writings which mostly refer to the profession in the States, although how legitimacy might be established in England and Wales and Germany will be discussed before turning to legitimacy internationally.

What might the term ‘legitimacy’ refer to when applied to the work of lawyers in large firms? Perhaps we should discuss how this work is justified, how it fits in

with the justifications which have been given for the granting of professional monopoly and self-regulation. Lawyers' own constructs of professionalism could be examined. We might also consider the accountability of such lawyers, to not only their clients but also to third parties who might be affected by their work.

Dezalay argues that legal orders "... in liberal societies achieve legitimacy in different ways, and thus legal fields differ in their scope, positions and characteristic struggles" (1993:15). However, he also feels that all legal orders must assert the unity and autonomy of the legal field whilst accommodating the diversity of social organisation. This is the first conundrum to be considered.

Dezalay argues that an important function of the legal field is to provide legitimation for a particular social order and this is achieved through establishing its own legitimacy and that of its actors (1993:41). The notion of lawyers' professionalism is one site through which legitimacy is established. This is a particularly fraught concept in the States where the "role" of the lawyer encompasses both the bar's rhetoric of the independent advocate, guarding the public interest and the lawyer acting as a "zealous advocate" of the client's interests (as seen in the discussions above).

These tensions render more complex what Gordon and Simon call the "traditional ideal of professionalism" (1992:230):

"The traditional ideal of professionalism involves an institutional element and a moral element. The institutional element is the commitment to autonomy in work. From the larger perspective, this means occupational self-regulation, which in turn has meant some immunity from the pressures of the market and some provisions designed to secure high-quality practice. From the perspective of the particular enterprise, it has meant a decentralized, informal, egalitarian workplace where individual workers retain a broad range of responsibility and enjoy the trust of their peers. The moral element of the ideal is a learned disposition on the part of individual lawyers to contribute to the social goals to which the profession is committed and to comply with social norms."

One difficulty with this concept, as Dezalay points out (1993:15), is that legal fields are closely tied to hierarchically ordered social, economic and political

fields and so their structures reflect the very hierarchies of power and status which they are constituted to escape. As Nelson and Trubek note (1992b:196):

“Lawyers in the American political economy occupy contradictory roles. On the one hand, they claim to be an independent estate, loyal to the law and the public as well as to specific clients. They claim the expertise to shape and influence public policy, whether they appear as representatives of specific clients or present themselves as disinterested public servants; yet the “professional knowledge” and skills that they command are for sale to the highest bidder. The result is a profession that is highly stratified in terms of the nature of clients represented, the professional status of legal specialities, and the social characteristics of lawyers.”

The effect of these contradictions is the profession’s need to claim, usually through bar associations, that it is a unitary body in order to preserve the legitimacy of American law as a unitary system, with equal justice for all. It also leads to the situation in which firms might be caught up in the irony of the following situation (Dezalay 1993:18):

“Wall Street lawyers have always been proud of their commitment to public service, even if that has largely involved filling the very gaps in the legal system in the afternoon that they were exploiting on behalf of their corporate clients in the morning.”

How large English corporate law firms establish legitimacy may be even more complex; it might be dangerous to apply the above model to the position in England and Wales. It is true that the profession is highly stratified, as is ‘society’, and that the Law Society stresses the commitment of practitioners to such nebulous concepts as the public interest. The “commercialisation” of large firms was discussed in the first part of the thesis, and their closeness to clients. Yet the relationship of large firms to pro bono work may be more complex than in the States, as was seen in the discussion of Boon and Abbey’s (1997) work. Indeed, Galanter and Palay (1995a) argue that large law firms perform most pro bono work in the US, largely because they have the greatest resources of all law firms and are under most public pressure to do so. By way of contrast, they believe that the establishment of legal aid prior to the emergence of large law firms in Britain and the existence of less public criticism have ensured that City firms undertake a much smaller amount of pro bono work than their US counterparts (although see Boon and Abbey 1997). We should also note Luban’s

point (1995:956) that pro bono and law reform activities are extracurricular activities which do not challenge the proposition that, in routine private practice, these lawyers' fealty rests with their clients and not 'society'. This leaves open the question of how large firms contribute to the legitimacy of the legal order, if at all¹¹⁶. Recognition of this situation might lead to limitations on the profession's right to self-regulation (Flood 1995:140).

In effect, at present, the legitimacy of the legal system as a system offering equal justice for all is called into question by the existence of law firms which reinforce inequalities in access to legal services. The work of Luban (1984, 1995) and Rhode (1985) would also suggest that these firms are largely unaccountable to third parties. Nevertheless, the work of large law firms might be regarded as legitimate in itself - for instance, it might be believed to contribute to business confidence.

The difficulty of determining the position in Germany is compounded by the limited literature in this area and by the fact that directly comparing common law systems with the German system might be misleading. The statute and code setting out the lawyer's position in society state that s/he should be an independent organ of the administration of justice (section 1 of the BRAO - "ein unabhängiges Organ der Rechtspflege") and that the lawyer is "independent". Nevertheless, Rhode (1994) has argued that German lawyers generally believe that their primary loyalty is to the client, rather than to the State.

As regards their obligations to a wider public, we cannot assume that the same type of "unified habitus" which existed in the legal profession in Britain after 1930 (based partly on a "public service ethos" - Hanlon 1997) also existed in Germany. We have seen earlier, for instance, that pro bono work is rare. It is unusual for German citizens to undertake voluntary work for social causes; social

¹¹⁶ Dezalay, quoting Bourdieu (1995:1), notes that "... professionals of law who describe themselves as guardians of public order are only credible if they start by imposing upon themselves the rules of conduct that they wish to impose upon others."

provision tends to be determined more strongly by the state. Indeed, in the Hegelian tradition, which still permeates much of German social and political thought, it is the state which guarantees social order (Rueschemeyer 1973:91). This order, instituted through the law and governmental authority, may become imbued with the sanctity of ultimate values. Moral ideals outside this order tend to be relegated to the status of private concerns and the traditions and interests of diverse groups are merely instruments or obstacles to the “common good” (ibid). In effect, the strength of the state may provide part of the reason why German lawyers have not engaged in public interest work.

The fact that the take-up of legal expenses insurance is also widespread and that legal fees are nearly always regulated (by statutory code) in private client work may mean that German lawyers’ sense of social responsibility is different to that of common law lawyers. The gap between the poorest and richest citizens in Germany is also smaller than in Britain or the States (Perkin 1996). In effect, there may be less unmet legal need in the country.

However, historically, German lawyers have been severely criticised for their lack of social awareness¹¹⁷ and critical ability. Dahrendorf (1968:239) argued that the rôle of the German lawyer was one in which criticism counted for less than loyalty, originality for less than a sense of tradition and imagination for less than knowledge of the existing legal order¹¹⁸. Moreover (ibid:243):

“Their social origin shuts German lawyers off from large parts of the society in which they are living. Their education does not contribute to their closing such gaps, at least by way of acquired knowledge ...”

¹¹⁷ Hitler found use for lawyers in the Third Reich, although he called them “the perfect nincompoops”, and after WW2 West Germany soon began to re-employ former Nazi judges and prosecutors (Markovits 1996:2272).

¹¹⁸ “They share the love of the German for the familiar and shy away from those breaks with inherited ties that cast doubt on traditional attitudes ... Studies of the social biography of German lawyers regularly yield a profile of conservatism and traditionalism, which far transcends the demands of their roles.” (1968:242)

Further Blankenburg and Schulz (1995:113) have argued that German lawyers have shown little concern to widen their services to cover the more needy in the past:

“In both East and West Germany the defensive attitude of the bar successfully obstructed the expansion of legal aid beyond fee waivers in divorce proceedings, and it also prevented institutional innovations, such as political representation, neighborhood law centers, and university law clinics. The lawyers’ lobby has sought to defend their monopoly over the traditional functions of advocacy rather than expand into new markets.”

Even though large law firms are still in a minority position in Germany, their growth may have implications for the legitimacy of the system. Schack (1991), for instance, has argued that the German fee structure does not allow an attorney to survive on small cases alone and so the concentration to larger firms will take work away¹¹⁹ from smaller concerns. Perhaps this might mean that there will be fewer small firms around able to service private clients. Might this also mean that more firms turn to hourly billing (to generate higher profits) and thus limit the availability of affordable legal expense insurance, creating greater unmet legal need¹²⁰? This would be particularly worrying if Dahrendorf and Rueschemeyer are right in their assessments of the lack of social responsibility of German lawyers, as it would be unlikely that they would take up needy cases on a pro bono basis.

Schack’s argument is based on the assumption that small firm lawyers or solo practitioners do work for businesses that cross-subsidise their other practice areas. However, Blankenburg and Schulz note (1995:104) that in 1991, 80% of German legal partnerships had fewer than 4 partners and that most of their work came from divorce cases. Hence, larger firms might not be taking work away from smaller firms. Consequently, it may be premature to begin stating such doom and

¹¹⁹ Schack’s point is based on the somewhat static assumption that small firms would continue to be able to serve commercial clients (presumably even as they grow and internationalise). This, however, does not undermine my remarks about the implications of the growth of the largest law firms.

¹²⁰ Fixed fees are also under threat on another front - the European Court of Justice has been asked to rule on whether fixed fees are anti-competitive (Unattributed 1999k).

gloom prognoses before more is known about the distribution of commercial legal work in Germany.

Nevertheless, the growth of large law firms in Germany is likely to heighten ethical tensions, such as those resulting from increased hours of work¹²¹. Perhaps also the demands of increasing specialisation and the lack of private client work undertaken may mean that lawyers in these firms know little of the concerns of those outside the business world and do not think beyond the immediate concerns of their wealthy clients. The first section of the thesis noted how large German firms are becoming more highly leveraged and may be moving away from their previous more individualised methods of working. This may ensure an increased fragmentation of responsibility as lawyers work on different parts of the same case. However, it is not easy to determine whether lawyers are becoming less independent from clients - although the first half of the thesis described the complaints of aloofness and arrogance made against “traditional” German lawyers, this did not prove that they then acted as a ‘mediating’ force in the legal system, and not as hired guns. The work of Dahrendorf above would suggest caution in suggesting that Rechtsanwälte had performed such a social rôle. It may be that the independence of these lawyers relates more to how they organise their own work rather than their distance from clients.

Certainly, the legitimacy debate becomes even more problematic at an international level. We have seen before how Abel believed that ‘clientelism’ was likely to be even more pronounced in the foreign offices of large firms, where, for instance, offices rely on fewer clients than at a national level and are unlikely to do any pro bono work. Hence clients’ interests are likely to take precedence over any other legitimate concern. And what about forum shopping? Does circumventing national rules in this way challenge the legitimacy of legal orders? How do lawyers justify playing financial and legal systems off against

¹²¹ As seen before, Rasor (1998), for instance, recounted how working hours at his firm increased dramatically as the firm grew.

each other? Regulatory authority is particularly ambiguous in the international arena and this may further serve to question the legitimacy of lawyers' work here.

At present, there is little work which relates lawyers' constructs of professionalism to the work they do at an international level, as indeed there is also little work on the potentialities of the 'deprofessionalisation' or 'reprofessionalisation' of international lawyers. The empirical work of the next section, part two, aims to provide some material with which to take this discussion further.

Comment

This literature review has looked at the regulation of large law firms in context. It has argued that large firm practice does raise several ethical issues which are currently largely unaddressed at both the national and international level. This situation calls into question the legitimacy of the regulatory system as it stands and raises the questions of how large law firms (and their lawyers) should be regulated and, indeed, what should be regulated.

From this review, we might pull out a few issues which the rest of the chapter might explore:

- How is international legal practice regulated? What are the limitations of regulation?
- What assumptions underpin the regulatory work of professional associations internationally and are these justified?
- Does large law firm practice raise the ethical problems outlined in the literature review?
- What regulation should be in place, to deal with the issues raised?

The next part of this chapter analyses how international practice is regulated by looking at the law and codes affecting the international legal work of the lawyers investigated.

Part two - Law and codes regulating international legal work

Analysing the formal regulation of the work of lawyers internationally was not as straightforward as I had hoped. Notwithstanding the work of bodies such as the EU, the Council of the Bars and Law Societies of Europe (“CCBE”), and the International Bar Association¹²² (“IBA”), determining what regulation exists, where, when and to whom it applies can be a complex business. Adamson notes that (1992:65):

“While there is much that is common to the rules governing lawyers throughout the world, the rules and regulatory systems in the various jurisdictions in Europe and elsewhere differ widely in detail and application.”

As it stands, this regulation tends to lag behind the international practice of lawyers, and in particular the work of ‘mega-law’ firms.

The next part of the chapter will look at legislation and codes of conduct¹²³ which govern the international practices of lawyers. The first part of the discussion is broken down into sections which deal with the different categories of lawyers studied (English, US and German) and their locations and focuses primarily on codes of conduct. The second part discusses legislation which has been formulated by the EU and the WTO which regulates lawyers. This division broadly (but not entirely successfully) separates professional conduct rules (discussed in the first section) and rights to establishment and requalification (seen in the work of the EU and WTO).

¹²² These organisations will be considered below.

¹²³ Lawyers’ conduct is subject to general law (such as the law of agency, contracts, torts, and so on), standards of behaviour laid down by the courts and codes of conduct (Cranston 1995:2).

Codes governing English and Welsh solicitors working outside England and Wales

The Law Society places no restrictions on solicitors actually practising in other jurisdictions *per se*, although they are bound by legal provisions and professional conduct rules.

General Provisions: the Overseas Practice Rules

At the beginning of the research, “The Guide to the Professional Conduct of Solicitors” (Sixth Edition), published by the Law Society in 1993 (Taylor 1993) was the most up-to-date version of the solicitors’ code. The latest edition is the seventh, published in 1996, but the following analysis is based on the former edition, as this reflected the rules applicable when the London interviews were carried out. Nevertheless, the provisions in both editions of the code are substantially the same, although the latest edition does have new material on (*inter alia*) money laundering and anti-discrimination.

Perhaps at the outset, on the matter of interpretation, it should be noted that Crawley and Bramall, who work at the Professional Ethics Division of the Law Society, believe (1995:103) that conduct provisions represented by the principles and commentaries should not be treated as if they were tax statutes to be scrutinised for loopholes as “They establish rights and responsibilities that must be viewed broadly and in the spirit¹²⁴.”

The Overseas Practice Rules (“OPRs”) are found within the guide and apply to solicitors practising as such outside England and Wales - but they are not an exhaustive statement of professional obligations as the general principles of professional conduct applicable to all solicitors also apply.

¹²⁴ In many respects, the codes are simply restating and expanding the general law. Violations of provisions can lead to legal actions, and ultimately disbarment of a lawyer from practice (Cranston 1995:4). However, professional bodies adopt a creative rôle in the interpretation of rules, so they are able to reason by analogy with other provisions (*ibid*).

The Solicitors' Compensation Fund Rules 1975 apply to overseas practice - so a claim may be made on the compensation fund in respect of the dishonesty or failure to account of a solicitor practising overseas¹²⁵.

The following discussion will outline most of the provisions applicable to the work of English and Welsh solicitors abroad, to try to give some indication of which matters have been adjudged to warrant the formulation of rules. The OPRs will be analysed first.

The Overseas Practice Rules 1990

In this section, individual OPRs will be considered, so that the later analysis of other codes can be compared in substance. The adequacy of the rules will be commented upon at the end of the section.

Rule 2 of the OPRs provides that a solicitor who practises as such¹²⁶ outside England and Wales must hold a practising certificate.

Rule 3 of the OPRs is identical to Rule 1 of the Solicitors' Practice Rules ("SPRs"), the rules which apply to solicitors in England and Wales. It provides that a solicitor should not do anything which would be likely to compromise or impair :

- the solicitor's independence or integrity;
- a person's freedom to instruct a solicitor of his/her choice;
- the solicitor's duty to act in the best interests of the client;

¹²⁵ This provision will be referred to again in the section on the work of the Solicitors' Complaints Bureau.

¹²⁶ Whether this is happening depends on the circumstances; for example, if a person is practising as a lawyer but with no other legal qualification than that of a solicitor, then the presumption is that s/he is practising as a solicitor.

- the good repute of the solicitor or the profession;
- the solicitor's proper standard of work; and
- the solicitor's duty to the court.

As such, this provision is similar in substance to the ABA rules, criticised in the literature review, which provide that the lawyer has duties not only to the client, but also to the court. This provision will be commented upon again at the end of this section.

Rule 4 of the OPRs deals with cross-border activities within the EU - that is, all professional contacts with lawyers of member states of the EU other than the UK and the professional activities of the solicitor in a member state other than the UK, ("whether or not the solicitor is physically present in that member state"). It corresponds with Rule 16 of the SPRs and requires compliance with "the rules codified in articles 2 to 5 of the CCBE Code of Conduct." The Law Society feels that a solicitor would fulfil the obligations imposed under articles 2 to 5 of the CCBE Code by complying with general conduct rules applicable to solicitors (such as the OPRs) and by following the CCBE rules which have no corresponding provision in the OPRs.

The CCBE rules which have no corresponding provision in the OPRs, which will be described later, are those on :

- incompatible occupations (2.5);
- co-operation among lawyers of different member states (5.2);
- correspondence between lawyers (5.3);
- change of lawyer (5.6); and
- disputes among lawyers of different member states (5.9).

Rule 5 of the OPRs covers publicity and states that a solicitor outside England and Wales may publicise her/his practice provided that s/he complies with not only the Solicitors' Publicity Code 1990 (which, for instance, prohibits

unsolicited visits and telephone calls), but also with any restrictions concerning lawyers' publicity in force in the jurisdiction in which the publicity is conducted. This, therefore, does not challenge the sovereignty of other national bodies (and so runs counter to the implications of Lash and Urry's (1994) thesis, seen in the first literature review¹²⁷). The CCBE code and the IBA code also contain provisions on publicity, as will be seen later.

Rule 6 governs introductions and referrals of business. It permits solicitors to accept and make introductions and referrals of business, providing that there is no breach of other rules.

Rule 8 deals with fee-sharing and is the equivalent of Rule 7 of the SPRs - thus, clause 8(1) sets out the persons (lawyers and employees) with whom a solicitor working abroad may share professional fees.

Rule 9 provides that solicitors shall not practise through a "body corporate" (a company) unless all the directors and shareholders are lawyers or unless they are permitted to do so under Rule 7¹²⁸. Rule 7 states that solicitors who are employees of non-lawyers "shall not as part of their employment do for any person other than their employer work which is or could be done by a solicitor ...". Solicitors may practice with lawyers of other jurisdictions (and barristers) abroad - subject to any applicable provisions of the local law or professional rules of conduct (principle 9.04 of the SPRs).

Rule 10 of the OPRs deals with how a solicitor's practice might be named.

Rule 11 concerns the supervision of offices. Following the general principle underlying Rule 13 of the SPRs, it states that a solicitor must "ensure that every

¹²⁷ Similarly, Rule 18 provides that when solicitors are also qualified as lawyers in another jurisdiction "nothing in these rules shall affect such duty as may be upon the solicitor to observe the rules of that profession."

¹²⁸ Rule 18A, a new provision in the latest edition of the Code, considers solicitors providing services other than in their capacity as a solicitor.

office from which their practice is carried on is supervised sufficiently to ensure that at all times the practice is properly conducted and the affairs of the clients receive proper attention.”

The Solicitors’ Accounts Rules 1991 and the Accountants’ Report Rules 1991 do not apply to a solicitor practising wholly outside England and Wales. However, the basic requirements of those rules are contained in Rule 12 of the OPRs; for instance, there are provisions on keeping client money separate from other moneys.

Rule 13 sets out principles governing solicitors’ trust accounts, Rule 14 deals with deposit interest and Rule 16 with accountants’ reports. Further assistance may be derived from the rules which apply in England and Wales.

Rule 15 empowers the Law Society to investigate the accounts of a solicitor practising outside England and Wales¹²⁹.

Rule 17 requires a solicitor practising outside England and Wales to have professional indemnity cover. The extent must be reasonable having regard to the circumstances set out in the Rule, subject always to any more onerous requirements of local law or local rules applying to the solicitor. Rule 17 applies to a practice operating wholly outside England and Wales. Where a firm practises both in England and Wales and overseas, the Solicitors’ Indemnity Rules apply to the whole practice except in the case of a MNP having fewer than 75% solicitor-principals, when Rule 17 will apply to any overseas branches.

Rule 19 gives the Law Society power to waive the provisions of the rules in any particular case(s). A solicitor practising outside England and Wales who finds that the application of any provision of the OPRs causes difficulty in the particular conditions of the jurisdiction in which s/he works may write to the

¹²⁹ We shall see later, however, that this provision has hardly ever been used.

Professional Ethics Unit of the Law Society for guidance and make an application for a waiver, if necessary.

Some other applicable rules

Whilst Rule 6 of the SPRs does not apply to solicitors outside the jurisdiction - acting for buyer and seller - a solicitor practising overseas must not act in any situation where there is a conflict of interest.

SPRs on contingency fees and claims assessors do not apply to a practice outside England & Wales - but a solicitor should not enter into a contingency fee arrangement where they are prohibited by law or local professional rules (again, affirming national rules).

A reflection upon the scope and nature of these rules

Perhaps the most fundamental point to make is that the basis of the professional conduct rules for solicitors cannot be understood by reference to morality or philosophy; politics and economics have greater relevance (Sheinman 1997:149). Sheinman argues that the legal profession in England and Wales has not created a discourse about legal ethics (1997:151) and so the Code of Conduct cannot be viewed as being grounded in consistent ethical principles. We are unlikely, then, to find a comprehensive ethical statement (whatever that might be) in the OPRs. As 'ethics' is often somewhat loosely used to describe what are in fact simply provisions in a code of conduct, this is an important point to bear in mind.

Ensuing sections of the thesis will compare the rules outlined above to those found in other codes which affect the work of solicitors overseas. For the moment, the following comments will suffice:

- the OPRs do include several provisions which may protect clients, including those on supervision of offices, accounting rules and indemnity cover;
- the OPRs do not challenge the sovereignty of overseas national professional bodies to subject solicitors working within their territory to their rules;
- the range of issues covered by the rules is similar to those covered by the codes considered later. In this, there is some agreement between the regulators as to what is 'regulatory material'¹³⁰. It will be argued at the end of this chapter that what is regulated is too narrow and a broader approach to regulating the international practice of lawyers should be adopted;
- there is an absence of advice dealing with what lawyers should do when their duties (as outlined in rule 3) clash. Nosworthy, for instance, argues (1995:61) that the problem that a solicitor faces is not an inability to understand responsibilities to the client or duties owed to the court but an inability to reconcile these duties when they conflict. She believes that what is needed today is a more considered examination of the problems caused when duties conflict. This may, however, not be as straightforward as it sounds. The difficulties arising when acting within the organisational setting of a large law firm have already been discussed; the tendency to resolve doubts in favour of the client would be difficult to change by merely altering codes. Further, it seems that many lawyers who are already practising are likely to strongly support the principle of client confidentiality above all other considerations (Mendick 1998a), increasing the likelihood that they will put clients first; and

¹³⁰ However, as has been seen, solicitors practising overseas are also subject to the general principles of professional conduct applicable to home solicitors. One such provision is that of anti-discrimination - "Solicitors must not discriminate on grounds of race or sex in their professional dealings with clients, employees, other solicitors, barristers or other persons." This is updated to additionally prohibit discrimination on the grounds of sexual orientation and disability in the latest code. It will be interesting to note, following on from Abel's assertion of the limitations of the work of international associations, that there is no such provision in the IBA and CCBE codes.

- the rules apply to individuals, not firms, a point which is picked up later.

A second code, the IBA code, to which solicitors working overseas are subject will now be analysed.

The International Bar Association (“IBA”) Code

This part of the thesis will begin by outlining the work of the IBA before moving on to analyse its code. I visited the IBA in 1995 and much of the following material is taken from a joint interview with two members of staff there.

The IBA is an international organisation of lawyers. It formed as a federation of bars after World War II, but then individuals joined and started a business law section. The business section is dominated by Anglo-American firms. A third of the IBA’s membership comes from North America, a third from Europe and a third from “the rest of the world¹³¹”. A certain number of members from a particular geographic region must join the organisation before those members can reach high office. The IBA is most well-known for providing a forum for lawyers from different countries to meet each other, at its conferences, to establish contacts¹³².

The salaried secretariat of the IBA is based in London - thirty-eight people worked there in 1995. This executive staff do not decide the organisation’s policy as that is deemed to be the prerogative of its members, although they can look into matters suggested to them by the membership. For instance, staff at the IBA wrote to authorities in Poland in 1994 to protest against proposed restrictions on foreign legal consultants based in Poland.

¹³¹ An IBA interviewee stated that they hoped to expand the membership to include countries which are not currently represented in the membership.

¹³² They also “support the independence of bars” and they have recently sponsored work on human rights.

As the last comment suggests, the IBA philosophy is one of promoting a free market, reflecting the dominance of the North Americans in the organisation (although the 'free market' to the American profession often means a free market for Americans abroad, as was suggested earlier).

The IBA code was the first real attempt to consider international legal practice in a code - the first code was published in 1956 although the current edition is the 1988 version. The IBA code sets out professional conduct provisions applying to "any lawyer of one jurisdiction in relation to his [sic]¹³³ contacts with a lawyer of another jurisdiction or to his activities in another jurisdiction."

Solicitors working overseas must comply with this code in addition to the OPRs, as the code has been adopted by the Law Society. However, the preamble to the IBA code states that it is not supposed to conflict/derogate from other codes; it does not intend to absolve lawyers from complying with other jurisdictions' laws or rules of professional conduct (again preserving national sovereignty). Instead, it intends to restate much of what is in these requirements and to act as a guide as to what the IBA considers to be desirable courses of conduct for all lawyers engaged in international legal practice. Thus, if there is a case of conflicting provisions, the Law Society code should apply. This is not, however, made fully explicit in the OPRs, as there is no comment made on the text.

The code is not directly enforceable against individual lawyers in the event of violation but may be the subject of a complaint by the IBA to the relevant professional regulatory body (Godfrey 1995:232). The IBA also does not undertake a guidance rôle in respect of its code¹³⁴. In fact, the regulators interviewed had no knowledge of written complaints leading to anything - the Ethics Committee of the IBA only meets twice a year and does not have the infrastructure to investigate complaints. This chimes in with the statements of

¹³³ This code, together with the CCBE code, linguistically denies the existence of women.

¹³⁴ There is a provision in the IBA's constitution to strike out members for misconduct, but the IBA interviewees had no knowledge of any member being expelled.

Abel and Freidson above, which noted the often toothless nature of conduct provisions.

The code thus seems to act as an 'add-on' provision to the OPRs. Consequently, it sometimes repeats ideas in the OPR/SPRs, sometimes extends these rules, occasionally potentially conflicts with them and sometimes adds something not covered at all in the OPR/SPRs.

The IBA code sets out various basic general principles of professional conduct (such as independence and fairness), with little in the way of comment. However, the following provisions are included:

1. A lawyer who undertakes professional work in a jurisdiction where s/he is not a full member of the local legal profession must adhere to the standards of professional ethics in the jurisdiction of admittance - and observe all ethical standards which apply to lawyers of the country where s/he is working¹³⁵.
2. It is improper for lawyers to accept a case unless they can handle it promptly and with due competence, without undue interference by the pressure of other work.
3. Except where the law or custom of the country concerned otherwise requires, any oral or written communication between lawyers should be accorded a confidential character as far as the court is concerned - unless certain acknowledgements were made on behalf of the client. It is also improper for lawyers to communicate about a particular case directly with any person whom they know to be represented in that case by another lawyer without the latter's consent.

¹³⁵ The OPRs are similar, but they also subject the solicitor to local law in addition to "ethical standards".

4. Lawyers should never disclose, unless lawfully ordered to do so by a court or statute, what has been communicated to them in their capacity as lawyers, even after they have ceased to be the client's counsel.

This may potentially conflict with the SPRs which do state that there may be exceptional circumstances where the client's confidences can be overridden. One example of such a scenario is when communications are made by a client to a solicitor before the commission of a crime "... for the purpose of being guided or helped in the commission of it ..." by the solicitor (Taylor 1993:332). Still, the SPRs should prevail, as the rider above holds that the IBA code does not apply "where the law or custom of the country concerned otherwise requires".

This is not to say that the SPR provisions on confidentiality are satisfactory. Cranston, for instance, argues (1995:8) that the exceptions to the rule on confidentiality are very narrow - disclosure in these exceptional instances is not obligatory, however serious the wrongdoing and the exceptions are limited to crime and do not extend generally to deliberate wrongdoing or breaches of a court order. The point will be returned to at the end of the chapter.

5. Publicity - a lawyer should not advertise or solicit business except to the extent and in the manner permitted by the rules of the jurisdiction to which that lawyer is subject. A lawyer should not advertise or solicit business in any country in which such advertising is prohibited¹³⁶.

6. A lawyer should never consent to handle a case unless:

- the client gives direct instructions; or
- the case is assigned by a competent body (this is not defined) or forwarded by another lawyer; or
- instructions are given in any other manner permissible under local rules or regulations.

¹³⁶ This is compatible with the OPRs, although the latter provide a little more guidance, by saying that publicity is conducted in the country in which it is received.

7. Lawyers should not acquire a financial interest in the subject matter of a case - neither should they acquire property about which litigation is pending before the court in which they practise¹³⁷.

8. Lawyers should not represent conflicting interests in litigation. In non-litigation matters, they should only do so after disclosing all conflicts/possible conflicts to all parties and then only act with their consent. This does appear to be more lenient than the Law Society's rules on conflicts, which do not allow such disclosure and consent. The SPRs provide that "A solicitor or firm of solicitors should not accept instructions to act for two or more clients where there is a conflict or a significant risk of a conflict between the interest of those clients" - there are only very limited exceptions from this rule. As seen before, there is no explicit provision to deal with this conflict, but we must assume that the Law Society's rules prevail.

9. There are similar accounting provisions to those in the OPRs, although the IBA code also states that lawyers should not retain money they receive for their clients longer than is absolutely necessary and that a lawyer may require that a deposit is made to cover their expenses. Advice on setting fees is also given.

10. Guidance is provided in relation to contingency fees. "A contract for a contingency fee, where sanctioned by the law or by professional rules and practice, should be reasonable under all circumstances of the case, including the risk and uncertainty of the compensation and subject to supervision of a court as to its reasonableness."

11. There is a clause which agrees with principle 21.02 of the SPRs by providing that lawyers who engage a foreign colleague on a case are responsible for the payment of the latter's charges, except where there is an express agreement to the

¹³⁷ This is more explicit than the OPRs.

contrary. The IBA rules additionally provide that when lawyers “direct” a client to a foreign colleague they are not responsible for the payment of the latter’s charges but neither are they entitled to a share of the fee of this foreign colleague.

12. Finally, an interesting provision is that “[i]t is not unethical for lawyers to limit or exclude professional liability subject to the rules of their local bar association and to there being no statutory or constitutional prohibitions” - presumably, a very ‘lawyer-friendly’ provision.

The IBA Professional Ethics Committee has tried to bring the code into line with the CCBE code but have so far failed to do so. An interviewee told me that this was because the CCBE want the code to be identical to theirs, yet the IBA’s audience is wider than Europe, covering “developing bars” which might be better served by the IBA Code.

At the June meeting of the IBA in Edinburgh in 1995, a list of “12 commandments” was formulated by a committee member. This was thought to be easier than trying to formulate the code in a way which was wholly compatible with the CCBE code. Yet it is hard to see at present what the rôle of these guidelines will be (do they intend to supplement or replace the IBA code?) and how they will be implemented, if at all. It seems, however, that the rôle of this code has more to do with a concern for developing bars than for any other form of practice. It may be used as the basis of a code for those countries which have few or no written rules on professional conduct.

For the record, the “General Principles for Ethics of Lawyers” are formulated as follows:

“Lawyers throughout the world are specialised professionals who place the interests of their clients above their own, and strive to obtain respect for the Rule of Law. They have to combine a continuous update on legal developments with service to their clients, respect for the Courts, and the legitimate aspiration to maintain a reasonable standard of living. Between these elements there is often

tension. These principles aim at establishing a generally accepted framework against which to measure the professional approach which may reasonably be expected of a lawyer in any part of the world.

1. Lawyers shall at all times maintain the highest standards of honesty and integrity towards all those with whom they come into contact.
2. Lawyers shall treat the interests of their clients as paramount, subject always to their duties to the Court and the interests of justice, to observe the law and to maintain ethical standards.
3. Lawyers shall honour any undertaking given in the course of their practice, until the undertaking is performed, released or excused.
4. Lawyers shall not place themselves in a position in which their clients' interests conflict with those of themselves, their partners or another client.
5. Lawyers shall at all times maintain confidentiality regarding the affairs of their present or former clients, unless otherwise required by law.
6. Lawyers shall respect the freedom of clients to be represented by the lawyer of their choice.
7. Lawyers shall account faithfully for any of their clients' money which come into their possession, and shall keep it separate from their own money.
8. Lawyers shall maintain sufficient independence to allow them to give their clients unbiased advice.
9. Lawyers shall give their clients unbiased opinion as to the likelihood of success of their case and shall not generate unnecessary work.
10. Lawyers shall use their best efforts to carry out work in a competent and timely manner, and shall not take on work which they do not reasonably believe they will be able to carry out in that manner.
11. Lawyers are entitled to a reasonable fee for their work. A demand for fees should not be a condition of the lawyer carrying out the necessary work if made at an unreasonable time or in an unreasonable manner.
12. Lawyers should always behave towards their colleagues with integrity, fairness and respect."

The list does have a wider coverage than the CCBE Code. An interviewee told me that the IBA is attempting to lay down general principles for very different cases, concerning very different clients. Nevertheless, the points made above in the reflection on the scope of the OPRs apply equally to the IBA code.

This review has not found an unambiguous body of conduct rules. Neither has it found regulation which is enforced vigorously. As has been seen, the IBA does not presently see itself acting as an enforcer of such provisions. Moreover, the rules that it has formulated are currently in a state of flux.

The CCBE code and its enforcement will now be looked at, to see whether the picture is any different.

Additional provisions for solicitors working in Europe

The Law Society has adopted the CCBE code in addition to the above codes, to apply to solicitors working in a European member state (Taylor 1993:184). This body and its code will now be considered.

The CCBE ("The Council of the Bars and Law Societies of Europe")

The CCBE itself is a body representing all the main legal professions in the EU. It was formed in 1960 and is composed of national delegations from the member states, together with observer delegations. Its objects are as follows:

- a. To act as a joint body on behalf of the Bars and Law Societies of the European Community in all matters involving the application of Community Treaties and Community law to the legal profession
- b. To co-ordinate the views, policies and activities of the Bars and Law Societies of the European Community in their common dealings with the European institutions
- c. To constitute the forum within which the representatives of the Bars and Law Societies may consult and work together
- d. To further the achievement of the objectives of the Treaty of Rome in its application to the legal profession
- e. To act as the joint body of the Bars and Law Societies of the European Community in supervising the inter-state practice of the legal profession throughout the Community
- f. To represent the Bars and Law Societies of the European Community in their dealings with other organisations in the legal profession and with other authorities and third parties
- g. To study and promote the study of all questions affecting the profession and to develop solutions designed to co-ordinate and harmonise the practice of that profession."

(Adamson 1992:3)

It is the main forum in which the legal professions of Europe can come together to debate matters of interest. However, Adamson notes (1992:3) that the CCBE has several weaknesses. It is composed of a limited number of delegates from the professional bodies in each member state, and does not provide for direct

participation by individual lawyers. In states where the profession is organised in a de-centralised fashion, a small national delegation is often unable to represent its members adequately.

Whether a body of this nature can be effective depends upon whether agreement on issues can be reached (Ogus 1994; also see Maley 1995). This matter will be returned to in the section on rights of establishment when EU law is analysed.

In relation to enforcement of its code, the organisation has not taken on the rôle of a supranational regulator even though point e. above shows that it considers itself to be a supervisory body. Its administrative resources are small¹³⁸ - the secretariat had less than 15 people working there in 1995. Although Abel noted in 1994 (1994:759) that the CCBE is seeking to implement an electronic filing and communication system to keep track of registrations and complaints, it has done little work so far in relation to enforcement. It did set up a Council for Advice and Arbitration in 1974 to help lawyers settle their differences by means of arbitration, but it has only been used once since then (Adamson 1998:131).

The CCBE Code

In 1988, the CCBE adopted a Code of Conduct for Lawyers in the European Community, which was of particular relevance to cross-border activities. An explanatory memorandum and commentary was added in 1989 to “provide assistance” in the “application of the code.” The CCBE Code has since been adopted by virtually all the lawyers in the CCBE member countries (Adamson 1998:132).

A CCBE working group suggested changes to the code in 1998 - these are still being considered and so it is difficult at this stage to predict whether they will

¹³⁸ I wrote to the CCBE several times, but they never responded to my letters.

come into effect. The proposed reforms will be considered together with the current provisions.

The purpose of the Code is set out in full in the following paragraph to give some indication of the ambition of the document:

“1.3.1 The continued integration of the European Community and the increasing frequency of the cross-border activities of lawyers within the Community have made necessary in the public interest the statement of common rules which apply to all lawyers from the Community whatever bar or law society they belong to in relation to their cross-border practice. A particular purpose of the statement of those rules is to mitigate the difficulties which result from the application of ‘double deontology’ as set out in Art 4 of EC Dir 77/249 of 22 Mar 1977.

1.3.2 The organisations representing the legal profession through the CCBE propose that the rules codified in the following articles:

- be recognised at the present time as the expression of the consensus of all the bars and law societies of the EC;
- be adopted as enforceable rules as soon as possible in accordance with national or Community procedures in relation to the cross-border activities of the lawyers in the EC; and
- be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation.

They further express the wish that the national rules of deontology or professional practice be interpreted and applied whenever possible in a way consistent with the rules in this code¹³⁹.

After the rules in this code have been adopted as enforceable rules in relation to his cross-border activities the lawyer will remain bound to observe the rules of the bar or law society to which he belongs to the extent that they are consistent with the rules in this code.”

Hence it appears that the CCBE code aims to take precedence over other codes, in the event of conflict between them. The OPRs’ commentary does not comment upon this, so it might be assumed that the CCBE Code takes precedence. Why such rules of precedence were not made crystal clear in the text of the OPRs is uncertain. This may illustrate what Abel characterised as deliberately

¹³⁹ Adamson feels that the code has been accepted by courts in certain countries as having a quasi-legal effect (1992:73):“An interesting development within the Community itself is that the CCBE Code is beginning to be treated as authoritative in its own right by national courts. In two decisions in 1990/91 the Court of Appeal of Bordeaux struck down certain local bar rules on the ground (among others) that they were incompatible with Articles 2.2 and 2.7 of the CCBE Code. It is not clear whether this was on the basis of specific incorporation of the Code in the relevant national rules, or on the more general principle that the Code should be taken as representing the consensus of opinion on professional rules in the Community and as such to be treated as, in a sense, part of Community law.”

ambiguously drafting; it certainly *potentially* complicates the most basic question of who has authority to regulate and (to the extent that codes conflict and differ in enforcement) what is regulated and how. Alternatively, this might be a mere oversight on the part of the regulators.

Nevertheless, this is the first code analysed which has attempted to override the sovereignty of national regulators, although the recent 1998 Directive on Establishment (considered later in the chapter) has since provided that (from March 2000) EU lawyers practising under home title in a host EU state are subject to all the rules of the host state profession. Host state rules will prevail if there is any duplication or conflict with home state rules.

There are four main categories of rule within the code (Adamson 1994:69):

- rules seeking to state a generally accepted principle which already applies in local rules of conduct in all the member states - for example, the provisions on independence and confidentiality;
- rules seeking to resolve conflicts where the rules of national states are different - for instance, the rules relating to publicity;
- rules providing a compromise between different national rules, such as those relating to contingency fees; and
- rules laying down a minimum standard of protection for clients - as in the rules on professional indemnity insurance.

The code starts off with a general rhetorical preamble about the function of the lawyer in society¹⁴⁰ and considers the purposes of the Code (seen above). Clause 2 sets out general principles of professional conduct. For instance, there are

¹⁴⁰ The lawyer is deemed to owe duties to the client, courts, legal profession and the public.

statements on independence, trust and personal integrity, which are similar to the tenets of the Law Society's rules.

There are also provisions on confidentiality which are not "limited in time" - as the IBA code agrees. However, this "right" of confidentiality is not hedged as it is in the SPRs; confidentiality in the CCBE code is seen more as an absolute right. This would appear to undermine the concern of the SPRs to define more precisely when duties towards the client are overridden by other concerns. I do not think that this is acceptable; the issue of confidentiality should be reconsidered.

As, too, with the OPRs, the "lawyers have a duty to inform themselves as to the rules [of the bar or law society of the host member state] which will affect them in the performance of any particular activity." To this extent, the sovereignty of national regulation is preserved and this ensures that national bars are not undermined by the presence of foreign lawyers acting, for instance, in accordance with more permissive regulation.

There is an additional provision which is not covered in the OPRs. It states that a lawyer is excluded from some occupations - these are those covered in rules of the host member state governing occupations which are deemed to be incompatible with legal practice.

Publicity is only allowed to the extent it is permitted by national authorities, as in the OPRs and IBA code. However, as Tyrrell notes (1993a:26):

"On personal publicity, the Code provides that a lawyer should not seek publicity where this is not permitted. This is a practical solution to a serious problem, but leaves uncovered the question - not permitted by whom? The impact of the EC Competition Rules in article 85 of the EEC Treaty is side-stepped."¹⁴¹

Adamson also believes (1998:136) that it is unlikely that rigid bans on lawyers' publicity can survive much longer in the age of the Internet. Such rules may well

¹⁴¹ It may be, in fact, that some of the limits placed upon self-promotion by national bars are contrary to European law, such as Article 59 of the Treaty of Europe.

be challenged, as Tyrrell (1999a) suggests above, as being contrary to competition rules. A proposed reform is to allow objective information to be provided to the public about a lawyer's services.

In relation to clients, it is stated that:

“A lawyer shall not handle a case for a party except on his instructions. He may, however, act in a case in which he has been instructed by another lawyer who himself acts for the party or where the case has been assigned to him by a competent body¹⁴²”.

This may conflict with the OPRs which allows referrals of work from people other than lawyers and “competent bodies”. Rule 6 provided that “Solicitors may accept introductions and referrals of business from other persons and may make introductions and refer business to other persons, provided that there is no breach of Rule 3 or any other provision of these rules.”

If “any other provision of these rules” could be construed as referring to the CCBE code as adopted in rule 4 of the OPRs, it may mean that the CCBE code should be followed. It does seem unlikely, however, that the Law Society would have intended this, but the CCBE code does state that its provisions should prevail over inconsistent national provisions on conduct, as seen above.

The CCBE provisions on conflicts of interest are similar to the SPRs, although the latter are more detailed¹⁴³. This is an area in which the CCBE working group are considering amendments to take account of factors such as the growth of large law firms (Adamson 1998:140).

¹⁴² What constitutes a “competent body” is not, however, defined. It may mean the same as “competent authority” which means the professional national authority which lays down the rules of professional conduct for lawyers.

¹⁴³ Unlike the New York code, as we shall see later, the CCBE code is silent on the question of whether a client's consent to a conflict can be obtained.

Contingency fees are not allowed (“3.3.1 A lawyer shall not be entitled to make a *pactum de quota litis*”). However, the IBA rules stated that “A contract for a contingency fee, where sanctioned by the law or by professional rules and practice, should be reasonable under all circumstances of the case” and so potentially allowed them. Contingency fees have now been allowed in England and Wales in certain circumstances and so this seems to be an area replete with anomalies. Although the CCBE code should prevail, it is arguable that this rule should be re-examined¹⁴⁴.

There are several provisions on fees. For instance, if a lawyer belongs to more than one bar or law society, the rules applied when determining fees shall be those with the closest connection to the contract between the lawyer and client¹⁴⁵. The provisions on payment on account are similar to those of the IBA. The position on fee-sharing is the same as in the OPRs, although the latter are more detailed - fee-sharing is not allowed with anyone other than a lawyer (although this provision is now under review).

The provisions on clients’ funds are similar to those in the OPRs, but there is also a clause which states that a lawyer carrying on work in a host member state may, with the agreement of host and home authorities, comply with the host to the exclusion of the home rules.

The CCBE rule on professional indemnity insurance is compatible with the OPRs (the IBA code did not consider this), although it provides extra detail - it includes, for instance, that lawyers who are obliged to insure at home and who carry on services in a host member state should use their best endeavours to extend the

¹⁴⁴ The SPRs on contingency fees do not apply to practice outside England and Wales, but a solicitor should not enter into such a fee arrangement in a jurisdiction which prohibits them. The CCBE code’s notes state that their rule attempts to reflect the prohibition of these fees in member states, but the national laws in England and Wales have moved on since the CCBE code was first formulated.

¹⁴⁵ It would be unusual, however, for a competent commercial lawyer not to sort out the question of fees explicitly with the client.

home insurance cover to cover this. A lawyer not required to obtain insurance at home or who fails to extend the insurance shall obtain cover for host state activities - and if this is not possible, the clients should be informed. A lawyer may, if host and home authorities agree, only insure following the host state rules. Suggested reforms include specifying a minimum amount of cover and allowing lawyers to limit their liability to clients, subject to certain safeguards.

At this point, it might be recalled that it was stated in the literature review that not all countries require indemnity insurance, and systems and coverage vary. This may result in gaps in protection available to clients. Professional indemnity insurance is, in fact, a matter of current interest to the European Commission (Monti 1995), as will be discussed later. A regulator told me that the requirement of indemnity insurance in the CCBE code meant that some states had not adopted the code as their national law did not require indemnity insurance.

Both the CCBE and IBA codes contain standard provisions dealing with relations with courts.

The CCBE code has several rules concerning relations between lawyers, which supplement the OPRs. The IBA code provides that “Lawyers shall treat their professional colleagues with the utmost courtesy and fairness ... Lawyers who undertake to render assistance to a foreign colleague shall always keep in mind that the foreign colleague has to depend on them to a much larger extent than in the case of another lawyer of the same country. Therefore, their responsibility is much greater, both when giving advice and when handling a case.” The CCBE code similarly states that “A lawyer should recognise all other lawyers of member states as professional colleagues and act fairly and courteously towards them ... It is the duty of a lawyer who is approached by a colleague from another member state not to accept instructions in a matter which he is not competent to undertake.”

The IBA provisions on correspondence between lawyers is set out above. The CCBE code sets out the specific clause that:

“5.3.1 If a lawyer sending a communication to a lawyer in another member state wishes it to remain confidential or without prejudice he should clearly express this intention when communicating the document.

5.3.2 If the recipient of the communication is unable to ensure its status as confidential or without prejudice he should return it to the sender without revealing the contents to others.”

Clause 5.3.2 raises the (unanswered) question of what circumstances are likely to oblige the recipient to return the “communication”. For instance, if the communication is suggesting that some illegality could be committed (and that is the reason why the lawyer returns the communication), this rule implies that client confidentiality is to override other concerns. Such a scenario would be criticised by Cranston, as seen above. However, proposed amendments to the code include possible limitations on the duty of confidentiality resulting, for instance, from over-riding legislation such as that on money laundering¹⁴⁶.

In relation to fees for referrals, the CCBE code (5.4) says that:

“A lawyer may not demand or accept from another lawyer or any other person a fee, commission or any other compensation for referring or recommending a client.

A lawyer may not pay anyone a fee, commission or any other compensation as a consideration for referring a client to himself.”

The OPRs allow solicitors to accept and make introductions and referrals of business, as seen before, but to find out about fees, one must look at the Solicitors’ Introduction and Referral Code 1990. These do not allow a solicitor to reward an introducer by the payment of commission or otherwise - but this does not prevent “normal hospitality.” It may be that this provision on hospitality conflicts with the CCBE code.

¹⁴⁶ The European Court of Justice also ruled on the law relating to confidentiality in the case of AM & S Europe Ltd. v Commission (Case 155/79 [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264), holding (*inter alia*) that the client may waive confidentiality.

In the converse case of a solicitor passing on a client, Practice Rule 10 states that:

“Solicitors shall account to their client for any commission received of more than £20 unless, having disclosed to the client in writing the amount or basis of calculation of the commission¹⁴⁷ or (if the precise amount or basis cannot be ascertained) an approximation thereof, they have the client’s agreement to retain it.”

The Explanatory Memorandum to Article 5.4 of the Code does, however, make it clear that it is not intended to prevent “proper” fee-sharing arrangements made between lawyers; the prohibition on referral fees is designed instead to ensure that lawyers do not make a secret profit. Adamson believes (1998:146) that arrangements made between associations of lawyers would not fall foul of this provision.

Only the CCBE code deals with the issue of a client changing lawyers. The substitute lawyer must inform the other lawyer and not act before the latter’s fees are paid (another ‘lawyer-friendly’ provision, although the CCBE working group has suggested that this provision should be removed, on the ground that it may be anticompetitive - such provisions in certain countries’ national rules have had to be abandoned at the insistence of competition authorities - Adamson 1998:140).

The CCBE code contains a provision which is compatible with the IBA code on responsibility for the fees of a lawyer.

Finally, clause 5.9 quite interestingly deals with disputes among lawyers in different member states, which is not provided for in the other codes. It is worth setting out in full:

“5.9.1 If a lawyer considers that a colleague in another state has acted in breach of a rule of professional conduct, he shall draw the matter to the attention of his colleague.

¹⁴⁷ Commission as defined includes a payment made to a solicitor for introducing a client to a third party, unless the introduction was unconnected with any particular matter which the solicitor was currently, or had been, handling for the client.

5.9.2 If any personal dispute of a professional nature arises amongst lawyers in different member states they should if possible first try to settle it in a friendly way.

5.9.3 A lawyer shall not commence any form of proceedings against a colleague in another member state on matters referred to in 5.9.1 or 5.9.2 above without first informing the bars or law societies to which they both belong for the purpose of allowing both bars and law societies concerned an opportunity to assist in reaching a settlement.”

I find it interesting that the client, and any harm caused to the client through the lawyer’s breach of a rule, is not mentioned at all. It does seem that the preoccupation here is with reputation, and how lawyers can act to preserve it amongst themselves.

Comment

The efficacy of regulation might be weighed by referring to several factors, including its enforcement, clarity and scope.

Enforcement of these provisions is problematic. Regulatory responsibility is diffuse as enforcement occurs (if at all) at a national level by the professional bodies of different states. The CCBE and IBA are not resourced or willing to take a more active rôle at present. The codes also assume that individuals should be the object of regulation, even though we have seen that this might mean scapegoating individuals in large law firms.

To look at the clarity of the regulatory system itself, regulations often overlap, sometimes conflict and are occasionally drafted in vague terms. Apparently conflicting provisions can be found on:

- confidentiality;
- conflicts of interest;
- referrals and commission; and
- contingency fees.

The mere fact that codes are created by so many bodies is likely to mean that the overall regulatory position will not be clear (even if only because the different bodies are likely to update their codes at different times).

The scope of regulation is also not immune from criticism. Whilst there are useful provisions which do increase client protection (such as those on indemnity insurance and accounting rules), regulation was treated narrowly in both the IBA and CCBE codes. For instance, there were no broad measures dealing with such issues as discrimination in the CCBE and IBA code. Certainly, wider ethical commitments to issues such as pro bono work were absent. Codes, in fact, did little in the way of highlighting in which situations the lawyer's responsibility to the client might clash with other responsibilities and resolving doubts.

One might treat this state of affairs as providing support for Abel's view that regulation is deliberately vague in order to preserve professional power through its indeterminacy, following the private interest notion of regulation. It would, however, be useful to know more about what regulators actually aimed to do when drafting these provisions (as the public interest theory of regulation would suggest). Is it easier to assume intention rather than incompetency in drafting? Or is the present regulation a political fudge, deemed to apply to many types of legal practice, but failing due to the complexity of its task? Is the CCBE code so apparently concerned with maintaining a high level of regulation as it had to accommodate national interests? And why does the Law Society appear to be so unconcerned with its international provisions that it is happy to let them remain often in conflict with other codes?

This latter question leads us to discuss the "regulatory assumptions" (Hancher and Moran 1989) underpinning the work of regulators; this issue will be considered next. The work of solicitors' regulators in England and Wales will be discussed, drawing upon interviews with these regulators. The lawyer interviewees views on conduct will be analysed later in the chapter, once the

regulation of US lawyers in England and Wales and the regulation of lawyers in Germany has been discussed.

The work of the former Solicitors' Complaints Bureau ("SCB")

This part of the thesis is based upon interviews with personnel working in what was then called the Solicitors' Complaints Bureau in 1995. The SCB was replaced by the Office for the Supervision of Solicitors¹⁴⁸, which was set up by the Law Society¹⁴⁹ on 1 September 1996, to be the organisation responsible for guarding professional standards and investigating complaints concerning solicitors' service and conduct (Baldwin 1997:25). Their offices are in Leamington Spa.

Interviewees at the SCB stated that the number of complaints against solicitors in this country in cases which have an international element is very small, perhaps less than 0.5% of the work of the Solicitors' Complaints Bureau. There have been very few complaints made against foreign lawyers in this country, probably not more than two cases. They were also not aware of any complaints made against lawyers who have used the Qualified Lawyers' Transfer Test (see the later section on the Diplomas Directive).

Of the cases the SCB has dealt with which have had an international element, four or five queries have related to companies buying property overseas, with the client claiming the solicitor's work (relating to the overseas side of the transaction) was inadequate (the solicitor was based in England or Wales). Other examples of 'international cases' could be jurisdictional disputes (where a client disagrees with the solicitor's opinion that the case should be dealt with in another country), complaints of inadequate control of overseas agents, cross-border

¹⁴⁸ For further information on the Office for the Supervision of Solicitors, see Baldwin 1996 (pages 25 and 26) and Sherr and Webley (1997:118). Perhaps it should be stated here that the Solicitors' Indemnity Fund covers any legal liability, including dishonesty (Cranston 1995:4) and is funded by solicitors' contributions.

¹⁴⁹ And so is a self-regulatory body.

probate cases and import/export contracts. It is interesting to note that most of the cases mentioned were more likely to occur in smaller firms than in larger commercial firms.

The impression given was that these cases formed such a small part of the work of the Bureau that they channelled few resources in this direction. For instance, the SCB would not usually query negligence in the appointment of an overseas agent; they state that this would be hard to prove. They also stated that they would find it difficult to handle cases involving foreign law as they would not have the necessary knowledge - they would have to seek outside advice. Fact-seeking may also not be easy if the case concerned events which occurred in another country.

The SCB does not usually deal with complaints against the kind of firms that I visited as part of the research. Whilst three to five partner firms have the worst statistics and reputation for negligence in England and Wales (Sherr and Webley 1997:130), sole practitioners are the main source of SCB interventions. Only 25% of interventions were made in partnerships.

The clients of larger law firms are assumed to be able to take care of themselves, having other sanctions against firms if they are displeased with the service they have received - "they could take their work elsewhere or pursue their remedies through the courts"¹⁵⁰. There was also the problem of the complexity of some of the work of these firms and its often innovative nature. The interviewees felt that it would be very hard to regulate innovation. Thus here was a regulatory assumption that work would be beyond them (although one might query whether all international work is innovatory, particularly as commercial law is fast changing. As one large law firm interviewee stated "What is innovation today is commodity tomorrow.")

¹⁵⁰ As regards clients taking cases to court, this was something my lawyer interviewees in Britain did not mention and I am unaware of the existence of statistics which show how many commercial clients take their lawyers to court.

Contacts are kept with other regulators in different countries, but this is usually more in terms of exchanges of 'know-how,' that is, on how to handle complaints rather than to collaborate in dealing with specific complaints¹⁵¹.

Thus the overall feeling was that international work was presently not a matter of great importance, it was a field which they genuinely rarely considered - there were few cases which came to them and those which did involved small scale practitioners. The "customary assumption" (Hancher and Moran 1989) was that the clients of large firms took care of themselves. There is obviously much in this to confirm the opinions set out in the literature review above about how large firm practice has little to do with this kind of formal regulation. There is also material from which to question a traditional justification of self-regulation that regulators have the expertise to regulate all their members. According to the fieldwork, it did not appear that they had the expertise at the SCB at that time to regulate large firm international practice.

The next part of the thesis reports the substance of interviews held with the Law Society's guidance unit, and will also pose the question of how important giving advice on international practice is to them.

The Law Society's professional conduct guidance unit

This unit was located in the Midlands, at Reddich. The Unit dealt with queries primarily from solicitors, by telephone or by letter. I visited this site and interviewed two people there.

An advice worker informed me that they generally only recorded statistics on queries asked according to the subject matter of the query (and so the type of

¹⁵¹ The SCB often gets asked for advice on how to set up complaints handling systems by professional bodies in other jurisdictions, particularly in Commonwealth countries.

practice of the solicitor contacting them was not recorded). However, they had conducted a survey, over a two week period in 1994, which recorded the queries received as follows:

Table thirty-one - a survey of enquiries received at the Unit during two weeks in 1994

<i>Form of practice of enquirer</i>	<i>No of telephone queries</i>	<i>No of written queries</i>
Sole practitioner	224 (17%)	62 (24%)
2-4 partner law firm	356 (27%)	83 (32%)
5-10 partner law firm	198 (15%)	39 (15%)
11+ partner law firm	211 (16%)	34 (13%)
Other (such as employed solicitors or accountants)	330 (25%)	42 (16%)
Total	1,319 (100%)	260 (100%)

It can be seen that firms with under ten partners made most queries. Unfortunately it was not possible to break down the statistical grouping of “11+ partners” further - this would have been useful for our purposes as the English firms interviewed for this research had between 60 and 270 partners.

The advice worker also stated that very few questions were asked which had an international element to them. For instance, they only received ten queries on the CCBE code in the whole of 1994:

“Solicitors may not be aware of it or don’t think in terms of it. Personally, I can’t remember the last enquiry I had on the CCBE code.”

And:

“Perhaps they also ask about indemnity cover.”

Advice workers kept records of the types of queries handled by filling in boxes on a form. The categorisation of queries was, however, quite broad. For instance, there was a box entitled “CCBE Code” but there was no means of recording what aspect of the code was considered. Still, the interviewee believed

that the most common questions asked on the CCBE code¹⁵² would probably relate to those areas of the code appearing to conflict with the Law Society code, such as the provisions on confidentiality.

Hence, the interviewee recognised that the codes were not unambiguous (although the latest edition of the Code has done nothing to clarify matters). It was stated that a pragmatic approach was adopted - if codes conflicted, solicitors would have to obey the higher standard. Yet this does not help when the conflict is not about stricter or laxer standards. The SPR provisions, for instance, on confidentiality differ from the CCBE code in what is regulated and this has not been reassessed in the latest Code.

Looking at the categories of queries which have an obvious international element¹⁵³, the following table records figures from the Unit for the *first quarter* of 1995:

Table thirty-two - international queries received by the Unit during three months in 1995

<i>Subject of query</i>	<i>Telephone query</i>	<i>Written query</i>
Multinational practice or registered foreign lawyers	85 (55%)	11 (34%)
Overseas Practice Rules	62 (40%)	18 (56%)
CCBE Code/Rule 16	7 (5%)	3 (10%)
Total	154	32

In total, 186 (154+32) queries were registered in these areas in this three month period. However, this is a tiny proportion of the queries received. For this quarter, the Unit received in total 12,259 telephone queries and 1,608 written

¹⁵² The interviewee had no knowledge of the IBA code.

¹⁵³ Of course, there may have been other questions asked with international elements to them, but it is impossible to determine this from the statistics given.

queries (making a grand total of 13,867 queries). Thus, these 'international queries' accounted for only 1.3% of their work in that period.

In effect, and again, regulators did not tend to deal with the work of very large law firms and found that international affairs formed a very small part of their customary practice. Consequently, they did not target resources to deal with the ambiguities of international practice as they felt they had more pressing concerns.

Comment

The work of both the SCB and the guidance workers revealed what little weight was being attached to the governance of international work. This may, as has been seen, be partly due to the lack of demand for their services in this area, and to the fact that large firms were beyond the ambit of their daily preoccupations. Further, it was also unlikely that even if these bodies showed an interest in becoming involved in regulating new areas that they had the resources and skills to do so. For example, interviewees stated that they could only remember two inspections of the accounts of the overseas offices of law firms, raising the question of whether home state regulators would spot financial irregularities in foreign offices' accounting. This does bear out the work in the literature review which noted how problematic regulating international work could be and which questioned the adequacy of regulation (and its enforcement) and traditional justifications for self-regulation.

The regulation applying to a second category of lawyers researched, US lawyers practising in England and Wales, will now be examined.

The regulation of US lawyers in England and Wales

In England and Wales, there is no obstacle to lawyers from outside the EU establishing themselves as foreign legal consultants (that is, to practise under home title) beyond general immigration controls affecting all non-EU

nationals¹⁵⁴. There is no compulsory requirement for foreign lawyers to register with the Law Society upon arrival (although the position will change for EU lawyers in the year 2000, as will be seen when EU law is discussed).

Foreign lawyers are not prevented from advising on UK law, as there is no monopoly of legal advice/practice of law granted for the home profession (except in relation to the “reserved” areas shown below). A Law Society interviewee stated:

“There is no regulation and it has always been like this. It’s facilitated the growth of London as a major international legal centre¹⁵⁵.”

Hence there is no apparatus at the professional association level in England and Wales to deal with complaints against these lawyers. As one interviewee from the Law Society put it:

“Caveat emptor applies, but most of their firms are very good.”

The only restrictions imposed by law are that foreign lawyers are prevented from the following (these are referred to as “reserved areas” of practice):

- practising before national courts;
- preparing formal documents relating to real property and succession; and
- using the professional title reserved to home lawyers.

The US lawyers interviewed said that they found England to provide a liberal regulatory regime under which they could work¹⁵⁶. Criticism of specific

¹⁵⁴ Godfrey notes (1995:69) that “... the Home Office requires as part of its immigration procedure that the applicant give an undertaking not to hold himself out as a solicitor, not to carry out the “reserved activities” and to comply with the standards of conduct applicable to solicitors. It should be noted that this undertaking does not prevent a foreign lawyer from advising on English law, and that the reference to standards of conduct relates only to broad principles of ethical conduct, and not to the detailed rules which would be applicable to a registered foreign lawyer.”

¹⁵⁵ The Law Society’s international section promotes a liberal regime for cross-border practice, although an interviewee there added that “[T]his has to be subject to reasonable regulation, to ensure quality.”

provisions (such as the MNP rules and the QLTT) will be considered in the section on EU law, but the general impression was that London was not a hostile place within which to practice.

Is this a satisfactory state of affairs? From the point of view of foreign lawyers, it seems so. Commercial clients using foreign law firms (such as the US firms studied) may have options (such as litigation) available to them away from professional association intervention if they are let down by their firms (although this is an issue which should be investigated further). What, perhaps, is of more consequence is the scenario of foreign lawyers seeking private clients, in matters such as immigration and asylum work, and performing a shoddy service¹⁵⁷. This is one area where clients may not have sufficient means of redress (and is an area being investigated by the government). Whilst the Law Society might not want to assume responsibility for regulating these lawyers (perhaps rightly so as another body might do this better), their working assumption that caveat emptor should apply as firms are mostly good is unlikely to be of much comfort to exploited clients.

Turning now to the regulation of professional conduct, several of the interviewees were qualified at the New York Bar and so were subject to its code (published by the New York State Bar Association in 1994). This code is much shorter than the Law Society Code (comprising eighty-eight pages in total as opposed to the Law Society tome of eight hundred and forty five pages)¹⁵⁸ and does not have a section

¹⁵⁶ The Law Society's traditional explanation of this liberality is that by encouraging foreign law firms to set themselves up here, the work available to home lawyers would be increased, as a spin-off effect. Whether this is accurate or not is another matter. The counter-argument is that some foreign lawyers compete for work with domestic firms and reduce the profits they make.

¹⁵⁷ For instance, David McNeill, head of the Law Society press office, stated in 1999 (Pye 1999) that there are foreign lawyers who exploit immigrant communities - although they have training abroad, they have little knowledge of the English legal system and so "These conmen can rip people off by asking them to pay hundreds of pounds, often for forms which any firm could get free of charge."

¹⁵⁸ Moore (1995:27) states that the American approach tends to be more legalistic as most of the rules have been derived from cases, principally malpractice suits. In the UK, this is not an area which has generated much litigation.

specifically concerning the conduct of lawyers practising abroad. This seems strange as the New York Bar exam is taken by many overseas lawyers, who are able to study for the exam in their own country and then fly over to New York to sit the exam¹⁵⁹. The assumption has to be made that all the provisions should be applicable to these lawyers, although there is no indication that there are any special enforcement provisions for breach of the code by these overseas lawyers.

By way of an analogy, this brings to mind Strange's comment (1986:51) explaining why the US government did not try to regulate the Eurodollar market. The US government could have regulated this but did not do so because of the "American concept of the role of the government and the prime importance given to behaviour within the United States of behaviour directly and visibly affecting the economy or society of the United States." Morris (1995:152) also states that the American bar has given little consideration to the problems of multinational practice and regulation is rendered difficult by the lack of a national authority with power to regulate attorneys.

Nevertheless, there is a provision in the code, a Disciplinary Rule (DR 3-101) (see below), which states that a lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction. Thus, the code preserves the national/regional sovereignty of professions to determine who practises on their soil although it does not state whether US lawyers are subject to the host state's rules on professional conduct.

By way of contrast, the ABA Model Rules (the code which provides model provisions which many State Bars copy) do state explicitly that lawyers engaged in practice outside their home jurisdiction are still subject to the home jurisdiction's discipline. Additionally, Sydney Cone (a partner at the US firm

¹⁵⁹ On the question of re-qualifying as a US lawyer, bilateral discussions have taken place between the UK and the US, to improve the position for English solicitors seeking to requalify in the US. At present, only very limited credit is given in a few states for a common law qualification, such as a UK qualification. This contrasts with the position in England and Wales, where substantial credit is given for US lawyers' home qualifications.

Cleary Gottlieb Steen & Hamilton and a professor at New York University) undertook some research on the CCBE code's relevance for US practice. He felt (1995:220) that if a US lawyer is established in an EU member state (under home title), then the member state could subject her/him to the CCBE code if they so desired. On this reading, the Law Society could discipline US lawyers in London if they contravened the CCBE Code. If the lawyer's activities "involved" the member state but the lawyer was not established there, Cone believes that the lawyer's own home code should apply. Yet this is one lawyer's opinion and it seems wrong that we are reduced to speculation on this point. The CCBE has, however, engaged in discussion with the American Bar Association on the possibility of an adapted form of the CCBE Code being applied to cross-border activities between US and Community lawyers (or even globally) (Adamson 1992:73) although little seems to have come of these talks.

This lack of guidance on international practice also means that there is no indication of what should be done if the New York Code clashes with other codes, which returns us to the critique above of lack of clarity in regulatory regimes. Indeed, Adamson states (1998:130) that the disciplinary authorities in the US do not appear to take account of the IBA rules in relation to the cross-border activities of US lawyers.

The New York Code contains two types of provision, ethical considerations (which are not mandatory, being aspirational in character and representing "the objectives toward which every member of the profession should strive") and disciplinary rules (which are mandatory). One "ethical consideration", for instance, states that a lawyer has an obligation to render public interest and pro bono legal service¹⁶⁰, a provision which is apparently disregarded by most lawyers based overseas.

¹⁶⁰ Similarly, lawyers are urged (ER 8-1) to assist in improving the legal system, through supporting legislative initiatives and programmes to improve the system.

From 1908 onwards, the ABA code included a provision which envisaged that lawyers would make pro bono contributions (Boon and Abbey 1997:635).

Most provisions appear to be uncontroversial¹⁶¹, although they may be less strict or even clash with provisions in codes such as the CCBE code. Contingency fee arrangements are allowed (it will be remembered that the CCBE code does not allow these), as is advertising, as long as it does not contain “puffery, self-laudation, claims regarding the quality of the lawyers’ legal services, or claims that cannot be measured or verified”.

Referrals and fees for such referrals are allowed in certain detailed circumstances (rule DR 2-103). It may again be recalled that the CCBE code was strictly against referrals, except when made by a lawyer or a “competent body” (an undefined term). The New York Code’s approach seems to me to be more sensible, as it facilitates the provision of low cost legal plans, which may widen access to legal advice.

There is a detailed rule (DR 4-101) which sets out the duty of confidentiality and when it can be overridden. In similar fashion to the SPRs, it is stated that a lawyer may reveal, *inter alia*, the intention of a client to commit a crime. It was seen earlier that the CCBE code sets out an absolute right to confidentiality and so it seems again that the CCBE code conflicts with another code. I believe that the SPRs and the New York code are in principle preferable to the CCBE code’s provision, as it seems right that lawyers should try to prevent such crimes (although I do not wish to engage in fundamental philosophical/ethical discussion on the morality of law, the meaning of wrongdoing in an unjust society, and so on, at this point!) We have seen, however, that the CCBE code aims to take preference over national codes.

The IBA code provided that lawyers could, in principle, limit or exclude professional liability. The New York code is stricter than this, providing (DR 6-102) that lawyers shall not seek to limit prospectively their responsibility to a

¹⁶¹ The code also refers to both male and female lawyers.

client for malpractice. Indeed, the New York code appears to be much more concerned with protecting clients' interests than, in particular, the CCBE code, providing commentaries to aid the practitioner in understanding the potential vulnerabilities of clients¹⁶².

The New York code also provides, in its "ethical considerations", a discussion as to the boundaries of the principle (critiqued by Luban (1995) and Rhode (1985) above) that the lawyer should represent a client zealously. For instance, it is stated (EC 7-8) that in assisting the client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision which is morally just as well as legally permissible. However, in the final analysis "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer." The lawyer may, however, withdraw from the case. I believe that this is useful (even though we will see below that lawyers in large firms in the US hardly ever report encountering moral dilemmas in their practice).

There is a whole section on conflicts of interest in the New York Code. The general rule is that a "lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests" *except* with the consent of the client after full disclosure (further guidance is given, litigation being the area in which lawyers are subject to the strictest regulation). This provision of consent may make these rules less onerous than those of the Law Society and CCBE, although the New York Code's provision may be more realistic in an age when lawyers move much more frequently from

¹⁶² Ethical considerations also talk about the differing responsibilities of different types of lawyer - for instance, government lawyers are urged not to use their position to bring about unjust settlements and public prosecutors are stated to have a responsibility to seek justice, not merely to convict.

firm to firm and the clients of commercial firms *may*¹⁶³ not need this form of protection.

The Code is broader than the other codes considered so far, as it acknowledges in several places the reality of diffuse responsibility in law firms. Hence, one ethical consideration states that law firms should adopt measures to ensure that all lawyers in the firm conform to the Disciplinary Rules - this provision might include instituting a confidential procedure whereby junior lawyers can refer ethical questions to a committee and providing continuing legal education in professional ethics. A lawyer can also be responsible for the violation of a Disciplinary Rule by another lawyer if the first ordered that conduct or had supervisory authority over the second lawyer, had knowledge of the conduct and failed to take reasonable remedial action. However, there is no explicit provision which states that these procedures should be put in place in foreign offices.

In effect, in many respects this code appears to be more realistic than the other codes analysed, as it engages with the different circumstances in which law is practised, and the differing needs of more and less knowledgeable clients. I prefer it to the CCBE code as it deals in a more balanced fashion with the ethical problems which lawyers may encounter in practice and seems less concerned with protecting lawyers' closed markets.

Nevertheless, it could be argued that the Code does not go far enough - that some of the obligations set out as "ethical considerations" could be treated as disciplinary rules. For instance, perhaps it should be a disciplinary offence if law firms comprising of more than a certain number of lawyers do not set up a confidential procedure for the referral of ethical problems. There should also be explicit provisions dealing with the position of New York qualified lawyers working overseas. Further possible reforms will be considered at the end of the chapter.

¹⁶³ The issue of confidentiality may be of differing importance to different clients.

The regulation of German lawyers will now be discussed.

The regulation of German lawyers (Rechtsanwälte and Rechtsanwältinnen) at home and in the EU

*“In Germany, everything is forbidden except what is specifically allowed.
In Britain, everything is allowed except what is specifically forbidden.
In France, everything is allowed, even what is forbidden¹⁶⁴.”*

Saying quoted by John Ardagh (1995)

In Germany, much of the regulation governing the work of lawyers is statute based. The BRAO (the Statute of Advocates) and the BRAGO (the Federal Act on Fees) and other legislation (such as the Criminal Code) contain regulations dealing with lawyers' work and conduct.

§59b of the BRAO provides that professional rights and duties are to be further detailed, within the framework of the BRAO, in the “Berufsordnung” (“the Code”), a professional code published by the Bundesrechtsanwaltskammer (national Law Society). The Ministry of Justice, however, decides whether the provisions of the Code formulated by the Bundesrechtsanwaltskammer are valid (§191)¹⁶⁵. The BRAO, as primary legislation, would override the Code in the event of conflict, but contravention of the duties set out in the Code are liable to the sanctions listed in the BRAO (§113) (which will be considered later) and federal courts may refer to the Code when ruling on breaches of professional ethics.

¹⁶⁴ Germany is three times as likely to use Parliamentary legislation as a vehicle for regulation as is France (Daintith 1988).

¹⁶⁵ The Federal Constitutional Court in 1987 held that the previous code was invalid as it had been promulgated by a body (a meeting of the heads of Rechtsanwaltskammern at the Bundesrechtsanwaltskammer) which lacked sufficient statutory authority. The new code was formulated under §191 of the BRAO which states how the statutory assembly (“Satzungsversammlung”) should be constituted and act.

The current edition of the Code came into force in 1997. The Code is set out in a booklet which is thirty two pages in length and is sent to lawyers upon admission to the Bar. It is still the minority of lawyers who receive training on conduct as part of their academic education (Schulz 1997:59). Indeed, I found that the law which regulates legal training in Hessen¹⁶⁶, one of the largest regions in Germany and home to the lawyers interviewed, does not mention conduct training. Schulz states (ibid) that a couple of years ago it was likely that advocates hardly knew that conduct rules existed. Lawyers do, though, receive a monthly journal from the national law society which includes information on lawyers' misconduct.

When German lawyers undertake cross-border work, §29 of the lawyers' Code clearly states that the CCBE Code applies *unless* the CCBE provision in question is contradicted by an EU Directive or by a provision in the German constitution or other German law. To this extent, the German authorities have attempted to assert national sovereignty. Under the Establishment Directive issued by the EU in 1998 (to be implemented in 2000 and to be discussed later in the chapter), EU lawyers practising under home title in a EU host state are subject to all the rules of the host state profession. Host state rules will prevail if there is any duplication or conflict with home state rules. Hence, for example, German lawyers working under home title in England will be subject to the conduct provisions of the Law Society.

However, it is unclear what rules of conduct German lawyers working outside the EU (under home title) are subject to - there is no German equivalent of the OPRs. This may be because it is only relatively recently that German lawyers have set up offices overseas, but it is lamentable that this issue has yet to be clarified (particularly as the German authorities had the opportunity to do so when redrafting the profession's rules in 1995).

¹⁶⁶ "Hessisches Gesetz über die juristische Ausbildung", as last amended on 18 May 1998.

The regulation of lawyers' rights and duties nationally will be considered (taking legislative and Code provisions together in a theme based analysis) in the next section, and compared with CCBE provisions when relevant.

The rôle of the lawyer - a lawyer (Rechtsanwalt/Rechtsanwältin¹⁶⁷) is to be an independent organ of the administration of justice ("Der Rechtsanwalt ist ein unabhängiges Organ der Rechtspflege") according to §1 of the BRAO. §1 of the Code also considers the rôle of the lawyer. I shall set out my translation of §1 of the Code in full, to give some idea of the tone of the document:

"§1 Freiheit der Advokatur

(1) Der Rechtsanwalt übt seinen Beruf frei, selbstbestimmt und unreglementiert aus, soweit Gesetz oder Berufsordnung ihn nicht besonders verpflichten.

(2) Die Freiheitsrechte des Rechtsanwalts gewährleisten die Teilhabe des Bürgers am Recht. Seine Tätigkeit dient der Verwirklichung des Rechtsstaats.

(3) Als unabhängiger Berater und Vertreter in allen Rechtsangelegenheiten hat der Rechtsanwalt seine Mandanten vor Rechtsverlusten zu schützen, rechtsgestaltend, konfliktvermeidend und streitschlichtend zu begleiten, vor Fehlentscheidungen durch Gerichte und Behörden zu bewahren und gegen verfassungswidrige Beeinträchtigung and staatliche Machtüberschreitung zu sichern."

"§1 Freedom of Advocacy

(1) The advocate practises his (sic) profession freely, in a self-determined and unregulated fashion, to the extent that the law or professional code do not impose special obligations.

(2) The advocate's rights of freedom guarantee the participation of the citizen in the law. His practice serves the realisation of the *Rechtsstaat* (the rule of law).

(3) As an independent advisor and representative in all legal matters, the advocate must protect his clients against losing their rights, aid them in the creation of legal rights and obligations, help them to avoid conflicts and to settle disagreements, protect them against wrongful decisions made by courts and public authorities and safeguard them against the state's abuse of power and unconstitutional infringement of their rights."

Schulz argues (1997:69) that the Code's formulation hails back to nineteenth century demands for a free, liberal profession, as a bulwark against state influence, whereas the formulation in the BRAO is defined more in terms of the lawyer's relationship to the state. However, §3 of the BRAO does state that the lawyer is independent ("Der Rechtsanwalt ist der berufene unabhängige Berater

¹⁶⁷ This Code discusses lawyers only in the masculine form, "der Rechtsanwalt".

und Vertreter in allen Rechtsangelegenheiten”), although (as already noted above) Rhode (1994) states that lawyers believe their primary loyalty is to the client.

Confidentiality - §43a (2) of the BRAO provides that lawyers have to keep confidential matters which they become aware of when practising, although this does not apply to facts which are already in the public domain. §203 (3) of the Criminal Code further states that if a lawyer divulges a secret which was revealed to her/him whilst practising as a lawyer, then the sanction can be a fine or up to one year in prison.

§1 of the lawyers’ Code states that the lawyer has a right and a duty of confidentiality (which continues after a case has ended). The lawyer must also ensure that people working with her/him sign a pledge that they will uphold the principle of confidentiality. However, there are statutory exceptions to the principle of confidentiality. For instance, the Criminal Code provides that a lawyer who finds out about a planned crime, whilst practising as a lawyer, *cannot* be punished for not communicating it to the authorities if s/he seriously tried to prevent the crime’s commission *unless* the planned crime is murder, manslaughter, genocide, or kidnapping, hostage-taking, or plane hijacking through a terrorist organisation¹⁶⁸. The CCBE Code provision on confidentiality was not limited by such an exception and so conflicts with this provision; the German code should prevail, as seen above.

Pertinence/restraint (“Sachlichkeitsgebot”) - §43a (3) of the BRAO states that the lawyer must not be “unsachlich”. This is not an easy word to translate accurately - my edition of the Cassell German-English dictionary states that it means “subjective, personal; irrelevant, not pertinent, off the point ...” In general, it appears to act as a catch-all provision to cover lawyers acting in what is deemed to be an ‘unprofessional’ fashion. The Code states that a lawyer is acting in such

¹⁶⁸ This effectively means that lawyers are not obliged to the same extent as other persons to pass on details of planned crimes, as the list of crimes which others must report is more comprehensive (see §138 (3) of the Criminal Code).

a manner if s/he knowingly tells an untruth or criticises another party without reason. This provision will be returned to when discussing the interview with the local law society representative.

Conflicts of interest - in situations where a conflict would arise, the lawyer cannot take instructions from a client (§43a (4) BRAO)¹⁶⁹. Specific situations are set out when lawyers cannot act (see §43a (4) and §45 and 46). For instance, a lawyer is not allowed to act in a case in which s/he acted previously outside her/his practice as a lawyer, or as a judge, public prosecutor or civil servant. An in-house lawyer may not represent the employer in court. This seems compatible with the CCBE Code, although it could be criticised for being too strict - for instance, the New York Code allowed clients to consent to conflicts and this might be more realistic where large commercial law firms undertake work for business clients.

The Code states (at §3) that a lawyer may not get involved in the same case in which s/he has already given advice (the question is what the “same case” means - Schulz 1997:70)¹⁷⁰. Schulz believes conflicts have not been a contentious topic in Germany although the growth in large law firms may mean that the importance of the issue will increase (1997:70).

Accounting - assets entrusted to lawyers must be dealt with prudently and monies not belonging to the lawyer should be paid into a separate account and paid out to the person entitled to them without delay (§43a (5) BRAO). The Code includes further provisions on accounting which do not appear to be contentious.

¹⁶⁹ Advising both parties to a matter is also a criminal offence under §356 of the Criminal Code, punishable with between three months and five years imprisonment.

¹⁷⁰ As partners are deemed to have knowledge of the work of other lawyers, it may be that this would limit partners moving to other firms, as presumably they would be restricted in the clients they could work for. This contrasts with the situation in England and Wales, where there is no general rule which prevents a solicitor from acting against a former client of her/his former firm (Sherr and Webley 1997:128).

Further education - the BRAO states that lawyers have a duty to further educate themselves (§43a (6)) although no mechanism for enforcing this duty exists (thus contrasting with the situation in England and Wales). This has led commentators on the Statute (Feuerich and Braun 1999:340) to comment that this provision can only be enforced indirectly when clients take their lawyer to court and allege that the lawyer negligently failed to keep up to date with legal developments.

Advertising - according to §43b of the BRAO, this is allowed insofar as the advertisement contains information about professional activity in form and content and is not directed at gaining instructions in individual cases¹⁷¹. This seems to me to be a rather fudged distinction (realistically, do lawyers primarily seek to inform the public when advertising?), an uneasy compromise reached to attempt to limit the use of advertising.

The Code similarly states (§6 - 10) that advertising is permissible, to inform the public about the lawyer's fields of interest. Lawyers cannot publicise their profit and turnover (in contrast to the situation in England and Wales and the States)¹⁷². They are also not allowed to give information about clients in their brochures or circulars without permission. Regulation here is not detailed, as court decisions have elaborated upon what is acceptable¹⁷³. §10 gives details on necessary information to be used in letterheads. This does not conflict with the CCBE Code.

Specialist titles - §43c allows the use of specified specialist titles, under conditions which are further detailed in a Statutory Order.

¹⁷¹ It has been held that German firms advertising abroad are subject to the host profession's rules, and not the German profession's rules, on advertising (OLG Düsseldorf 19/10/1993 - 20 U 8/93).

¹⁷² Rueschemeyer notes (1973:66) "the disdain of German lawyers for the public invidious comparisons which are commonplace in the American bar" and believes this is due to the German preference for being treated as a group as opposed to focusing on individual treatment.

¹⁷³ This regulation is more restrictive than that found in the States. Groot-van Leeuwen similarly notes that the ABA code on advertising is more liberal than the latest Dutch code (1997:14).

Fees - fees are regulated by statute in Germany (see the BRAGO and the BRAO §49b), although in non-litigious matters a lawyer may charge on a time basis or negotiate a different fee¹⁷⁴. Lawyers interviewed for this study worked overwhelmingly on a time basis. Contingency fees are not legal (contrasting with the position in England and Wales)¹⁷⁵.

Indemnity insurance - §51 of BRAO states that indemnity insurance of at least DM 500,000 must be taken out, to cover losses arising as a result of professional mistakes. Liability of over DM 500,000 can be limited, subject to the written agreement of the client (§51). This is compatible with the CCBE code.

Partnerships - lawyers can form partnerships with other professionals such as accountants, patent attorneys and tax advisers (§59a BRAO) (contrasting with the prohibition existing in England and Wales). The functioning of these multi-disciplinary practices does not appear to have caused problems in practice. Notaries and accountants (Wirtschaftsprüfer) can practice together, following a decision of the German Constitutional Court in June 1998 (see Unattributed 1998e). The CCBE Code allows foreign lawyers in host states to participate in other occupations to the same extent as home state lawyers (rule 2.5.3).

Comment

Rueschemeyer (1973:137), commenting on the rules in place in Germany in the 1970s, stated that:

“The German rules reveal an image of the legal profession that is quite different from the one implicit in the American Code. The German bar aspires to a higher degree of solidarity, it gives greater emphasis to the need to protect the reputation of the bar and it seems more confident that measures to prevent notoriety in cases

¹⁷⁴ As Schulz notes (1997:55), the BRAGO contains a complicated system of scaled fees for all types of legal work. It is only recently that hourly fees have been accepted.

¹⁷⁵ Although a public company, called *FORIS AG*, was founded by two ex-lawyers in 1996, to which plaintiffs who do not want or who are unable to finance their cases can assign their claims. The value of the claim must, however, be DM 100,000 or more. If the case is successful, the company takes a percentage of the compensation obtained. See <http://www.foris-ag.de>.

of actual wrongdoing will basically be justified by a low level of deviant behavior in the bar. By comparison, the official norms of the American bar give less protection to the dignity of appearances and to the solidarity of the profession.”

Whilst many changes have been made to professional conduct rules in Germany since the seventies, there is still some force in these comparisons, particularly when the German provisions on advertising, limitation of liability, the toothless nature of continuing education provisions and the constitution of local law societies (discussed next) are considered. The German Code regulates areas of conduct which have traditionally been governed by professional associations and does not deal with broader topics such as discrimination¹⁷⁶.

On the other hand, the regulation does set out clearly which rules will govern lawyers, in the event of clashes with the CCBE Code and such clarity is to be applauded (although there is an absence of clarity in relation to the rules governing German lawyers outside the EU). The code is also more lenient on the issue of multi-professional practices than Anglo-American codes and deals with exceptions to the principle of confidentiality more clearly.

The local Rechtsanwaltskammer

The work of law societies (“Rechtsanwaltskammern”) in Germany and the enforcement of lawyers’ professional regulation will now be discussed. I interviewed a member of a local law society for this research and much of the following discussion is based on information gathered during that meeting.

Lawyers (Rechtsanwälte) in Germany must belong to their local law society and pay an annual membership fee to this organisation. The presidents of local law societies form the Bundesrechtsanwaltskammer (national law society), which is based in Bonn, and meets twice a year.

¹⁷⁶ Schulz argues (1997:72) that this was not something which the overwhelmingly male Statutory Assembly which decided the rules were interested in.

The board of management (“Vorstand”) of local law societies are dominated by lawyers from small firms. Members of the board are elected by each other (adding support to Rueschemeyer’s analysis) every four years, but this period is renewable and so can last decades. My interviewee stated that large law firms may feel that the local law society is out of touch with their needs and so are often unwilling to participate in the running of their local law society. This is confirmed by Andreas Junius (a partner in the German firm of Pünder, Volhard, Weber & Axtser) (1995:63):

“Lawyers who practise on an international level have tended to leave active membership and leadership in the bar association to solo practitioners and those in smaller towns. These lawyers see not only foreigners, but also bigger German firms, as a threat. These lawyers have a powerful voice and dominate the discussion in the bar association to which the government listens.”

This potentially undermines one of the arguments in favour of self-regulation, that regulation occurs in an atmosphere of mutual trust.

Salaried members of local law societies (who have the status of civil servants, although a small number will also be qualified as lawyers) usually know their counterparts in other local law societies and so will contact them informally if necessary, for instance to discuss policy.

Local law societies may provide seminars for members, and these may be cheaper than those arranged by private organisations as law societies do not need to make a profit. They also provide advice to lawyers, typically on the regulations governing their work (Berufsrecht). Questions asked mostly concern fees (under the BRAGO) although issues of confidentiality and conflicts of interest are also often raised.

One other function is complaint handling (although there are few complaints made, as will be discussed below). A client’s written complaint is sent by the law society to the lawyer in question who must make a written reply to the

allegations. Schulz and Blankenberg (1995) state that the law societies try to deal with these complaints informally.

The most common sources of complaint are (alleged) overcharging and “rude, unprofessional conduct” (“Unsachlichkeit”). Most often, complaints arise during the context of divorce cases, where my interviewee felt the parties often misdirected their anger at their lawyers. He added:

“We also get some complaints about male lawyers in the mid-forties who are experiencing mid-life crises. They feel resentful of their clients’ wealth and steal some money from their accounts ... Other complaints concern clients who feel that their lawyers have dealt with their cases poorly and so have lost them money or that the lawyer has done nothing at all.”

Even though the law societies try to deal with these complaints informally, there is a court of lawyers (“Anwaltsgericht”) which will hear more serious complaints (although questions on fees are dealt with by the civil courts; see below). Members of these courts are appointed for four years by the Ministry of Justice, acting upon the recommendations of local law societies (whose staff may simply ask people they know whether they would like to join the court or not). Again, the impression is given that law societies are very concerned to keep regulatory responsibilities within a known and trusted insider group.

This court has power to warn, reprimand, or fine a lawyer and to bar the lawyer from practising a certain type of law for up to five years or to ban the lawyer from the profession altogether. Most cases are dealt with by a warning or reprimand. Appeals can be made to the Anwaltsgerichtshof, which is part of the appeals courts and from there an appeal on legal grounds can be made to the highest federal court (“Bundesgerichtshof”). However, less than one per cent of lawyers are subject to disciplinary proceedings at advocates courts each year (Schulz 1997:76).

My interviewee stated that the clients of large law firms do not go to the local law societies if they are dissatisfied with the service they have received (confirming the lawyer interviewees' views, to be seen below):

“They have large legal departments and big law firms have their own ways of dealing with complaints¹⁷⁷.”

Thus, for example, the regulator believed that if a lawyer in a large firm “went off the rails” then her/his colleagues would handle the situation, whereas this might not happen in a small firm. Hence, the customary assumption (Hancher and Moran 1989) was that both firms and clients would ensure that their lawyers' conduct was acceptable without intervention by the professional association.

Clients can also sue for negligence in the ordinary courts and some types of case must be dealt with by the civil courts - an example is disputes about fees. The State Prosecutor (“Staatsanwalt”) can also take action if the lawyer's behaviour amounts to a breach of the criminal code (Manz and McGregor 1996:161). However, these cases are normally settled by the lawyer's insurance company, there being one claim for every four lawyers in Germany each year (Schulz 1997:75¹⁷⁸). This, then, seems to be most clients' preferred way of seeking redress from failing lawyers, particularly as legal expenses insurance is widespread (Schulz (1997:77) states that 50% of all Germans hold such policies).

The regulation of foreign lawyers in Frankfurt

In London, an interviewee at the Law Society told me that they often worked with the German law society on international matters as the two associations' views were very similar. It will also be seen later that the UK and US lawyers interviewed had experienced few problems with regulation in Germany. I found nothing to doubt this in Frankfurt, the regulator interviewed stating that:

¹⁷⁷ However, there are no compulsory client complaint procedures which must be in place in German law firms, as is the case in England and Wales.

¹⁷⁸ Schulz (1997:75) states that 44% of these cases concern non-observance of time limits.

“I don’t have protectionist ideas. These firms have provided job opportunities for young German lawyers ... Young lawyers are particularly interested in working for foreign firms and the growing importance of European law means that the legal culture is becoming more and more open. And German lawyers work abroad too ...”

European firms were officially allowed to set up offices in Germany in 1989/90 although, unlike in England and Wales, German lawyers have a monopoly on the provision of legal advice on German law (although the new Establishment Directive has now radically modified this).

When US law firms first arrived in Germany, they set up their offices using either English solicitors or German lawyers. In 1990 the legislation¹⁷⁹ reserving the practice of law in Germany to local lawyers was additionally relaxed to allow lawyers from non-Member States, subject to reciprocity, to practise their home state law and international law in Germany. It is for the German Minister of Justice to determine what constitutes reciprocity and so far the Minister has issued three decrees (in 1994), stating that lawyers from the US, Japan and Hungary have this status. Germany qualified its acceptance of the EU commitment reached in the GATS (see the later section on this) to state that the access of lawyers from WTO member states (to undertake international law and home law) is subject to the regime of reciprocity described above.

There is no distinction made in German law between (non-EU) lawyers giving advice by means of establishing an office in Germany and giving advice during an ad hoc visit to the country (the distinction made in the European directives to be seen later). Both are treated in the same fashion.

Local law societies have the power to discipline foreign lawyers practising in their area. Indeed, Eggers (1995:92) believes that foreign lawyers in Germany are broadly subject to the same regulation as German lawyers. He does state,

¹⁷⁹ The provision is to be found in §206 of the Statute of Advocates.

though, that if a choice of law has not been made in respect of fees, then the assumption will be made that the lawyer's home law governs this. It is likely that there are few cases where foreign lawyers have been disciplined by the German authorities.

The arrival of foreign lawyers in Germany has raised the issue of their indemnity insurance cover. It has been decided in Frankfurt, for instance, that these lawyers must carry insurance which is compatible with that required of German lawyers. Usually, though, foreign firms are insured for much higher sums than this, although several lawyer interviewees found the paperwork (translating their home insurance documents and so forth) tedious.

Another issue raised by the establishment of foreign firms in Germany has been that of their letterheads¹⁸⁰. German lawyers are used to seeing the names of all partners on firms' letterheads and judges might check letterheads to see whether lawyers in cases before them had the ostensible authority to undertake certain actions. UK and US firms often do not include the names of partners on their letterheads (as there are too many). In addition, in Germany the name of law firms should only include living partners, which is often not the case in Anglo-American firms, whose historic names may be treated as their trademarks. One (German) lawyer interviewee told me that he thought this rule illustrated the traditional German tendency to treat the lawyer as more important than the firm and:

“The Düsseldorf office of Shearman & Sterling lost a court case on this ... The compromise is to use the firm's US name, but to put all the firm's lawyers' names on the letterhead, maybe on the reverse ... The Rechtsanwaltskammer in Frankfurt takes the position that if you don't ask them about this, then they will do nothing - that is, the view is don't ask us about this as maybe you won't like the answer.”

¹⁸⁰ Another issue mentioned, not strictly one of regulation, was determining how to deal with tax returns (to work out which country's tax treaties partners and firms were subject to).

This comment about the traditional German tendency to treat the lawyer as more important than the firm leads us back to the discussion on the changing nature of German professionalism in the first half of the thesis. However, the Frankfurt law society seems to accept the arrival of foreign lawyers and has not acted in a protectionist fashion. They seem to adopt a *laissez faire* attitude to the regulation of foreign lawyers in their region. Still, even if they did wish to regulate these lawyers more proactively, it is unlikely that they would have the knowledge and resources to do so.

Thus, if the international work of the large firms considered remains largely untouched by national regulatory bodies, this raises the question of how the lawyers 'self-regulate' their own behaviour on a day to day basis. The views of interviewees will now be considered.

Views of lawyer interviewees on the governance of professional conduct

Interviewees in Britain

“Reputation, reputation, reputation! O, I have lost my reputation, I have lost the immortal part of myself - and what remains is bestial.”

Cassio in Shakespeare's *Othello* (1997)

The views of the UK and US interviewees will be taken together, since there was so much consensus in their responses, as will be seen. Conduct problems which involved some international dimension will then be discussed.

In several interviews, lawyers stated at the outset that they did not know if they would be able to help me with my work on regulation. It was honestly not an area which they often thought about.

This largely set the tone for many of the interviews. Regulation in terms of codes of conduct was not considered important. Most of those (whether US or UK lawyers) who were members of the IBA, for instance, knew nothing or little about its code. A couple of City solicitors had heard of the CCBE code but it had only

been looked at once. As regards EU law on professional practice, the interviewees stated that they would rely on their office in Brussels or EU specialists to inform them of anything which would affect their practice.

However, one US partner did take a step back from this to state:

“It is hard to say how important provisions in codes are. Through training and after, one adopts a certain style until it becomes second nature, and this is a subconscious process”¹⁸¹.

At this level, codes may not be important in terms of picking them up as a reference document, but they may have had some impact at the formal and formative early stages of professional training¹⁸².

Nevertheless, what was seen as crucial to conduct was reputation, the firm’s standing in the market¹⁸³:

“The best way of policing a high level of performance is through the firm’s reputation, the desire to be known for the work and to get the work in the future.”
(English partner)

Interviewees felt that to preserve this reputation, firm culture was the key:

“In London, conduct matters are not important as all firms heavily involved in international work are large businesses based on integrity.”
(English partner)

¹⁸¹ It must be pointed out, though, that certainly in relation to the legal training of would be solicitors prior to the passing of Law Society examinations, little note, if any, is taken of professional conduct matters in relation to international work. Thus, the assimilation of norms of professional conduct could only be those aimed at national practice, some of which do, of course, have international relevance, such as rules regulating conflicts of interest.

¹⁸² However, Abel, commenting on the US profession, (1989:142) would disagree: “Nearly all law schools today insist that students take a course in professional responsibility, even though empirical studies repeatedly have shown that these measures have no effect on behavior. Indeed there is evidence that law school makes students *more* cynical about legal ethics” (italics in original). The Lord Chancellor’s Advisory Committee on Legal Education and Conduct has also noted (Sherr and Webley 1997:117) that teaching codes of practice in themselves will not automatically produce ethical lawyers (whatever, or whoever, ethical lawyers might be).

¹⁸³ This confirms Lee’s view (1993), seen in the literature review above.

“We are so self-regulating, it is hard to imagine an encounter with a regulator.”
(US partner)

“A lot of what we do is about preserving reputation, which is a higher test than that of the regulators in preventing crooks.”
(English partner)

“Professional conduct is the ethos of the firm you work in, which you absorb.”
(English partner)

But what might reputation mean and does it necessarily imply that firms act with “integrity”? Whilst Reichman (1992) argues that if regulatory policy recognises the importance of reputation, firms may be scrutinised by regulatory agents less, this leaves unclarified what exactly reputation is, how it relates to regulation of conduct and what is regarded as legitimate conduct. For might it be, for example, that certain clients are attracted to certain lawyers/firms if those firms have the reputation for willingness to “bend” the law as much as possible to fulfil client desires? Conversely, a firm/lawyer might have a reputation for honesty, empathy with clients and special competence to do the work. Even more confusingly, might not the values of honesty and client-centredness sometimes suggest radically different conduct¹⁸⁴?

Baldwin argues (1997:3) that reputation might be a means of seeking to reassure potential consumers, in a situation where there is an asymmetry of information and differences between client and lawyer (such as when the more work a lawyer does, the more s/he is paid - “principal-agent problems”). This view might have less weight in our setting, if clients are more knowledgeable.

The work of Eccles and Crane (1988) on investment banks is useful as it focuses not only on the ‘information problem’ outlined by Baldwin but also discusses other reasons why banks might wish to project a particular reputation and why clients might wish to choose firms with a particular reputation. They argue that

¹⁸⁴ “The Popular Oxford Dictionary” states that reputation is “what is generally said or believed about a person’s or thing’s character ..., state of being well thought of, respectability,” which could cover all these characteristics - although “respectability” does imply a certain conformity to socially prevalent mores.

investment banks are under pressure to differentiate themselves from one another, when they are competing for new employees and business (1988:109). Differentiation through reputation is particularly important as, because every deal is different and customised to some extent, it is difficult for a bank to distinguish itself in terms of enduring product characteristics. There is nothing enduringly distinctive about a mortgage-backed security deal done by Salomon Brothers or Merrill Lynch in terms of how the deal is structured although there may be differences in style in terms of how it is executed. Hence reputation provides a way for banks to differentiate themselves in a business where product differentiation is difficult.

Eccles and Crane note (1988:110) that the dimensions along which firms seek to differentiate themselves by establishing a particular reputation are often general and difficult to measure. Statements may be made to affirm that they are “quality people”, they have “commitment to relationships” and “teamwork and communication.” Hence a firm’s professed ‘culture’ could be part of reputation. However, the utility of a feature (such as “commitment to relationships”) diminishes if others claim the same quality, making it difficult to evaluate the reality behind the rhetoric (1988:111).

Nevertheless, this differentiation may help clients make purchasing decisions among firms within an acceptable price range, which is particularly important where the stakes are high (1988:110). In selecting an investment bank, the customer must base expectations about future performance on past experience, the experiences of others and impressions gained from marketing presentations. Reputation has a strong influence on these expectations and impressions. For instance, large M&A deals can be the subject of shareholder actions. CEOs can protect themselves to some extent should the deal run into trouble by using an investment bank with the reputation of being one of the best in the business. As Eccles and Crane quote “The old saying “Nobody ever got fired for buying IBM” comes to mind.”

How well does this argument transfer to explain the importance of reputation to large law firms? Do they have trouble differentiating themselves from other firms, as their “products” do not have enduring characteristics? How often do their clients have to justify their choice of a particular law firm to others? It does seem that law firms do need to differentiate themselves from other firms, unless they are the only firm in the market with specialism in a particular field of law (an unlikely scenario, as the largest firms tend to offer similar specialisms). It is harder to know how often clients gain from the security of using one of the largest law firms; presumably, much would depend upon case in question. However, Reichman (1992) has argued that businesses “purchase professional authority” by contracting with big law firms or big accounting firms, to take advantage of their authority and influence. Similarly, a partner in the German firm of Beiten Burkhardt Mittl & Wegener stated (quoted in Unattributed 1999j):

“If anything goes wrong with a transaction, the management can’t then blame someone for not getting advice from one of the biggest and therefore presumably also good law firms¹⁸⁵.”

Nevertheless, Eccles and Crane do not discuss the significance of their thesis for (the absence of) regulation. We are still left with the question of how reputation *necessarily* ensures conduct which enables a regulator to stay away.

Perhaps all that can be said at this stage, somewhat unhelpfully, is that clients will be attracted to different lawyers and firms for different reasons in different cases - for instance, a firm with a reputation for a certain substantive expertise might be chosen for a particular transaction whereas another firm might have the edge in another case because of its cultural skills or ability to bend the rules.

The desire to be responsive to clients is likely to be an extremely important influence on conduct, as one English partner stated:

¹⁸⁵ “Denn wenn doch einmal etwas schiefgehen sollte, könne dann niemand dem Management vorwerfen, sich nicht Rat bei einer der grössten und damit doch ganz sicher auch guten law firms geholt zu haben.”

“If you want to be a serious corporate commercial lawyer working in a City environment, working for big PLC clients, working with other financial intermediaries and professionals with a good reputation, the rule book is always written by those people. There are standards which they expect in terms of client care, in terms of delivery of service, in terms of general execution which our esteemed professional body¹⁸⁶ hasn't a clue about. So it's very much self-regulation, almost built on the expectations of clients.”

The English partner here thus felt that the work of any City lawyer (whether the work had an international element to it or not)¹⁸⁷ would have to be responsive to clients needs. This is implicitly putting forward an idea of professionalism which supports Hanlon's (1997) formulation of a commercial professionalism.

To turn to the organisation of the firms themselves, firms had some structures in place which had some bearing on conduct. Provision ranged from computer programmes to detect potential conflicts of interest¹⁸⁸ to office manuals (which might include advice on anything from billing to which lawyers were members of the firms' conflicts committees - see below).

The US lawyers interviewed were also asked how they kept up to date with developments in their field. Whether continuing professional development programmes were compulsory for lawyers away from home depended upon the state of qualification (some states insisting on continuing education, others not). However these lawyers felt that their US offices would inform them of significant developments and some lawyers also went on conferences here and elsewhere. Training in general tended to occur on an ad hoc basis, sometimes via videos or conference calls from the US or at regular lunches held within the firm where lawyers exchanged ideas.

¹⁸⁶ Reference to the Law Society.

¹⁸⁷ Indeed, all the lawyers here spoke of conduct required in commercial lawyering, whether the work was national or international in nature.

¹⁸⁸ Firms in Frankfurt also had provisions to deal with conflicts of interest (such as computer programmes).

This leads to the less tangible, but vital processes of socialisation amongst lawyers in firms, implied in the quotes above. It was felt that lawyers learned how to act mostly by example. For the US firms, there were partners who advised on certain areas, such as conflicts, in the US together with committees (some called Opinion Review committees). In their London offices, finding out how to deal with such issues was usually determined by talking problems through with colleagues and by watching how other lawyers dealt with matters.

For the English firms, the philosophy was the same - partners would be consulted on difficult issues of professional conduct:

“If people are worried, they ask. Common-sense is more likely to be relevant than Law Society advice.”

(English partner)

As result, the Law Society’s potential rôle in providing guidance was seen as largely irrelevant in these firms:

“They are not properly staffed or resourced to do the job ... They believe themselves to be capable of regulating the conduct of the profession as a whole, but the profession is just too diverse¹⁸⁹.”

Hence, it is the ‘socialising’ processes which seem crucial to an understanding of how lawyers deal with conduct issues. This confirms other work, such as that of Seron (1996:8) and returns us to the importance of the cultural environment of the law firm in influencing lawyer behaviour. We have seen already that several writers have outlined ethical problems posed by large firm practice. Problems arose from several sources, from the likelihood of lawyer reliance on a small number of clients to the fragmentation of work diffusing moral responsibility for action. Rhode (1985) also argued that once habituated to the firm’s norms and

¹⁸⁹ However, it has been seen before that the Law Society do not believe that they are able to regulate all lawyers; they did not seem to be too worried about ‘protecting’ the clients of large law firms and did not think that they had the knowledge to regulate them.

practices, lawyers may find it difficult to evaluate professionally accepted practices by publicly acceptable standards¹⁹⁰.

Bearing this in mind, the Frankfurt interviews will now be discussed.

The interviewees in Frankfurt

Again, there was much consensus to be found amongst interviewees. Colleagues were the resource lawyers turned to in the event of a conduct problem. In fact, when asked how the quality of work was maintained, interviewees noted that they were careful as to whom they hired in the first place. Partners were then responsible for managing the work of colleagues. Several firms also stated that their associates were subject to appraisals, to discuss their work.

Only one solicitor had consulted the Law Society in relation to practice in Germany (to check about indemnity insurance and banking provisions).

German lawyers were as dismissive as the interviewees in Britain of the relevance of the work of their professional association (Rechtsanwaltskammer) to their practice. German professional bodies simply did not promote the interests of large firms. As a partner in a large German firm stated:

“We are in a minority. Firms with more than ten lawyers are in a sheer minority in this country and all these bar associations look at the sole practitioner or firms with two or so people and that’s a totally different world. That’s divorces and traffic accidents.”

Another German lawyer (working for a US firm) was particularly critical of the Rechtsanwaltskammer:

¹⁹⁰ Similarly, Webb argues that (1998:141): “Organizations themselves are often insulated against acts of individual conscience, either by a bureaucratized ‘floating responsibility’, whereby ethical problems are disguised and dissipated by the division of labour, or by distorted notions of professional ethics which enforce collective loyalty and responsibility to the institution. In these contexts, amoralism all too easily dominates the normal modes of thinking and doing.”

“Generally my experience with the Rechtsanwaltskammer is that it is not a very service oriented thing, it seems very bureaucratic, I’m not much inclined to deal with them. It has a publication which comes out every one or two months or so which is just terrible ... American publications for attorneys have lots of pictures and topics that will interest you, it’s set up like a newstand publication - the German journal is just academic ... I just don’t see any development there, they’re so bureaucratic. They also offer workshops for attorneys but when you see the rules they have for participating in them you don’t want to participate in them - you have to have your form in by so and so, you’d better not have your mobile phone switched on, and so on. It’s a whole thing about telling you what not to do instead of encouraging people to come and being grateful for people being interested, none of that. So I see it as a typical bureaucracy which has no concept of service.”

Codes of conduct were not viewed as being important, one US interviewee stating:

“What is in codes is common sense.”

The one exception to this attitude was the view of an English partner who believed that codes were very important as:

“Unless people conduct themselves in accordance with an acceptable code, then professional standards will fall. If professional standards fall, that harms the profession as a whole, not just the individual whose standards are lower. I’m reasonably old-fashioned in that view, but I like to see a profession which is properly regulated and properly policed.”

Nevertheless, this lawyer stated that he only used codes for reference purposes when setting out the standard terms of a new matter and stated that he did not expect much from the Law Society when working overseas.

As seen above, continuing professional education for German lawyers was not subject to certification procedures, to ensure this occurs. German lawyers went to conferences and seminars (on legal, not management topics), provided by external bodies, largely upon their own initiative.

Although UK and US firms might have extensive in-house training provision in their home countries, this was felt not to be practicable in their smaller foreign offices, (although they may provide in-house seminars on specific issues, often

for clients though lawyers could attend). Again, external conferences and seminars may be attended on an ad hoc basis¹⁹¹.

Several lawyers were asked about what ethical principles guided their work. Acting truthfully and respecting confidentiality was stressed, as was providing “top quality advice.” One English partner stated that:

“[T]he old idea of a solicitor as a man of affairs is a starting point. To me, that means that what I say, I will do. You know, the “my word is my bond” principle¹⁹². I think on that I build everything that I practise ... Without that, it’s dangerous, as you need to rely on your lawyer ... And then, absolute discretion is required, you mustn’t do anything without the client’s express approval. And a determination to provide advice which is correct, top quality legal advice.”

One (US) lawyer stated that “one must act in the long-term best interests of clients,” adding:

“Not everything permitted in codes should be done. You must develop your own code of conduct.”

This lawyer’s stance was very unusual. He worked for a smaller firm than most other interviewees and was very cautious in relation to expansion of the office. The more common response was that lawyers should speedily respond to client requests:

“You should do your best for the client, which is connected with the service orientated approach of this firm and that is different from traditional German lawyers. Traditionally, you went to see a German lawyer and it was an honour if you could reach him and he wouldn’t call you back; you’d have to call him, so that he would hear you¹⁹³. Here, if a client calls and wants an agreement

¹⁹¹ One US lawyer did not know whether continuing education when abroad was required by state bar associations.

¹⁹² See, for instance, Hutton (1996:114) and Hanlon (1999:13) for a discussion of the “gentlemanly ideal.” I found this lawyer’s views to be particularly interesting, as he appeared to have sympathy for some form of “gentlemanly” ideal yet also embraced a very commercial form of practice with very modern marketing methods. This suggested that the personal ideologies of lawyers may be composed in complex ways; further, perhaps longitudinal, research on this would be useful.

¹⁹³ This reminds me of the difficulties I encountered when contacting lawyers in German firms by phone, reported in the methodology section of this thesis. Is the reluctance of lawyers in large German firms to respond to telephone queries part of this view of professionalism? It contrasts

tomorrow, if there's a way, he'll get it tomorrow. If you called a traditional lawyer, you might get something the day after tomorrow, maybe. *We do whatever is in the interests of the client.*"

(German lawyer working for an English firm)

All interviewees in Frankfurt agreed that if clients were dissatisfied with work, they would not go to a lawyers' professional association to complain. They would complain to the firm. They may, for instance, contact the person who did the work or a colleague of that person or contest the bill. If it was a serious case then (according to a German partner):

"Clients wouldn't come back and we'd probably never find out why, unless it was a major client¹⁹⁴."

Comment

The overwhelming impression I gained from interviews, both in Germany and in Britain, was that clients were "calling the shots", at least in relation to how the 'legal service' was delivered. In Britain, there was evidence to support Hanlon's thesis about the existence of a commercialised professionalism and there was also some evidence that some German lawyers were becoming increasingly enamoured of the 'service mentality' of Anglo-American lawyers.

Few interviewees attributed much importance to codes in influencing conduct. They felt that they learned how to act within their firms. This might sound warning bells if the literature review's outline of various ethical problems which large law firm practice might raise is remembered. The next section will consider lawyers' perceptions of difficult conduct/ethical issues encountered in their practice.

sharply with pictures of American lawyers who are renowned for being constantly available - see, for instance, Seron 1996:121.

¹⁹⁴ Few firms have formal structures in place to find out client opinions about their work (only one - UK - firm noted that its home office undertakes regular research on clients' satisfaction with their service). Instead, some lawyers might informally meet clients to discuss their work.

Conduct problems in international work

“[M]ost lawyers never even perceive moral dilemmas in their practice. Only 16 per cent of a sample of 224 lawyers in four large Chicago firms in the late 1970s had ever refused work because it conflicted with their personal values.”

Abel (1989)

This section will be prefaced by reference to research undertaken in the United States. In the above quotation, Abel is referring to the work of Robert Nelson. Nelson (1988:257) gave three reasons which might explain why few practitioners in large law firms had encountered a conflict between their personal values and their work:

- the majority of tasks in large law firms turn on technical matters involving parties of equal status and resources. For instance, even in a hostile acquisition, the contest is not one between ‘good and bad guys’;
- the attitudes of lawyers and clients are not widely divergent - to some extent, by working for a commercial firm, one is choosing which ‘side’ one wants to represent¹⁹⁵; and
- it may be that professional training and experience teach lawyers to transform potentially troubling questions of values into matters of technique and strategy. Hence lawyers do not look to the wider picture.

Lutz (1995:83) also believes that US lawyers do not notice particular professional responsibility issues in international practice as they are so used to operating in transjurisdictional contexts when they advise on another US state’s law; consequently they do not perceive any special problems when the other jurisdiction has an entirely different legal system.

¹⁹⁵ Heinz and Laumann (1994:155) believe that in most cases there probably is no conflict between the interests of lawyers and clients, as events that make the client stronger will usually make their lawyers stronger in the long run as well: “Corporate lawyers may thus come to regard their own interests as inseparable from those of clients. After lawyers have advocated a client’s position for several years - after they have, time and again, been called upon to think of and express all of the strongest arguments for the client - it may well be impossible for them to step out of that role and to consider and assert their own interests apart from those of their clients.”

The last two points made by Nelson have already been raised in the literature review above - this literature should be kept in mind when reading the next section.

Interviewees in Britain

Lawyers were asked whether they felt that international practice posed any particular difficulties in relation to professional conduct. Most lawyers felt that international work did not do so. The general point was made, however, that the more foreign offices you had, the greater was the risk of conflicts of interest. This might be due to the fact that you were serving more clients or that it might be harder to track potential conflicts.

A few specific examples were given of potentially difficult scenarios and it was interesting to note that it was the US lawyers who were more forthcoming when speculating upon these matters¹⁹⁶. Even then, however, most US interviewees did not raise such issues and hardly any of the English lawyers could think of, or were willing to tell me of, these matters.

One possible scenario thought of by one US lawyer was that clients may be tempted to use bribes¹⁹⁷, particularly in emerging markets, perhaps to encourage a state official to process a transaction speedily. Another issue encountered was drawing the line between avoiding or evading the law, perhaps in tax matters or in choosing a jurisdiction on the basis that a transaction would be legal there but not elsewhere¹⁹⁸. Such questions were often difficult to resolve and colleagues were turned to. He felt that:

¹⁹⁶ The question 'why' is begged - should we resort to hunches, or clichés, about English cultural reticence?

¹⁹⁷ See Pallister (1998) for a discussion of the extent of use of bribes in international business.

¹⁹⁸ I felt that it was interesting that this was posed as a dilemma at all - it does contradict to some extent the force of Dezalay's argument about how lawyers relish the prospect of forum-shopping. Much more research would need to be undertaken, however, to determine how often such issues arise and how they are resolved in practice before we can draw conclusions on this.

“It’s not easy and it’s not black and white. It’s hard and it’s grey and it takes a long time to think things through.”

A wider difficulty could be the temptation to become involved in matters outside one’s own area of competence, such as foreign law matters. The pressure may be on to accept work which you were not the best person for. This could lead to there being dramatic differences in quality within the work of a firm. As a result, the problem for management was how to balance growth with breadth of practice. The position of the individual was also difficult, as in this instance it was unlikely that there were people within the firm who had the expertise to help resolve the issue¹⁹⁹. It was a question for one’s own conscience and judgement, although colleagues could be turned to for advice.

This in part explains some of the reluctance to take on local lawyers considered earlier in the thesis. There is the fear of moving too far beyond the firm’s traditional area of expertise and not being able to adequately supervise new forms of practice, thus risking reputation.

To reiterate, most lawyers did not perceive of (or were not willing to tell me of) conduct problems in practice. It may be that this type of question is better dealt with by undertaking other forms of research, probably participant observation where the researcher is less dependent upon establishing trust very rapidly and can (potentially) construct accounts of ethical behaviour by watching lawyers practise.

Interviewees in Frankfurt

The overwhelming consensus in Frankfurt was also that international work did not raise any particular conduct problems. The only person who dissented from

¹⁹⁹ I do wonder, though, how far in extremely competitive firms, where lawyers are ambitious and keen to prove themselves, colleagues will inevitably be turned to for advice. There may be a reluctance for some lawyers to reveal a lack of knowledge, for fear of being considered less competent - as was also discussed in the section on management in the first literature review.

this was one lawyer in a UK firm who believed that the firm's practice might not always be compatible with some aspects of the German code of conduct:

“There are professional rules for lawyers in Germany, but if you read them you don't feel too good as we do things which you shouldn't. For instance, there are strict rules on conflicts of interest but clients might ask you to work on both sides of the deal and you do, you put up a Chinese wall²⁰⁰.”

As was the case with the British interviewees above, it is hard to know how far and how often professional rules in general are infringed by large law firms, as most interviewees are reluctant to discuss this. How far this matters will to some extent depend upon the contravention in question.

Before the issues raised in this part of the thesis are summarised, one final issue relating to law firm practice, which raises several ethical issues, will be considered.

- *The problem of the long hours worked*

“It is not easily feasible to practice law within a delimited time frame.”

Carroll Seron (1996)

“The trend toward mega-firms and the fixation on the almighty bottom line are destructive and dehumanizing. In my short time as a lawyer (thirteen years) I see fewer and fewer people having fun and more and more willing to do anything (ethics be damned) to get ahead.”

Lawyer quoted by Hagan and Kay (1995)

The issue of working long hours was highlighted in the second literature review as a possible cause for concern. During the second stage of the research, in Frankfurt, partners and associates were asked about the number of hours they worked to investigate this matter further.

²⁰⁰ Although this brings to mind Gower's view (quoted in Hancher and Moran 1989) that: “I have never met a Chinese wall that did not have a grapevine trailing over it.”

Lawyers (both Anglo-American and German) stated that they worked, on average, eleven²⁰¹ hours a day²⁰² although they would work longer hours when urgent cases required it. One difficulty relates to the “open-endedness” of work - work usually carries over until the next day, so the decision has to be made when to stop working (see Salaman 1995:22 quoting Mintzberg). It may also be that those lawyers serving clients in different time zones sometimes have to work longer hours, although the interviewees themselves did not mention this. Finally, there is also the tendency of some commercial lawyers to believe that working until late (or, even better, working all night) confirms their importance and gains the respect of (some of) their colleagues to whom they tell their ‘war stories’ afterwards.

When associates were asked what they disliked about their work (if anything), the problem of the number of hours worked turned out to be the most frequently cited issue. One (German) lawyer working for a UK firm stated:

“There are many who find it hard ... what puts pressure on you is that you have a life outside of work and that’s particularly hard to get used to at the beginning, as it’s really hard to get your personal life in order, to keep in touch with your friends, it’s much more difficult to organise your shopping, to get your apartment nicely furnished, do sports - everything beyond the office is hard to organise. So you always have a bad conscience that you should be doing something, such as tax declarations, you are always behind with these things, or you should call someone. So these things are for many hard, especially if you are young and you don’t think that work is all your life, to find a way so you are not so tired.”

Several associates also mentioned that it was hard to get to know new people outside the firm, as they never had the time outside work to engage in activities which might bring them into contact with others. This was particularly difficult for those who did not already have friends and/or family in Frankfurt before starting work and could lead to feelings of isolation or being dependent upon the

²⁰¹ The new European directive limiting the number of hours worked per week to 48 is unlikely to affect this situation as many lawyers will waive their rights under this provision (Keane 1998 and Pandya 1999). Those firms which do not ensure that their lawyers sign waivers may, however, be open to action, instituted by the Health and Safety Executive (Pandya 1999 and Unattributed 1999a).

²⁰² This supports Schultz’ findings (1997:61).

company of colleagues (and so “never getting away from the office and office politics”):

“I am not from Frankfurt and so everyone you get to know is from the office. And many of the others are not from Frankfurt ... Most weeks we go out on Friday night ... and we might also go out together at weekends.”

(German associate in a UK firm)

“I would really like to meet someone outside work, but I’m scared to arrange anything as it’s likely that I’d have to break the appointment, as I often have to work so late. At the beginning of a friendship or relationship you can’t cancel meetings like that, so I never get to meet anybody.”

(Associate in a US firm)

A partner did discuss the subject but was more positive about his enjoyment of the work:

“At present, the rewards in the top commercial firms are much higher than those in-house. You end up with the lifestyle issue, which is the same one that you have in London or the US. There will always be some people who are fascinated with the job of legal adviser from the outside perspective and take the downside with it and there are others who will say no, whether its 250 or 300²⁰³ a year, it’s not that important to me, I want control over other elements of my lifestyle ... It’s not easy, the job, but on the other hand, it’s a different working atmosphere and you haven’t got the bureaucracy. I mean, you’ve seen our offices and compare them to the legal offices at [X - name of company] or [Y – name of company] or somewhere like that. It will always be other factors which make life here in some ways more pleasant ... While there’s the hard work, there’s the ability to have fun and to do it in a way which isn’t oppressive. You don’t have to make hard work unpleasant; you can’t necessarily make it into play but you can find a way which minimises hassle, you know, by efficient use of resources, use of technology, know-how. The burden is bearable and at the end of the day, it’s a positive sum which comes out - the combination of working with colleagues, interesting work, minimal hassle in doing it and the number on the paycheque add up to something positive²⁰⁴.

²⁰³ That is, £250,000 or £300,000 a year (earned by partners, not associates, of course). The table in appendix two sets out partner remuneration in the most profitable Anglo-American law firms.

²⁰⁴ Recent research published by the Law Society (Jenkins 1997) which found that only 15% of solicitors in 11+ partner firms said their status was worse than expected when entering the profession (as opposed to around 30% in smaller firms) although 51% in these firms stated that being a solicitor had a worse than expected impact on their social life (compared to a figure of 33-38% in smaller firms).

This leaves open the question of what exactly graduates expected prior to joining the firm - although back in 1989, Sherr and Webb found that “students still retain the dated image of the solicitor as general practitioner” (1989:246).

As seen above, the organisational setting of a law firm encourages associates to work inefficiently long hours (Lander, Rebitzer and Taylor 1996). However, and similarly to Seron's findings (1996:148 and Seron and Ferris 1995), associates tended to construe the institutional demands to work expanded hours as a personal problem. As she notes, there is a "deeply individualistic strain" in lawyers²⁰⁵. Hence, working long was seen as a "lifestyle issue", making it more difficult for them to lead more fulfilling lives. Interviewees did not mention the potential ethical issues working long hours might raise, as outlined in the literature review.

Nevertheless, one associate felt that it was not possible to work productively all those hours:

"You couldn't concentrate and sit at a desk all those hours, it's biologically impossible."

Several interviewees stated that in some firms associates were expected to stay in the office, be seen to be there in the evenings ("face time"), confirming the idea that working long hours is not always due to the demands of cases themselves, but rather a response to the cultural environment of the workplace.

If this is to change there is, first and foremost, a need for a cultural shift in firms. For instance, partners would have to agree and make it abundantly clear that what counts is the ability to work efficiently, so that those who do the work effectively are not penalised for not giving "face time". Managers should also ask overstretched employees if they need extra help rather than assuming that they are simply demonstrating "commitment" (Baker 1998). Lawyers (and partners in particular) may also need to become less prepared to work to the (sometimes unrealistic) expectations/timetables of clients. Even though writers such as Nelson (1988) stressed that responsiveness to client demands is key to the

²⁰⁵ Seron (1996) also argues that it is this "strong streak of individualism in their thinking and analysis of problems" which accounts for the difficulty women lawyers have in talking about the "social problems of entering a man's world."

professionalism of these firms, lawyers may have more leeway with clients than they sometimes are prepared to admit. As one associate (a German lawyer in a English firm) stated:

“If the English partners are asked when something will be done, they always give a short deadline. But when they ask me, I try to give myself more time. You know, the clients often don’t mind about that, particularly the German clients as they might not know any different ... The English and American clients might be more demanding and expect things to be done tomorrow.”

Again, this quote implies that clients are different and that German clients may still be less demanding than their Anglo-American contemporaries. More importantly for present purposes, this lawyer is suggesting that lawyers may have some leverage over clients. Clients often may not know, for instance, what other transactions the lawyer is working on and consequently how realistic their demands are, giving the lawyer some latitude (in some cases) on how quickly the matter is dealt with. Hence there may be a need for firms more widely to acknowledge their own responsibility in creating unnecessary pressure in the workplace.

Flexible working arrangements are being increasingly sought by lawyers. One partner commented when asked “Do you think more firms will become more flexible in structuring work?”:

“I think that will develop and I think it should. Some firms are barbaric in their use of women and there is a classic glass ceiling when they get to child-bearing age and it’s unfortunately where the career structures in most countries mean the partnership decision is made. It’s a waste of resources in senior lawyers, with the up or out syndrome and I think that there’s a pool of talent and experience that can be used. And I think one of the challenges to the legal profession in England or Germany or wherever it may be is to find ways to keep and use that talent without wasting it. Because for every person who leaves to work somewhere else, that’s wasted training costs for the firm and a competitive advantage you’re giving someone else.”

(English partner)

It is interesting that his reply assumes that only women will want to take advantage of flexible working practices and this does beg the question whether there may be a desire to keep more experienced women lawyers in law firms, but

in positions subordinate to partners, the 'life-long associate' or 'of counsel' position, the 'grinder' rôle. This brings to mind the well-worn argument that women's progress will continue to be blocked until women are able to participate equally in the most rewarded parts of the work (such as 'rain-making) and men contribute equally in the home.

Whilst writers in the professional press (Keane 1998 and Tyler 1998g) are increasingly pointing out the potential benefits of flexible working and there are some signs of progress²⁰⁶, some costs are less apparent to employers than others. Managing partners, for instance, have usually been more attentive to the immediate losses that follow from reduced work hours or the absence of a key lawyer at an inconvenient moment than the issues mentioned above (Hagan and Kay 1995).

This account does stress the agency of lawyers, that the corollary of "time-space compression" and the increased commercialism of practice does not always have to be that lawyers are unable to control the structure and practice of work. There are still choices to be made, and these will be returned to in the conclusion.

Comment

This part of the thesis has argued that large firms work beyond the jurisdiction of formal regulatory bodies in relation to conduct matters (and professional associations are unconcerned about this). Instead, their work is constrained

²⁰⁶ Wilde Sapte was reported in March 1998 to be considering introducing the option of teleworking for all fee-earners (Davidson 1998). The scheme was said to help lawyers with children or those with clients in different time zones who had to work at night (Tyler 1998g). Davis & Co is thought to be the only City firm so far to have introduced teleworking for all its solicitors (ibid), claiming to charge clients 30% less than its competitors as a result of savings made on premises and support staff. Freshfields is believed to be the only large City firm to have issued portable computers to all its fee-earners so that they can work from home or when travelling (as the computers are linked to the office networks), although no solicitors at Freshfields work on a part-time basis. Finally, Linklaters was reported to have a "unique" flexible working scheme for partners (Unattributed 1998m).

However, in a report published by the Law Society in 1996 (Sidaway and Cole 1996), only 3% of firms had part-time solicitors working for them.

largely by the rules of the market, of the need to appeal to and deliver the service expected by clients. In this, the maintenance of reputation is key. This returns us to issues of “clientelism” and legitimacy.

To recall the concept of the “regulative bargain” that Soloman (1992) set out above, this suggested that part of the professional monopoly in the USA was constructed on the premise that lawyers avoided the excesses of the market. The importance attached to the pursuit of clients’ interests in these extremely lucrative areas of practice by the lawyers interviewed raises the question of how far these firms do actually avoid excess. Indeed, in the States, one of the factors which has been said to have instigated a questioning of notions of professionalism is the entrepreneurial character of lawyers there (Nelson and Trubek 1992a).

Most lawyers interviewed did not view the practice of law as problematic in conduct or ethical terms. The tenor of this finding resounds with the work of Galanter and Palay (1995a:210) who interviewed lawyers in large London firms between 1990 and 1994. They found that lawyers felt little sense of distress about the increasingly commercial character of law practice. It also supports Nelson’s work in the States, seen above, which examined the closeness of commercial lawyers and clients.

Whether this is a satisfactory state of affairs is another matter. Reform will be considered in part four of this chapter, but the present conclusion is that the current national regulation of international practice is limited. Bearing this in mind, the next step will be to look at the nature and effectiveness of supra-national regulation which has been formulated to apply to this work. Thus two supra-national organisations will next be discussed; they are the EU and the World Trade Organisation.

EU legislation regulating lawyers' rights to practise and requalify within the EU

From considering themes related to professional conduct, the discussion will now move on to look at the regulation of rights to practise in other countries and requalification rights. The work of the EU is first considered.

The background to the debate on rights to practise

The first wave of Anglo-Saxon law firms which set up offices in European countries in the 1960s were usually able to practise their domestic law and EC law with little objection from local bars, who often benefited from referrals of work (Godfrey 1995:12). However, pressure tended to develop later for greater regulation within those countries, particularly when foreign firms were suspected of advising on local law (ibid):

“Although professional relations were generally very harmonious in practice, a mutual incompatibility of views began to develop. The local lawyers found it incomprehensible that foreign lawyers should practise, apparently unregulated, in their country; the foreign lawyers found it unjust that the regulatory system devised for (say) a Belgian avocat should be applied to (say) an English solicitor practising English or EC law in Belgium.”

A split developed in Europe as to how this difficulty could best be solved, the lines being drawn between those countries which were largely “exporters” of lawyers (England and to some extent the Netherlands) and those which were “importers” (chiefly France and Belgium). To some extent, this does indicate how disputes over the rights to practice abroad were primarily of an economic and self-interested nature (Godfrey ibid). Pressure began to build for EU regulation.

Some countries, however, were already liberal in their approach to establishment rights. In the UK, Ireland, Belgium, the Netherlands and Italy, for instance, no effective monopoly exists for local lawyers in giving advice, although there are areas of work reserved to local lawyers (mainly in relation to practice before

courts, conveyancing and probate) (Adamson 1992:59). Still, until recently, clear-cut reservations of all forms of legal practice existed in Germany, Spain, Portugal and Greece. Recent changes to this picture include the enactment of German legislation which in 1990 allowed lawyers of other Community member states to practise home state and international law (as has been seen), whilst France moved in the opposite direction by merging the professions of *avocat* and *conseil juridique*, thus monopolising the giving of legal advice to French legal professionals.

The thesis will first look at those general provisions of Community law which have been designed to regulate the practice of law by legal professionals away from their home jurisdiction before tackling requalification rights and the controversial issue of rights to establishment under home title.

EU legislation

Even today, there remain significant differences between the educational systems, structures and functions of the legal and quasi-legal professions of Member States. However, European legislation on free movement has included regulation of the professions and the European Court of Justice has dealt with cases concerning the practice of law in host states. The next section considers the legislation produced at Community level and what impact it has had on the provision of legal services within Europe.

The Treaty of Rome and the case law

Several provisions of the Treaty of Rome have application to cross-border legal practice. Title III deals with free movement of persons, services, capital and labour, Chapter 2 discusses rights of establishment (Articles 52-58) and Chapter 3 deals with services (Articles 59-66). Article 52 sets out the basic right to freedom of establishment:

“Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.”

Article 59 further provides that:

“Within the framework of provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended ...”

The case law summarised below, however, is only concerned with the right of establishment by way of integration into a host state and does not deal with whether the Treaty grants a right of establishment under home title without integration into the host state profession.

Reyner's case (1974)[1974] ECR 631

This case involved a Dutch national who was refused admission to the profession of avocat in Belgium as he was not a Belgian national. The court decided that if a national of a member state was fully qualified for admission to the legal profession in the host state, s/he could not be required to fulfil a condition of nationality of the state. In effect, nationality requirements as a condition of admission to a legal profession were invalid.

Van Binsbergen (1974)[1974] ECR 1299

In this case, a Dutch lawyer wanted to practise before Dutch courts, although he lived in Belgium. The Dutch had a legal requirement of residency. The court

decided that Article 59 had direct effect and so a host state could not require permanent residence as a condition to allow practice as a lawyer²⁰⁷.

Thieffry (1976) [1977] ECR 765

This case concerned the French refusal to recognise a Belgian diploma, but it has now been superseded by the 1989 Directive (which will be considered later).

Klopp (1983) [1984] ECR 2971

This was the first time that a specific provision of a national bar came before the European Court. The French refused admittance of a German national who was qualified for the French Bar, as he intended to maintain a professional residence in Germany as well as Paris. The Court held that this refusal was invalid.

Gebhard (1995) ECR I-4165 and (1996) 1 CMLR 603

Gebhard (who was qualified only as a German Rechtsanwalt) was disciplined by the Milan Bar Council for performing a professional activity on a permanent basis in Italy under the title of avvocato.

The Court's judgement held, *inter alia*, that a person is covered by the EC Treaty's provisions on Establishment (not those on Services) when s/he pursues a professional activity on a stable and continuous basis, holding out her/himself from a professional base to (amongst others) nationals of the member state. National measures liable to hinder or make less attractive the exercise of the freedom to practice had to fulfil four conditions:

1. They must be applied in a non-discriminatory manner;
2. They must be justified by imperative requirements²⁰⁸ in the general interest;

²⁰⁷ One writer, however, has also argued that this case confirmed the compatibility of national laws on compulsory residence with reference to arts 59 and 60 of the Rome Treaty when the 'good' functioning of the justice system is involved (Olgiaiti 1995:194).

3. They must be suitable for securing the attainment of the objective pursued;
and
4. They must not go beyond what is necessary to attain it.

The case confirmed the right of a Member State lawyer to be established under home title in another Member State to carry on those activities which are not reserved (on strictly justifiable criteria) to host state lawyers (Adamson 1998:43).

In summary, case law has tended to strike down attempts to restrict practice on grounds of nationality and residence.

The Directives

This section first looks at both the “Services” and “Diplomas” Directives and the case law following them before discussing the Establishment Directive.

1. 1977 Directive (22/3/77) on Freedom to Provide Services - “The Services Directive”

This Directive was designed to govern the delivery of occasional services in other countries. It requires each Member State to recognise lawyers from other member states for the purpose of providing occasional services. It therefore confirms the right of visiting foreign lawyers to perform such general advisory work in the host state. Lawyers may appear before any court, tribunal or public authority in the other country provided that s/he acts in concert with a lawyer entitled to practise in the host jurisdiction²⁰⁹. The Directive specifically does not address the issue of rights of establishment nor the mutual recognition of qualifications.

²⁰⁸ The earlier case of *Säger* (Case C-76/90) 1991 ECR I-4221) had also held that restrictions must not be disproportionate to the objective of securing the necessary protection of consumers.

²⁰⁹ The Directive is premised on the basis that a lawyer remains subject to home rules when working in a host state.

Adamson (1992:33) believes that the Directive was designed as a limited measure to cover only the temporary provision of services until a wider measure dealing fully with lawyers' rights of establishment was promulgated. He doubts its practical significance²¹⁰ - its operation has given rise to little controversy²¹¹, although it is significant in a more theoretical sense as an express source of Community law on the rights and duties of lawyers in cross-border matters.

Yet this is not to say that the Directive is without its ambiguities. It is unclear exactly what the "recognition" obligation actually covers. It is, for example, uncertain whether the recognition provision means that visiting lawyers should be treated as fully qualified members of the host state, giving them access to areas of law reserved to the local profession (ibid):

"[The Directive] confirms the right of visiting lawyers of performing general advisory work in the host state. It might be doubted whether a Directive was necessary for this purpose, since no Member State would have seemed likely to try to prevent visiting lawyers acting in this way. However, a point of substance may be contained in this freedom if a Member state is prevented from prohibiting visiting lawyers advising on host state law. It can be argued that, as the Directive contains no relevant exception, the rights of visiting lawyers must be the same as the rights of host state lawyers in this respect. A fortiori, a Member state could not prevent a visiting lawyer from advising on home state or Community law (or indeed any law other than host state law.)"

This would mean that legislation such as that found within France which purports to create a monopoly in legal advisory work for the local profession must be invalid to the extent that it attempts to exclude visiting lawyers from other states

²¹⁰ As one lawyer interviewed stated (who was the only lawyer in London who knew of the existence of the Directive) : "It is useful to have it recorded that there is no problem with cross-border services, but it is what everyone across the world does anyway, so it makes little practical difference." In Frankfurt, two German lawyers stated that EU law had made it easier to open foreign offices and had meant that their foreign lawyers could become German qualified (see later) but the overall impact on their work was limited.

²¹¹ Adamson also notes (1992:101): "The Lawyer's Services Directive of 1977 addressed some relatively unimportant problems with solutions which were specific but lacking in any clear underlying principle... The implementation of the Lawyer's Services directive by several member states has been found to be much too restrictive." However he does feel that the Directive may be useful in relation to lawyers appearing on an occasional basis in court proceedings if another jurisdiction is very similar to the home state - such as the two jurisdictions in Ireland.

from this work²¹². The latest Directive on establishment extends lawyers' rights further, as will be seen later.

Article 4 (2) of the Directive also states that the service-providing foreign lawyer "shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in his home Member State." As Goebel points out (1995:298), this leaves open what should happen if there is a conflict between home and host state rules. The Directive does not give sufficient guidance on how such issues should be resolved and the CCBE code does not resolve all issues where the host and home state rules may conflict.

The case law on the Services Directive

If the Directive is not without its ambiguities, the case law itself has not succeeded in providing a general framework of principles in this area (Tyrrell 1993), although the general trend of decisions has been to move cautiously in the direction of liberalisation of practice rights.

Gullung 1986 [1988] ECR 111

This decision was before the 1989 Directive (to be considered later) had been adopted by the Commission.

Gullung had dual French and German nationality and was barred from practising as notaire in France - he then tried to set up as a legal adviser and the local French bars refused him assistance. Adamson analyses this decision as follows (1992:37):

"Although it may be doubted whether the Directive was strictly applicable to the facts in this case, the judgement of the Court answers two questions about the interpretation of the Directive.

²¹² For further criticism, see Goebel 1995:280.

The first is that a lawyer who has dual nationality of both the home state (ie the state where he is qualified) and of the host state (where he seeks to provide services) is not deprived of his right to rely on the Directive by the fact of being a national of the host state ...

The second point decided by *Gullung* is that a lawyer established in one Member state cannot rely on the Directive to provide services in another member state where he had been barred from access to the profession of lawyer for reasons relating to dignity, good repute and integrity.”

Commission v Germany 1985 [1988] ECR 1123

This case illustrates the Commission attacking the validity of national transposing legislation under the Directive. The attack was on national legislation requiring the visiting lawyer to work with a local lawyer in activities relating to the representation of a client in legal proceedings. The Court held that the visiting lawyer has a primary right to provide any services relating to the proceedings, subject only to a minimal requirement to act in conjunction with a local lawyer.

Commission v France 1989 [1991] ECR 1-3591

This again was a challenge to the French implementing legislation and follows the stance of Commission v Germany.

The points decided included that the duty to act in conjunction with a local lawyer cannot be imposed except in relation to activity before courts and the visiting lawyer cannot be required to act in conjunction with a local lawyer before courts where representation by a lawyer is not mandatory. Furthermore, visiting lawyers may not be subjected to rules of territorial exclusivity.

The latter point is interesting and may, in fact, result in anomalies. Lifting restrictions on visiting lawyers is necessary where non-lawyers as well as local lawyers have rights to practice before national courts (Adamson 1992:41). However, if the German and French cases are taken to mean that visiting lawyers have virtually unrestricted access to practice before national courts, then this is hard to reconcile with other Community legislation such as the Diplomas

Directive (which will be considered next) which requires aptitude tests for access to national professions, and national legislation which limits rights of audience in courts.

To sum up, both the Directive and the cases which have followed it have both brought ambiguities which have yet to be reconciled. In relation to the case law itself, Adamson feels that (1992:101) the progress made has been slow and patchy, depending largely on the vicissitudes of particular references from national courts and:

“The question is whether the issue of these rights should be determined by ad hoc references - particularly as there may be some reluctance for lawyers at the start of their careers in a new country to get involved in litigation with the local bar association.”

The next section will look at another piece of Community legislation, that known as the Diplomas Directive.

2. EC Directive 89/48 on the Mutual Recognition of Qualifications (“The Diplomas Directive”)

When looking at the most appropriate way to regulate within the European Community, one way forward is that of “integration” (Ogus 1994:101). This occurs when regulation is achieved by bargaining between national governments. The drawback of this is that if the unanimous consent of all the governments is required before a Community instrument can be issued, each government may be tempted to hold out for a form of regulation which will minimize any loss to its electorate, perhaps by creating escape clauses and loopholes under which some discretion on the implementation of the regulation is retained (ibid).

The alternative approach is “co-ordination” (Ogus 1994:102), which takes the form of framework legislation at Community level which sets out broad policy goals. Member States may retain their own regulation to pursue those goals, but must recognise other states’ regulation. One example of this is the 1989

Directive (the “Diplomas Directive”) which facilitates the re-qualification of lawyers in other Member States, which will be outlined in this section.

Although the principle of subsidiarity has reinforced the use of co-ordination, it is not without its problems. Ogus argues (1994:102) that:

“From a public interest perspective, the consequences of the co-ordination approach are nevertheless ambiguous. It cannot deal effectively with externalities unilaterally imposed by one Member State on another ... Also, there are diseconomies of scale in the existence of multiple regulatory regimes. Against these costs must be assumed closer proximation to citizens’ preferences. However, in the longer term these benefits may diminish. The principle of mutual recognition of national regimes will mean that traders complying with the regulations imposed by one Member state may have to compete with foreigners subject to less stringent requirements or less effective enforcement. To eliminate the competitive disadvantage, the traders may exert pressure on their national government to deregulate. The process may result in the reduction of unnecessary constraints and thus to more efficient national regulation; but it may also lead to a government overriding the preferences of its citizens, particularly if they are less effective lobbyists.”

It will be useful to bear these points in mind as the Diplomas Directive is discussed.

The Directive was designed to provide for the integration of foreign professionals into a host state profession, its provisions covering several professions²¹³. It allows the full integration of a foreign lawyer into the legal profession of a host member state, upon that state’s recognition of the home state legal qualifications of the lawyer. The Directive governs the recognition of training (“diplomas”) of at least 3 years’ duration.

Under Article 4, the host state can also require further recognition of competence in either of two forms:

²¹³ Orzack notes (1992:10) that “Preparation of the draft text for this Directive occurred without the kind of overt consultation with interested bodies, either national, multi-national, or international, that marked consideration of sectoral Directives.”

- the host state may require an aptitude test (as in England and Wales where the Qualified Lawyers' Transfer Test has been set up); or
- the host state may subject the lawyer to a waiting period (not exceeding three years) before becoming a fully qualified member of the host state profession.

In choosing an aptitude test, the national authorities must compare the education and training requirements of the host state with that received by the professional and compile a list of subjects not covered by the professional's qualifications. The test is to cover subjects which are "essential" in order to be able to work as a professional in the Member State. Although several states did not implement the Directive on time, all states except Denmark have opted for the aptitude test as their adaption mechanism, using both written and oral tests.

If a test is thought to be too difficult and not based upon a proper assessment of qualifications, then the test may be subject to challenge. The case of Vlassopoulou (Case C-340/89 ECR I-2357), for instance, although concerning a situation existing before the Directive came into effect, required host state authorities to consider whether knowledge acquired in the host state (gained either by studies or practical experience) could count towards establishing possession of the missing knowledge needed to join the profession (Adamson 1998:74). It is likely that tests which do not provide for waivers from parts of the test in the light of individual qualifications and experience are vulnerable to challenge (ibid). The Commission has, in fact, stated that it is currently looking at the tests of all the member states and it will then decide whether it is appropriate to bring infringement proceedings on this point (1996:14).

An interviewee at the Law Society said, in 1995, that the Society believes its test is "serious but transparent and fair"²¹⁴. The tests of other states were perceived of

²¹⁴ The Law Society commissioned Julian Lonbay (1990) to produce a report on legal education in other European countries, so that they could construct their test with greater awareness of the jurisdictions of other states.

as being of differing degrees of severity and transparency - for instance, there may be no guidelines on the syllabus in some countries. There was no published syllabus on the French test, for example, which was also said to vary between the regions. France disliked the test - there may be too few applicants to make the test commercially viable and they were loathe to introduce another category of lawyer after having unified their profession relatively recently.

The Commission (1996:5) notes that at least 11,000 individuals obtained recognition of their diplomas, in various professions, from January 1991 to December 1994, and nearly 6,000 of these were recognised by the UK. In relation to the legal professions in Europe (1996:31), some 620 lawyers obtained recognition under the directive in the period up to autumn 1995, more than 400 of those were in the UK. The Commission feel that this number is low and can probably be explained, to an extent, by the fact that some states allow practice under home title. Other reasons could be that many states were late in implementing the Directive and also that the aptitude test acts as a disincentive to requalification (1996:32). There has been quite a widespread feeling of disappointment in the Commission with the results of the Directive; a strong impression has been established that aptitude testing is being used to maintain undue obstacles to the freedom of movement of lawyers (Adamson 1998:84)²¹⁵.

More detailed figures on the UK's Qualified Lawyers' Transfer Test ("QLTT") show that 65 out of 143 candidates from Member States other than Ireland²¹⁶ have been successful in the test for solicitors, whilst 7 cases were referred. Adamson states that the pass rate has been around 50%. All 17 taking the test for barristers passed. More detail on the running and criticism of the test will be given next.

²¹⁵ The Commission, for example, has asked the European Court of Justice to hold that Italy is not complying with the Directive. The Commission allege that candidates hoping to sit the test to become dually qualified have to wait for over a year to sit the test, the number of subjects tested is excessive and the results of the test are not notified to the candidates (Unattributed 1999).

²¹⁶ Around 300 Irish solicitors have used the automatic requalification mechanism set up by the Law Society to become dual qualified under the Directive.

- *Qualified Lawyers' Transfer Test ("QLTT")*

The figures above effectively show that England and Wales has admitted more lawyers under the test than the rest of Europe put together. The test is also used to enable lawyers from selected countries outside the EU to requalify as solicitors, particularly lawyers from Commonwealth and common law jurisdictions²¹⁷. Lawyers who are not from these jurisdictions who want to become solicitors must requalify from scratch, although the Law Society has in place a rolling programme of review under which it considers whether to open the test to lawyers from other countries. One Law Society interviewee stated:

“The test was founded on the basis that lawyers have basic lawyering skills, so you are looking for areas of substantial difference between their past training and the competence they need to practise here.”

Lawyers who become dual-qualified in this way have the same status and obligations as traditionally qualified solicitors. Lawyers qualified in the USA were allowed to take the test for the first time in 1994 - 40 took it in the Autumn of that year.

To take the test, the lawyer needs a certificate of eligibility from the Law Society, more of which later. Once permitted to take the test, the lawyer sits the relevant part/s and is not subject to further training, except in some instances when qualification in the home state was achieved without any practical training.

The test is divided into two parts:

- two written papers on substantive law (litigation and property) and a shorter paper on professional conduct and accounts; and
- an oral test on the principles of common law.

²¹⁷ Taking all the heads of the exam is not always necessary - for instance, lawyers from Ghana need only take the property exam. Lawyers from countries with a civil code must, however, sit all heads.

Several of the US lawyers interviewed had taken the test and I asked them why. Some interviewees stated that they had taken the test as a defensive strategy. They noted that, during negotiations, English solicitors often stated that the US lawyers present could not understand a legal point as they were not aware of local law. Being able to turn around and state that you were dual qualified was a useful thing to be able to do. To some extent, therefore, the test could be seen as a means of establishing credibility and proving cultural capital. As one lawyer put it:

“At the moment, its principal purpose for me is as what I call my ‘shut up’ principle. When I go to a negotiation, invariably at some point in the negotiation, the solicitor on the other side will turn to my client and his and say “He doesn’t understand; he’s an American lawyer, he’s not an English solicitor.” Now I get to say , “Shut up, yes I am!” ”

Other potential reasons floated for taking the test included young US lawyers who had decided to stay in the UK using the qualification as a safety device; if they did not feel too secure within their firm, they may feel that the qualification widened their possibilities elsewhere. Another reason given was that one particular managing partner of a firm would find the qualification helpful in facilitating administration of their MNP.

However, interviewees were sceptical of the practical use of taking this test in terms of furthering their actual competency as lawyers. As the areas examined often did not relate to their own areas of specialism, the test could only be of background interest in promoting a general awareness of the local legal system. If they had a problem with English law, they would still have to call in an English lawyer. The regulators’ defence to this is that once a person is qualified as a solicitor, s/he has the right to perform certain “core activities such as conveyancing” and that this needs to be recognised in the test. The argument is obviously the same as that used against the Legal Practice Course where students

study areas in which they will never practise²¹⁸. The Law Society does, though - as some form of compromise - allow exemptions from the aptitude test if the applicant has been practising in the area of English law under examination²¹⁹. Yet the general discussion does provide some vindication of the point made in the literature review about the lack of fit between legal education and practice.

Interviewees found the process of applying and preparing for the test time-consuming. It could take some time to obtain the consents from their home profession needed for the certificate of eligibility. The test itself was also said to be very time-consuming and different from US examinations, which were thought to be more reliant upon “spoon-feeding” and where the precise scope of the potential questions were known in advance of the examination. This does tend to refute Abel’s (1994) opinion that examinations do not pose significant barriers to ambitious law graduates. If a test is difficult, it may keep potential lawyers out of the profession, even if the numbers are likely to be small in the case of the QLTT. One regulator also stated that there had only been small numbers of continental lawyers who have taken the test (and that their pass rate was lower than that of Commonwealth lawyers):

“They are reluctant to take exams in English.”

- *Requalifying in Germany*

Germany has set up, under the Diplomas Directive, an aptitude test for EU lawyers wishing to become qualified as German lawyers (Rechtsanwälte/innen). The main elements of the test have been decided upon at the federal level, although the test is organised by individual Ministries of Justice in the various regions (which can add local requirements). Candidates can attend a five week

²¹⁸ However, in 1994 the Law Society was considering whether it would be possible to establish an assessment regime without a test which would measure competence. The argument was that assessments can be more suitable for gauging competencies than tests and that regulators did not like forcing experienced practitioners to take exams.

²¹⁹ There is also an exemption for “distinguished lawyers” of standing in the profession who have been qualified for at least 10 years.

preparation course (run in the summer in Freiburg by the Deutscher Anwaltsverein) if they so desire.

Federal rules provide for two 5 hour written examinations and an oral exam. The first test paper covers the compulsory subjects of civil law, the German civil code, the laws of contracts, property, procedure and codes of conduct. The second test paper covers elective subjects: applicants must choose one subject each from the following two groups:

- Group One - public law or criminal law; and
- Group Two - family law and land succession, commercial law or employment law.

The applicant also chooses one subject from the second test paper to be examined in an oral exam. At the beginning of the exam, the applicant gives a presentation which is then followed by a discussion with the board of examiners (covering the optional subject and the rules of professional conduct) which lasts for no more than 45 minutes.

The successful applicant can then apply for admission to practise as a lawyer and can use the title of Rechtsanwalt/Rechtsanwältin in both Germany and the home state. I did not interview anyone who had taken the test.

- *The importance of the Diplomas Directive*

Adamson argues that the Directive applied a “very broad brush” to the problems of an enormous range of different professions (1992:101). As a result, many of the most difficult issues have been left to national regulators. Many Member States were very late in implementing the Directive. Effectively, the co-ordination approach to regulation did produce additional costs.

Nevertheless, the Directive, and the QLTT as extended to non-European lawyers, is useful for individual lawyers. It can help those wishing to integrate more fully into the local legal community, even if only a small number of professionals opt to take this route.

One other idea raised by an interviewee was the possibility of the Directive being used by would-be lawyers to 'forum-shop' for legal training. A law student might work out that it would take less time to qualify in another European jurisdiction and then return home to take a test to become dual qualified. It is, of course, likely that such strategies would only be available to those with competency in other languages and with the money to finance such non-traditional study. Such lawyers may also be mistrusted as not being 'properly qualified lawyers' in their home state.

Those firms which undertake their international work through alliances might be less interested in these provisions than those which have foreign offices and want their lawyers to remain in the host country (or to gain a dual qualification whilst on a placement overseas). Whelan and McBarnet (1992:57) assert, however, that UK firms with branches in Europe are unlikely to want to staff their offices with dual qualified lawyers. They do not proffer any empirical evidence to support this and it may be argued that their assumption is wrong. A dual qualification might provide useful cultural capital, as seen above when the US lawyers noted how it helped them in negotiations.

Yet, at a more general level, they do feel that the Directive could be used to undermine the goals of the Single European Market. This is because the regulation of professions in the states is left untouched by the Directive; individuals will still have to meet the requirements of the particular national body regulating the profession (although, as has been seen, a test could be challenged for being too strict). This is part of the wider criticism in general of mutual recognition legislation that the host state is protected (Lovecy 1995). Moreover, this chimes with Olgiati's thesis that by enforcing the mutual recognition of

diplomas, the diploma created a “new, *integrated* official system whose aim is to *protect* the jurisdictions of those professions ... that were already protected by state laws at national level” (italics in original) (1995:196). Thus, “two birds have been killed with one stone” (1995:195):

“On the one hand, the legitimacy of all (existing and future) national official professional bodies, rites of passage, systems of education, and so on, that deal with or are linked to the production of those diplomas has been formally recognized. On the other hand, the same official prerogative that they already had by virtue of state law has been formally ascribed to them: the right and duty to define the nature of the profession and the character of its jurisdiction. Last, but not least, by adding to national qualifications the requirement of a period of three years’ compulsory training or an official examination in the host country, the directive provides national jurisdictions with a further level of institutional control through selection on cross-border legal performance.”

To sum up, Adamson’s comment (1992:101) that the achievements of Community law have been inconsistent is hard to refute. Furthermore, this conclusion is reached even before the issue of rights of establishment is discussed. This is the subject matter of the next section.

3. The “Establishment Directive” (to facilitate the practice of the profession of lawyer on a permanent basis in a host member state) (EC 98/5)

This Directive was finally adopted on 16 February 1998 (and published in the Official Journal on 14 March). The need for a directive initially centred on the situation whereby a lawyer wished to establish her/himself in another member state whilst retaining home title and without joining the local profession. Hence, the lawyer would not necessarily wish to have all the rights necessary to perform local legal work. The history of the passage of this Directive will be shown in some detail, as it usefully illustrates how difficult it can be to achieve agreement in this area.

Godfrey believes that it was a “widely held view” (1995:17) that an EC directive was needed but the European Commission wanted the legal professions in

European to agree a plan for a measure²²⁰. However, opinion was split between the Member States - some argued that the Diplomas Directive covered this field by providing for integration within a host state profession, whereas others who had been established in host states for some time and were simply regulated by their home professional bodies did not want to see the situation made more restrictive²²¹.

The French and the Spanish adopted an integrationist approach. France, for instance, had united its profession after the reforms of the early 1990s and so there was some reluctance to recreate another category of foreign legal consultant, which might have operated beyond the control of national authorities (see Adamson, quoted in Pykett 1995). As an interviewee at the Law Society noted:

“The French and Spanish are dogmatic in their belief in an integrationist philosophy.”

The Law Society, on the other hand, sought an unlimited right to practise in a Member State but:

“There is a trade-off. You cannot get acceptance of mobility without a regulatory regime to reassure local bars that the activity will not get out of hand.”

It may also be that some countries were not keen on the exam-style approach to this issue; tests may be time-consuming to formulate and administer, particularly if the number of potential applicants is small.

The CCBE provided the main forum for discussion and various drafts of a directive were produced over a 15 year period, with little progress occurring until

²²⁰ Much of the co-operation and conflict revealed in this account supports Hancher and Moran's (1989) views, seen earlier, on the nature of relationships between regulatory authorities. It also confirms some of the criticisms Ogus mentioned above in relation to 'integration' regulation.

²²¹ On a practical basis, lawyers of one Member State are able to establish offices in another state and work under home title where the law and practice of the host state do not effectively reserve all forms of legal practice to its own professions.

1992 when the deadlock appeared to be broken at a CCBE meeting in Barcelona. This was largely the result of several delegations (including the French) agreeing that a registered foreign lawyer after a period of three years practising in the host state would be entitled but not bound to seek admission as a full member of the host state profession (Godfrey 1995). Lovecy argues that this proposal was a compromise, allowing the solicitors' claim that lawyers would be able to provide services under home state title on a quasi-permanent basis whilst also, by necessitating the registration of the foreign lawyer with host state authorities, consolidating and extending professional regulatory powers (1995:526).

The CCBE draft was submitted to the Commission. Just before Christmas, in 1994, the Commission then adopted its version of a draft Directive, which departed from the CCBE draft in several ways²²². The proposal limited the right to establish under home title to 5 years. The draft required that after 5 years the lawyer must integrate with the host state profession. Automatic integration would be available to those who could show three years' unbroken practice of the host state law, including EU law. Those who could not show this practice would have to sit an aptitude test comprising of papers in procedure and deontology.

It seemed that a split had again re-emerged since Barcelona, as the Commission had consulted with professional bodies further, and several had modified their agreement²²³. The new draft was also apparently founded on a view that to create a permanent right to practise under home title would be incompatible with Article 52 of the Treaty (Adamson 1998:92).

²²² It seems that this occurred because delegations supporting the integrationist line, such as France and Spain, had the opportunity to press their case again to the Commission.

²²³ Only one lawyer I interviewed in London in 1995 was aware of the proposed directive. He felt that the draft (as amended by the Commission) was : "... as good as we are going to get ... The backwoodsmen of Europe [are] reacting against the Treaty of Rome as it should be interpreted [which is] backdoor protectionism... The officials at the EU are treating this as a politicised issue."

The next development in the saga was the Gebhard decision in 1995 which showed that lawyers already had a right of establishment to practise under home title, subject to particular (justifiable) restrictions in national laws. The draft directive was subsequently amended again to reinstate a right to practise on a permanent basis under home state title²²⁴ (under Article 2 of the Directive) together with the automatic right in certain circumstances to join the host state bar or law society after three years working in that country. The Directive must now be implemented by Member States by March 2000.

The Directive provides that a lawyer practising under home title must register with the host State “competent authority”²²⁵ (it is left to Member States to designate the competent authorities for the purposes of the Directive). The fundamental provision (in Article 5.1) is that a lawyer practising under home title may carry on all the professional activities available to lawyers of the host state, most importantly allowing the practice of host state law.

As Adamson notes (1998:103), it may seem surprising that a lawyer who has no training in host state law should be allowed to advise on it, but it should be borne in mind that this was already the position in some states (in England and Wales, for instance, subject to the reserved areas of practice which are considered in the next paragraph). The Lawyers’ Services Directive also apparently allowed lawyers to advise on host state law when providing temporary services.

As previously noted, the right to prepare conveyances and probate documents in England and Wales is reserved to solicitors (by statute). Article 5.2 enables the

²²⁴ Article 11 of the Directive also confirms the right of lawyers belonging to the same firm in their home state to set up a branch in the host state (which can have the same name as the home firm). This effectively allows multinational practices with EU lawyers in Member States. However, host states which forbid multi-disciplinary practices can apply the same rules to lawyers practising under home title.

²²⁵ The CCBE has adopted guidelines on the implementation of the Directive, including a model form of application for registration (Adamson 1998:127). England and Wales may treat failure to register as a criminal offence, if it follows proposals put forward by the Lord Chancellor’s Department (Unattributed 1998x).

exclusion of lawyers from Member States from preparing such documents only where such activities are reserved for professions other than lawyers. This effectively means that the UK can only exclude EU lawyers from preparing conveyances and probate documents when they are from Member States where these activities are reserved by law to notaries. Thus lawyers from Denmark, Sweden and Finland may not be excluded (Adamson 1998:105). This is an obviously anomalous situation.

The lawyer is required by Article 4 to make it clear that s/he is advising as a lawyer of her/his home state so that consumers are not misled and the lawyer is subject to the regulation and discipline of the host State (Articles 6 and 7). In effect, these lawyers are subject to all the rules of the host state profession. Host state rules will prevail if there is any duplication or conflict with home state rules. Article 7.2 provides that the home state authority must be informed before any disciplinary proceedings are started against a lawyer (and proceedings in the home state must be communicated to the host state authorities). Article 7.5 states that the withdrawal of the lawyer's right to practise in the home state automatically involves the withdrawal of the right to practise under home title in the host state. However, when the lawyer has been subject to proceedings in the host state, it is for the home state to decide whether to take action against the lawyer - this effectively allows states to adopt differing views of the importance of the issue in question and retains national sovereignty to this extent.

Article 6.2 states that these lawyers should be granted "appropriate representation" on the professional bodies of the host state. This must involve the right to vote in elections to their governing bodies.

It was mentioned earlier that the Directive also provides the right in certain circumstances to join the host state bar or law society after three years working in that country. Article 10 details this, by providing two routes to integrate into the host profession (which are additional to the provisions of the Diplomas Directive, which may be chosen as a quicker route). Article 10.1 states that if a lawyer can

show that s/he has “effectively and regularly” pursued in the host state for a period of at least three years an activity in the law of that state including Community law²²⁶, then s/he can demand admittance to the host state profession. It is for the lawyer to factually prove such practice and so the lawyer must provide the authority with relevant information and documents.

This does, however, leave a number of questions hanging. There is wide scope for interpretation of what would satisfy the test of “effective and regular” practice (Adamson 1998:116²²⁷). Would, for instance, proof of three years practice of a mixture of law suffice, as when a lawyer dealt with matters concerning home state, international and host state/Community law? Adamson argues (1998:117) that a competent host state authority would be entitled to disallow this, as Article 10.1 provides a complete dispensation from any form of assessment of competence and the applicant could use Article 10.3 instead.

Article 10.3 applies when the “effective and regular” practice is for a period of less than three years. A lawyer may apply for admission to the host state profession “in accordance with the procedures” which are set out in full below:

“(a) The competent authority of the host Member State shall take into account the effective and regular professional activity pursued during the abovementioned period and any knowledge and professional experience of the law of the host Member State, and any attendance at lectures or seminars on the law of the host Member State, including the rules regulating professional practice and conduct.

(b) The lawyer shall provide the competent authority of the host Member State with any relevant information and documentation, in particular on the matters he has dealt with. Assessment of the lawyer’s effective and regular activity in the host Member State and assessment of his capacity to continue the activity he has pursued there shall be carried out by means of an interview with the competent authority of the host Member State in order to verify the regular and effective nature of the activity pursued.

Reasons shall be given for a decision by the competent authority in the host Member State not to grant authorisation where proof is not provided that the

²²⁶ This presumably means that three years of exclusively practising Community law would suffice.

²²⁷ Adamson believes that the word “effective” corresponds with the word “actual” so that all that needs to be proved is the real, active practice of law for clients. The word “regular” requires more than sporadic activity from time to time.

requirements laid down in the first subparagraph have been fulfilled, and the decision shall be subject to appeal under domestic law.”

It is not obvious what weight should be given to the various factors of regular and effective practice, knowledge and professional experience of the host state law and attendance at lectures and seminars (in (a)). It seems, though, that by expanding the nature of the evidence (beyond regular and effective practice) which the lawyer can rely on to prove experience in the host state law (to attendance at lectures and so on), the idea is to compensate for having practised for less than three years. Applications should be considered flexibly, or the decisions will be subject to challenge under EU law.

Comment

There is some evidence in the history of this Directive to support economic interest theories of regulation. It took over 15 years for the legal professions of Europe to reach a compromise, only for disagreements later to provoke another split of opinion. Whilst this might indicate something of the vested interests in this area, it hardly promotes confidence in the ability of the legal professions of Europe to achieve effective compromise²²⁸. It lends more weight to the arguments of those cynical of self-regulation but also highlights how differently professions perceive their interests across Europe²²⁹.

²²⁸ It may be that bi-lateral meetings between national bodies who feel that they have common interests are more successful. Within Europe, bilateral meetings often occur between some national professional associations, such as the joint committee of the Law Society and the Brussels bar. One reason to meet would be to discuss the position of English solicitors in Brussels. However, such discussions may result in agreements which both professional associations have no power to impose on their members, (as was the case with the Brussels “Memorandum of Understanding” of 1994, which was largely to do with English solicitors practising in Brussels.)

Another example of this would be the recent meetings of Law Society staff with members of the German professional associations during the passage of the Establishment Directive, to draft amendments to the Commission’s proposal.

²²⁹ More generally, there is also much in this story that lends weight to critiques of the legitimacy of European rules (see, for instance, Baldwin’s assessment (1996:271) onwards).

How far might consumers be protected by this? The US interviewees, for instance, thought that the QLTT would not guarantee the quality of their work as the test had little to do with their specialisms. One doubts whether the new Directive will fare any better in this regard. Indeed, EU legislation only regulates who lawyers are and not what they do. The Establishment Directive does provide that lawyers must use their home title and not hold themselves out to be host state lawyers but it seems that the system works largely on the basis of *caveat emptor*.

The Directive will result, in England and Wales, in the anomalous situation in which EU lawyers practising under home title will have to register with the Law Society but other foreign lawyers (such as those from the US) will not have to do so.

How far the latest Directive will be interpreted restrictively by national professions to limit international practice is yet to be seen. Certainly, the one generalisation, or truism, to make is that the different conditions and attitudes within Europe make decisions and consensus very difficult to achieve.

Before final conclusions are drawn on regulation affecting international practice, the work of the former General Agreement on Tariffs and Trade (the GATT) (now the World Trade Organisation) and the future of international regulation will be analysed.

The World Trade Organisation and the GATS

The World Trade Organisation ("WTO") came into being as the successor to the GATT ("the General Agreement on Tariffs and Trade") on the first of January 1995. The GATT itself was a development of US thinking formulated in 1948. The idea was to develop a contract between nations which would provide a set of rules for the co-ordination and conduct of international trade. Its ostensible purpose was to reduce tariffs and to increase the volume of world trade. The WTO is a consensus based organisation in which all the member nations work out

a set of rules for international trade (Buckley 1996a). Most major trading countries in the world are members of the WTO, with the current exceptions of China and Russia.

In effect, these rules form a multi-lateral treaty containing reciprocal rights and obligations based on a number of trading principles. These principles include:

- non-discrimination amongst members;
- equality of treatment for foreign and domestic products;
- transparency and predictability of trade barriers;
- the commitment to liberalise trade; and
- consultation between trading partners to solve disputes.

The liberalisation objective applies to regulatory measures (which include legislation, regulations and rules) of Member countries which restrict the ability of foreign suppliers to gain access and to operate without discrimination in a market. Thus non-discrimination is seen as the predominant and enforceable international standard by which the regulatory treatment of services in trade is to be judged.

The WTO acts as a forum for bargaining, for negotiating the reduction of tariffs and other barriers to trade between nations. It incorporates dispute settlement machinery in respect of obligations undertaken in the GATS (see below). The last round of trade negotiations was the Uruguay round, and the mandate of the talks outlined the objectives of a new contract between governments containing rules for trade in services.

The GATS (the General Agreement on Trade in Services) was established as a result of the Uruguay round (and the signing of the Marrakesh Agreements in 1995). For the first time, it established a set of multi-national rules for the conduct of services trade and created a framework for a continuing process of

liberalisation. Again, the basic aim was to expand world trade by liberalising markets.

It is important to note that the GATS does not apply to the relations of EU states between themselves but only to their relations with WTO states outside the EU (Adamson 1998:177). Nevertheless, the EU legal professions found it notoriously difficult to formulate common policy in this area. Godfrey describes (1995:228) the tortuous nature of the negotiations during the Uruguay round and the compromise eventually reached:

“As in other areas relevant to the GATT, the European nations found it difficult to speak with one voice on matters relating to the legal profession, and extensive discussions took place over the years between the CCBE and the Commission on what the common EC position should be. From some quarters, there was considerable opposition to the legal profession being included within the GATT at all; the Commission itself took a generally trade-orientated line, but some of the national bars were moved to protest that lawyers should not be regarded as a commodity like baked beans ... Agreement among the professions in the EC had been difficult enough, given the widely diverging economic interests involved, and the progress achieved had not generally been applicable to non-Europeans; some countries were now clearly fearful of their local profession being swamped by the large and highly organised American firms. This resulted in a somewhat half-hearted approach, whereby the CCBE at first attempted to have the area of legal services excluded from the GATT altogether, but later accepted what came to be the common EC approach; this was to offer liberalisation of the admission of foreign lawyers as legal consultants to advise on their home country law and on international law, but excluding advice on local law and court-related services.”

Thus this commitment is designed to relate only to practice as a foreign legal consultant practising under home title and not to include integration into the host state profession (Adamson 1998:185). Individual Member States then had the opportunity of qualifying their acceptance of the agreement, by adding any exceptions, limitations and qualifications they desired. Nevertheless, the commitment does act as a lowest common denominator as it means that those Member States which did not qualify their acceptance of the agreement (and this includes the UK) have committed themselves to allowing unrestricted market access and national treatment for the commercial presence of lawyers from all other WTO member countries as foreign legal consultants (subject to immigration requirements). Moreover, the principle of “standstill” also ensures that once a

commitment has been undertaken, more restrictive provisions cannot be introduced in the future (Adamson 1998:178).

Further liberalisation is to be achieved by negotiation between parties by way of offers and requests addressed to each other. The ensuing agreements will be bound by the GATS general rules. However, little activity has since occurred (Godfrey 1995:230). Few countries have made offers on legal services and the offers made have tended to be incompatible with others²³⁰. The main exception to this is the agreement reached at Evian, France, in 1993, when the American, EU and Japanese professions agreed to allow foreign lawyers to establish under home title to practise home law (although there was less enthusiasm for the American proposal that lawyers should be allowed to employ foreign lawyers and offer them partnership). Hence, an overall deal on legal services under GATS remains to be reached²³¹. Even though the US, EU and Japan reached some form of agreement, the attitude of other countries will obviously be crucial to liberalisation (ibid). An interviewee at the Law Society added:

“Progress will be slow as everything is painful.”

Other organisations are also working in this general field²³² - the IBA is one such organisation²³³. In 1997 it was reported that lawyers groups worldwide suspected

²³⁰ Still, in 1998, the ABA, the CCBE and the Japan Federation of Bar Associations held a forum on transnational practice to encourage dialogue between bar representatives (Adamson 1998:181).

²³¹ Although in March 1998 it was reported that the EU plans to start talks on creating a free trade area between the US and the EU and that liberalisation of professional services is expected to be on the agenda (Unattributed 1998u). However, the ABA has consistently argued that it is not a regulatory body and so cannot negotiate on issues such as foreign lawyers' rights of establishment in the US (Unattributed 1998u).

²³² For example, the European Commission is considering proposals to ease the transfer of professionals, such as lawyers, from non-EU countries who are lawfully established in a Member State but who wish to work in another Member State. In early 1999, the European Commission put forward proposals for two Directives on the free movement of services in the internal market (COM (1999) 3 final/2). One of these directives covers the right of businesses established in the EU to provide services in another Member State using non-Community staff who are lawfully established in the EU (Unattributed 1999b). At present, a third country national (such as a US lawyer) who is established in one Member State who wishes to work in another Member State has to comply with the national rules of the second Member State with regard to visas, residence and work permits. The proposal is to introduce a “EC service provision card” which would be issued

that the Organisation for Economic Co-operation and Development²³⁴ (OECD) wanted to apply standard criteria for liberalisation to all professions and that had catalysed the formation of the forum of the ABA, the CCBE, and the Japanese Federation of Bars, to discuss the liberalisation of legal services (Unattributed 1997d). In 1999, the competition working party of the OECD held a roundtable discussion on competition issues in professional services (Unattributed 1999d) and the organisation recently discussed a paper on cross-border service provision (without establishment) (Unattributed 1999e). This work is ongoing. The WTO was also due to begin an investigation into the legal profession at the end of 1998 (Unattributed 1998s, Unattributed 1998l); they are concerned to ensure that foreign lawyers can gain rights to practise in member countries and are also considering whether provisions (“disciplines”) which have been drawn up to cover the accounting profession can be expanded to apply to the legal profession²³⁵.

But how important is all this? Although little may have happened so far, all the WTO member states are now part of a process of liberalisation and cannot go back on commitments already entered into. The GATS may also have broken

by the Member State where the worker was established. The card would be valid for six to twelve months and would act as a guarantee by the first Member State that the worker is legally resident there. Discussions on the proposal in the Council of Ministers started in the Spring of 1999 (ibid). Effectively, the proposed Directive is designed to make it easier for businesses to exercise their right to provide services and in so doing may circumscribe to some extent the ability of nation states to hinder non-EU nationals from working in their countries.

²³³ The IBA’s Professional Program Committee (1994) has drafted proposed guidelines for foreign legal consultants which they hope will be “an important step toward the development of an international consensus on the regulation of foreign legal consultants.” They are in the process of discussing these as a first step towards their adoption.

Still, the IBA has been trying to reach a common position on rights of establishment for years (some commentators have alleged that they were “hampered” by the belief that the US and UK professions were promoting a liberal regime so they could dominate others legal markets - Unattributed 1998l).

²³⁴ The OECD is an organisation providing a forum in which the governments of its 29 member countries can discuss and develop economic and social policy. Their exchanges sometimes lead to agreements for formal action (Unattributed 1999d).

²³⁵ Source - conversations with officials at the Department for Trade and Industry and the Services Division of the WTO in Geneva, in 1998.

down psychological barriers to liberalisation - “[governments] have had to learn ... to consider legal services as something tradeable across frontiers in the same way as other service industries” (Adamson 1998:190). This *may* lead to a more precise articulation of what justifications should exist to limit practice by foreign lawyers, thus raising fundamental issues such as how clients of legal services can and should be protected (although it must be said that the discussion to date has yet to consider seriously what protection is needed). Finally, the outcomes of the negotiations on the question of partnership with or employment of host state lawyers *may* have a critical effect on the extent to which US lawyers are enabled to take a major share of the market for domestic legal services in Community Member States (Adamson 1992:93).

Thus the GATS may in the future become much more important to the regulation to the legal profession than the work of any nationally based regulators, despite the fact that there seems to be little widespread comprehension of this within the legal world at present.

Whether trade itself should be liberalised is controversial, however. The section on free trade towards the end of the chapter will discuss broader issues surrounding the ideology of free trade and will outline critiques to free-market thinking.

Part three - Will there be a supra-national regulatory agency for lawyers in the future?

This section discusses the question of the likelihood of the emergence of a supranational regulator to regulate the international work of the profession.

It has been seen that there is no one body that has responsibility for regulating the international work of lawyers. For example, regulation is formulated at EU level and by national authorities, whilst the CCBE and IBA have both produced codes

which attempt to regulate the professional conduct of lawyers. Yet there is no supranational body charged with the enforcement of all these provisions.

Whether this will change is another matter. In the abstract, the formation of such a body is possible. As Hancher and Moran state (1989:278):

“There are no obvious natural limits to boundaries to regulation. Notions of what is ‘regulatable’ are plainly shaped by the experience of history, the filter of culture and the availability of existing resources.”

Yet Hancher and Moran also note (1989:284) that regulatory change almost always happens because some sense of crisis is precipitated. I gained little sense of such a crisis amongst my interviewees, who felt that the establishment of such a regulator was highly unlikely.

Interviewees believed that national legal professions were unwilling to give up their power; there was not the political commitment amongst legal professions to generate change²³⁶. National bodies also seem unlikely voluntarily to contribute resources to any organisation taking on this rôle. Existing supra-national professional societies, such as the IBA, do not have the resources to act as an international regulator and an interviewee there said that they would not want to become involved in the regulation of the international work of members:

“Countries should regulate nationally, as there are widely different circumstances throughout the world ... We would not like to get involved in the regulation of our members. We are an umbrella association and we support the independence of bars.”

An interviewee at the SCB stated that it would be not be easy to work out common standards and to make any system compulsory²³⁷. The problems of the CCBE in reaching agreement amongst members seen before reinforce this. One lawyer also commented that it would be difficult to make the distinction between

²³⁶ Whether national governments or the EU would like to see change is also highly doubtful.

²³⁷ The discussion in the literature review above about the difficulties to be encountered in the regulation of international practice, such as whether appropriately skilled regulators exist at present and the problem of regulating innovation, is pertinent here.

practising local law and international law when working on cases; that might make the work of any regulator more difficult.

However, a sense of crisis might be generated in other quarters which effects change. One possibility could be the occurrence of a case in which a private client, or group of individuals, are let down greatly by their lawyers and find no redress. If, for instance, such a case in an emotive area such as disaster litigation²³⁸ was highly publicised, who knows whether change might be forced?

Still, one only has to look at the US experience of both federal and state bar associations to realise that supranational regulation would be a great departure from conventions in the regulation of legal practice. The existence of vehicles such as the GATS and the CCBE point instead to the potential for increased 'multi-national' co-operation and contact.

Flood's arguments are interesting here. He believes that the regulation of commercial international legal practice could go in one of two directions - either external state or super-region driven regulation will develop or a *laissez-faire* approach will be adopted. He argues that large firm, bureaucratic, practice will undermine acceptance of self-governance and autonomy (1995:141) (which brings us back to the discussion on legitimacy and how the traditional justification for self-regulation was being undermined by large law firm practice). Adopting the colours of one in favour of international business and profit maximisation, he does not, however, view the possible loss of self-regulation with regret:

"This is not necessarily a great loss: in exchange for external regulation, professions will be able to adopt organizational forms more suited to the exploitation of international markets. Professional firms will incorporate, have limited liability and outside shareholders, and form multidisciplinary and

²³⁸ Other possible scenarios include lawyers' failings coming to light in litigation following the insolvency of businesses, such as proof of gross negligence in carrying out due diligence prior to a large cross-border corporate merger which later failed.

multinational conglomerations ... None of this is fantasy. It already exists - the exemplars are the Big Six accounting firms.”

Clearly, we are within the realms of speculation; what seems most likely to happen in the short to medium term is that organisations such as the EU and the WTO will further continue their plans for liberalisation. Their work is, however, likely to become ever more complex. The development of more sophisticated and cheaper telecommunications (as seen, for instance, in the growth of shopping over the internet) may result in the physical location of the provider of a service (and of the person to whom the service is provided) frequently being almost irrelevant (Lever 1998:2). Consequently, new issues will arise as to whose regulatory regime should apply - that of the nation where the service provider happens to be located at the moment the service is provided or that of the nation where the person to whom the service is provided then happens to be?

Comment

As the legal profession becomes more entrepreneurial, more market orientated and more diverse, problems of governance will become more severe (Burrage 1996:73). This chapter has highlighted a number of areas in which regulation as it stands is less than satisfactory. To recap some of these concerns:

Codes - quite often the various codes analysed differed in coverage, were limited in scope and conflicted with each other. They sometimes did not make it clear which code should take precedence over the other although, on the whole, the sovereignty of national professional associations was not challenged. No supra-national enforcement agency exists.

Establishment and requalification rights - the aim of organisations such as the EU, WTO and OECD is to liberalise these rights although liberalisation may mean that the potential problems incoming large law firms may bring are not tackled (such as the possible overwhelming of local legal professions,

undermining the service available to national clients by recruiting the most highly regarded local lawyers, and potential lack of cultural sensitivity).

EU legislation left gaps in the regulatory framework and largely confirmed the sovereignty of national professional associations. Even the Commission itself has expressed disappointment with the strict way national authorities have construed the Diplomas Directive.

Self-regulation - the various justifications given for self-regulation do not apply when the relationship of professional associations to large law firms is considered. For instance, they believe that they do not have the expertise necessary to regulate these firms.

Large law firm practice - various ethical issues are raised by the way most large law firms conduct their business (including those posed by the long hours worked and closeness to clients) yet often there is little discussion of this within the professional community.

Who should be protected and how - professional associations appear to have given little thought to the issue of whether private clients (or small businesses) are adequately protected by the current 'system' of international regulation.

The final part of the chapter will consider ideas for reform. First, however, the next section will discuss free trade and the free movement of capital. As many of the suggestions made in the last part of the chapter are inherently grounded in insights gained from free trade critiques, this afternote will 'set the stage' for reform.

Afternote - An excursion into the principles and philosophy of free trade

“In the quest for economic growth, free-market ideology has been embraced around the world with the fervor of a fundamentalist religious faith. Money is its sole measure of value, and its practice is advancing policies which are deepening social and environmental disintegration everywhere.”

David Korten (1995)

“Even though attorneys work in a “protected” occupational niche where a regulatory apparatus between the profession and the state determines who may practice law ..., they return to a free-market, voluntary image in discussing their service obligations to the community or to the public.”

Carroll Seron (1996)

At several points in the thesis, reference has been made to the regulation of global business itself. In this regard, and particularly since the 1970s, free trade ideology has dominated Western economic and social thinking. Hence the concept of free trade has provided the subtext and background to much of the debate surrounding the regulation of international markets.

The general and unquestioning acceptance of free trade ideology constantly struck me throughout the research. As one solicitor interviewed put it:

“After so many years of Thatcherism, one doesn’t automatically leap to protectionism as being sensible²³⁹.”

Further, the Law Society’s international policy is to support a liberal (deregulatory) regime for foreign legal practice, subject to the need for “reasonable professional regulation” which should ensure quality.

In spite of such wide acceptance, it is interesting to take a look at what this doctrine means, what are its assumptions and its effects. Free trade is often touted as a universal panacea which will promote world trade and increase the overall wealth of nations. Commercial lawyers service this trade, and participate

²³⁹ Korten (1995:123) also reports that an international survey of business executives conducted by the Harvard Business Review in 1990 found that 12,000 respondents from 25 countries agreed by a substantial margin that there should be free trade between nations and the least possible protection for domestic enterprise.

in the work of bodies working towards de-regulation, such as the World Trade Organisation.

In this brief discussion of (some of) the debate surrounding free trade, the intention is *not* to cover in detail arguments which are raised; rather, some flavour will be given of the political, economic and social arguments which underpin stances taken.

Looking behind free-trade rhetoric involves examining economic concepts first articulated by Adam Smith and more recently used by Margaret Thatcher's guru, Milton Friedman. The basic free trade argument is that if more free trade principles are applied (so that money and goods can be exchanged unrestricted by national barriers), economic activity between nations will be greater and so more wealth will be created. This wealth will permeate all sectors of society, through a filtering down process. Free trade is therefore seen as the means to increase world trade and, by so doing, increase the wealth of the world.

To examine this further, this free market theory provides a model of trade taking place within the context of perfect competition and full information. Thus consumers choose what to buy and the price mechanism equates demand and supply. On a world-wide scale, trade benefits all countries through the operation of comparative advantage. This means that each nation will specialise in what it can produce most cheaply and so has an advantage in. The trader takes the goods to where there is the most appropriate market and goods are exchanged for those produced elsewhere. Everything is produced most cheaply and so everyone is better off. Moreover, consumers will have more choice and resources will be used most efficiently²⁴⁰. This is, of course, the crux of Adam Smith's "invisible hand" thesis.

²⁴⁰ Friedman, for instance, argued for the virtual exclusion of governments from economic life. Production and the exchange of goods and services would be best handled by private enterprise where exchanges were believed to occur only if both parties benefited. Accordingly, aid would distort the free market process.

In spite of the Conservative promotion of free-market philosophy during the Thatcher years, criticism of free trade theory comes from many perspectives - sociological, psychological, economic and environmental.

Ogus (1994:23) points out several controversial assumptions of the market system, which grounds free-trade theory, which are believed to advance economic efficiency:

“Individualism. The model assumes that social welfare can be understood only as the aggregate of all individual welfare; what is ‘valuable to society’ can have no other meaning²⁴¹.

Utility-Maximising behaviour. Individuals are assumed to behave ‘rationally’ by choosing courses of action which maximize their utility. With the possible exception of the very young and the mentally handicapped, no allowance is made for incompetence or the inability to process information²⁴².

Information. Individuals are further assumed to have the information necessary to make utility maximizing choices. Although agreements resulting from a misrepresentation from one party to another will not, in general, be enforced, the mere absence of information is not considered to be an obstacle²⁴³.

*Absence of Externalities.*²⁴⁴ Allocative efficiency will result only if decision making in the production process takes account of external costs and benefits ... there are private legal devices available, notably contract, property rights, and tort, which may internalize such externalities, but their use is constrained by transaction costs. These may be so high that misallocations are not corrected.

Competitive markets. Finally, the market system depends crucially on the existence of competition in relation to resources. It is far from clear that the

²⁴¹ The basis of Friedman’s thinking is that it is human nature to pursue one’s own interests individually, a view contradicted by others who emphasise the need to pursue interests collectively (see, for instance, Korten 1995 and Green 1995).

²⁴² Duncan Green’s construction of “Homo Economicus” outlines his conception of the individual at the centre of classical economics (Green 1995:27): “Homo Economicus has no friends, family, community nor any other non-economic links. S/he has an insatiable urge to acquire goods and his/her happiness is directly proportional to consumption... S/he acts purely on the basis of short-term self interest.”

²⁴³ Yet as Keynes argued (quoted in Hutton 1996:239): “We have only the vaguest idea of any but the most direct consequences of our acts ... our knowledge of the future is fluctuating, vague and uncertain.”

²⁴⁴ Externalities exist when market transactions have spillover effects, adversely affecting individuals who are not involved in the transaction.

private legal means of controlling anti-competitive practices and situations are adequate.”

Several of these themes are picked up in the following discussion.

The theory of comparative advantage, seen above to be the basis of free-trade thought, has been criticised as it does not take account of the free movement of capital which distorts the model. The mobility of capital means that today investment is governed by absolute profitability and not comparative advantage. This means that capital can move to finance production where there are lower costs. Further, capital moves to those localities which offer the maximum opportunity to externalise costs (see below - Korten 1995:79). This increases productivity and output and lowers prices; some countries are forced out of the market.

Other theorists emphasise non-comparative advantage trade, arguing that countries do not necessarily specialise and trade solely in order to take advantage of their differences (see Hoogvelt (1997:207). They also trade because of increasing returns which make specialisation advantageous per se. This, together with market distortions, makes a case for government intervention. The static model of comparative advantage does not account for this.

Furthermore, and as suggested above, some economists have argued that ‘externalities’ such as environmental and welfare costs have not been built into the free market model. It follows, then, that the price mechanism is not a true reflector of costs. This allows vast environmental destruction to occur under free-trade. Moreover, the principles of treaties which promote freer trade, such as the former GATT, militate against bringing such costs into the equation by the use of tariffs, as these are seen as restraints against trade. As Stuart Harrop, professor of wildlife law at Kent University (and former director of legal services at the London Stock Exchange) commented “Welfare concerns add to production costs and this runs counter to the basic free trade concept that competition at the lowest price should prevail” (quoted in Erlichman 1997).

Currently, the WTO (the successor to the GATT) is the vehicle through which many initiatives designed to liberalise trade are negotiated. Yet even though one of the articles of the GATT rules does permit discrimination against goods if public morals or animal health are threatened, this provision has been interpreted strictly. Proof must be adduced that bans or sanctions are “necessary” to protect morals or animal health - but “necessary” has been interpreted as requiring that all other solutions such as friendly bilateral agreements have been exhausted (Erlichman 1997) and:

“This can never be proven because the guilty country will merely adjourn the bilateral talks indefinitely. “In theory the WTO is great, but in practice decisions like this are taken by disputes panels dominated by free traders²⁴⁵” says Harrop.”

Michael Rose, a partner at S J Berwin & Co and president of the environment commission of the UIA (the international lawyers’ association) similarly comments:

“The WTO agreements ought to allow all countries to give reasonable weight to concerns for animal welfare and the environment - even if these would hinder world trade ... Unfortunately things aren’t working out that way. The WTO held a conference in Singapore with the avowed intent of widening environmental and welfare²⁴⁶ concerns, but it failed abysmally to make any progress.”
(quoted in Erlichman 1997)

In effect, increasing free trade may compound environmental damage. It may also encourage a model of economic growth which is not sustainable, once the world’s growing population and its limited and fast depleting stock of natural resources are brought into the reckoning.

²⁴⁵ The GATT negotiations themselves, and the workings of its organisational successor, the World Trade Organisation, are viewed as being democratically unaccountable and shrouded in secrecy.

²⁴⁶ The Clinton administration and the Japanese government have not made favoured trade status dependent upon observance of human rights. Buckley, conversely, reports the reluctance of some developing countries to support the imposition of social protection measures (such as bans on child labour) in trade agreements, as their nations believe that they will lose their competitive position if that occurs (1996a:6).

Others have argued that free trade promotes global inequality - there is no (or only a small) trickling down of wealth to the mass of people in the developing world (Lang and Hines 1993). Therefore, free trade is believed to encourage the uneven spread of employment and widening gaps between the rich and the poor. The period of great expansion in world trade from 1960 to 1990 was a period when the average rate of expansion of GDP per capita in all the developing countries' income groups was lower than that of more economically advanced countries (United Nations 1990). Trade is thus argued to benefit the few, particularly TNCs who are believed to dominate world trade and exploit developing economies²⁴⁷. Such inequalities have a destabilising effect on societies (Perkin 1996 and Buckley 1996a). The discussion here can move back to that before on development and dependency theory and its critique, although the criticism there does not undermine the argument that the operation of global business often effects inequitable outcomes.

Some also argue that there is hypocrisy in free-trade rhetoric as those who often most fervently espouse free-trade ideology quietly ignore the philosophy when their interests oppose it (Lang and Hines 1993:41):

“The superblocs promote a more efficient internal market, but retain some aspects of the old protectionism in order to make their own corporate giants more effective in the global market ... In the late 1970s and early 1980s - the period of supposed trade liberalisation - there was an increase in this kind of protectionism through the rise of non-tariff barriers, voluntary export restraints and orderly marketing arrangements²⁴⁸.”

²⁴⁷ Lang (1995:14) argues that UN figures show that the top 500 companies in the world control two thirds of world trade. Thus “GATT is about the globalisation of economics - ie its capturing by about 500 companies, arguing that what they want is identical with what the world needs.” In a similar vein, Chomsky (1995:10) says the GATT is not a free trade agreement but an investors' rights agreement.

²⁴⁸ As Chomsky puts it (1995:9): “One well-known fact about trade is that it is highly subsidised with huge market-distorting factors, which I don't think anybody's ever tried to measure. The most obvious is that every form of transport is highly subsidised, whether it's maritime, aeronautical, or roads or rail... If the real costs of trade were calculated, the apparent efficiency of trade would certainly drop substantially. Nobody knows how much.”

In effect (Chomsky 1995:11): “... there's a lot of very passionate rhetoric about free markets but, of course, that's free markets for the poor, at home and abroad.”

Similarly, Dezalay notes (1993:47):

“The very description, of a “free” trade agreement, suggesting a market liberated to follow its own mysterious logic, conceals the extensive amount of regulation required for the construction of even a “deregulated” market economy.”

Yet some commentators do believe that the WTO is better than nothing. Their views are usually based on the premise that growth is good. Buckley (1996a:1), for instance, argues that “The WTO provides at least a starting point for developing a fairer trading system”. He believes that if the WTO did not exist there would be a confusing proliferation of bilateral agreements which would create a form of anarchy and this would disadvantage weaker countries.

There have, however, been alternative visions of trade proposed (often by environmentalists) one of which was formulated by Lang and Hines and labelled “The New Protectionism.” They (1993:3) argue for a reduction in international trade and a reorientation and diversification of entire economies towards producing the most that they can locally or nationally, “then looking to the region that surrounds them, and only as a last option to global international trade”. The idea, then, is not to deny all the benefits of development, but rather to control more carefully how economic activity takes place. Similarly, Korten argues (1995:270):

“Our challenge is to create a global system that is biased toward the small, the local, the cooperative, the resource-conserving, and the long-term - one that empowers people to create a good living in balance with nature²⁴⁹.”

Nevertheless, such alternatives assume fringe status when one sees how entrenched notions of free trade are within the political and business communities of core nations, at least rhetorically. For the foreseeable future, it seems that

²⁴⁹ Korten further argues (1995:304) that the International Monetary Fund and the WTO should be replaced by United Nations’ agencies under the authority and supervision of the UN’s Economic and Social Council. These agencies should be involved in rewriting international finance and trade policies to support economic localisation within a framework of global cooperation. The performance of these agencies should be assessed in terms of progress towards increased local economic self-reliance and global equity (1995:324); thus they would have the opposite functions and purposes of the WTO as presently constituted.

barriers to free trade will continue to be challenged. Indeed, the ‘mega-lawyers’ we considered in the first section of the thesis will probably consider it to be in their own interests to do so for, as Dezalay notes (undated:9):

“In the eyes of these masters of free-trade, state intervention not only hinders the free play of competition, it has above all the great defect of limiting their room for manoeuvre.”

A critique of the free movement of capital

“Derivatives need to be well controlled and understood but we believe we do that well here.”

Former Barings Plc chairman, Sir Peter Baring (quoted in Hunt and Heinrich 1996)

Chapter two argued that the deregulation of the financial markets in London in the 1980s increased the work of some of the law firms in London investigated. Germany’s stock markets are also increasingly active (Callister 1999a). Hence work involving capital markets continues to assume great importance for many of the law firms which took part in the research. Their vested interest in this type of practice will be useful to bear in mind whilst reading the following critique of the free movement of capital.

In the previous section, the critique of comparative advantage rested upon the free movement of capital. This section will look broadly at capital’s mobility and note some of its potential effects.

Studies of the financial markets in Britain have often looked at whether they are able to deliver credit to the rest of the domestic economy - views range from assertions that the culture of financial markets in Britain is hostile to the long-term financing of industry (Hutton 1996) to arguments that bank-dominated markets allow the most effective provision of finance to industry.

To look internationally and more generally at the wider significance of deregulation and its promotion of the freer movement of capital, some commentators have argued that this creates an inequitable world system whereby the strong industrialised nations dominate the developing world²⁵⁰ (following the thrust of dependency theory). The basic argument is that free capital movement allows global businesses to increase their competitiveness by manufacturing in the most advantageous locations, and this often entails exploiting the labour force in some developing country.

In a similar vein, Picciotto (1989:37) argues that the large TNCs embody concentrations of global economic power which have largely escaped any effective social accountability and control²⁵¹ and one instance of this is their tendency to manipulate differences between nations' tax systems (ibid):

“... the globally integrated TNCs quickly found the means, after 1950, to ensure that their international investments bore a lower overall tax burden than would purely national investments. This undermined the existing processes for establishing tax equality both nationally and internationally”²⁵².

Furthermore, there is a huge outflow of money from nations such as the UK, and this may not go to where investment is needed (as opposed to where it will create

²⁵⁰ One statistic, quoted in Brittain and Elliott (1996), is that the wealth of the world's 358 billionaires exceeds the combined annual incomes of countries which are home to nearly half the world's people. Another statistic is that cited by Held (1992:35): “The number of people who die of malnutrition each year is equivalent to dropping a Hiroshima bomb every three days, yet this is not for want of adequate food production on a global scale.” See also Elliott and Brittain (1998) and the United Nations Human Development Report at www.undp.org/undp/hdro. For statistics on inequality in Europe, see Walker (1998) and <http://europa.eu.int/eurostat.html/>.

²⁵¹ As a manager of a large company notes (quoted in Sampson (1995): “Management has never been so powerful, or so unaccountable.”

There is no body equivalent to the WTO for the regulation of global money markets, although smaller organisations (such as the International Organization of Securities Commissions, which tries to improve and coordinate securities legislation, exist (Wouters 1999).

²⁵² Cowe and Buckingham (1996) note that Rupert Murdoch's empire paid tax at less than 7% in 1995, whilst most large companies pay at a rate of between 20 and 40%. They assert that this is in part due to the “Byzantine” structuring of his empire, designed purposely by the “best legal and finance minds.”

most profit for business)²⁵³. One statistic is that a net one billion pounds flows out of the UK every month. Another, quoted by Hutton (1996:56), is that in 1992 the stock of international bank assets was more than double the volume of world trade; thirty years earlier they were only fractionally more than 10 per cent of world trade.

Moreover, a substantial amount of this money is used for speculation, not investment. As Lang and Hines point out (1993:141):

“Only a fraction, perhaps only 10% of the 900 billion exchanged each day on the world’s currency markets are now used for facilitating trade. The rest is trade for risk management or profit²⁵⁴.”

This casino capitalism (terminology of Strange 1986²⁵⁵) often frustrates the plans of domestic economies who appear to have little or no control over this risk taking/management. George Soros²⁵⁶, for instance, made more than \$1 billion when Britain was forced out of the European exchange rate mechanism. The Nick Leeson²⁵⁷ affair seems to bring this into even sharper focus²⁵⁸, as has the more recent Asian meltdown²⁵⁹.

²⁵³ The free-trader’s defence is that the money will go where investors can make best use of it. However, big capital tends to be concentrated in the core world of the superblocs (Europe, North America and Japan). As Hoogvelt says (1997:83) “[I]t is very unlikely that money will flow more easily from where it is concentrated and politically and strategically safe, to where it is scarce and subject to great political and strategic risks.”

²⁵⁴ In 1996, Buckley stated that about \$1 trillion per day was estimated to move in and out of the world’s financial markets and most of this was used for speculation (Buckley 1996a:6).

²⁵⁵ Although Ben-Ami (1998), editor of *Investment Adviser*, has argued that the decade since 1986 (when Strange’s book came out) has been one of relatively low financial volatility.

²⁵⁶ As Bowring (1998) argues: “The real dangers lie in a system where individuals are actually encouraged to take huge risks with other peoples’ money. If their gambles - be they in foreign exchange futures or Chinese Red Chip shares - pay off, they collect huge bonuses. If they fail, they merely lose their jobs, and most likely soon find another with a house down the street.”

²⁵⁷ One psychologist’s perspective on global money flows is that (Rowe 1998): “The reason that billions of dollars shift around the world every day is not simply due to the growth in international trade and the spread of computers. It’s also because so many men protect their sense of being a person by competing with one another... One successful futures trader told me that what he fantasizes about is not spending the money he might make, but on making the perfect, the most successful trade.”

²⁵⁸ See also Hutton (1996:235) for a further critique.

In spite of such criticism, there is a strong lobby vehemently opposed to fundamental change. To focus on Britain, one argument raised is that the position of London in the world financial markets widely benefits the domestic economy - this sector has provided many jobs in the South East (in 1989, over 2.6 million people worked in the insurance, banking and allied business services in Britain - see Moran 1991:5). Less tangible is also the 'prestige' some feel it brings to the state.

However, such 'benefits' are not universally applauded. The turmoil in the financial markets in 1998 focused many minds (Hutton 1998)²⁶⁰. Further, Sassen (1991) argues that although in London there has been an increase in the number of high income residents in central areas, there has also been a growing concentration of poor inhabitants in inner London. Economic inequality has assumed distinct forms in the consumption structure which affects the organisation of work. There is an indirect creation of low-wage jobs induced by the presence of a highly dynamic financial services sector, which effects a polarised income distribution²⁶¹. These conclusions are mirrored in the analyses of theorists such as Harvey (1989), Lash and Urry (1994) and Sklair (1991).

David Held articulates the concern of many (1992:35):

"The unregulated pursuit of capitalist expansion is as unviable an option in contemporary circumstances as the survival of state socialist societies ... ceaseless capitalist accumulation ... is not self-sustaining in terms of resources, and the massive disparities it creates between the life chances of different groups and regions bears a cost in human terms that few can accept upon reflection ..."

The final part of this chapter will now consider possibilities for reform.

²⁵⁹ Elliott and Atkinson (1997) discuss possible implications of the latter.

²⁶⁰ Political leaders in Europe are increasingly interested in reform of the world's financial management system - see Walker 1998a. Indeed, the British government has floated the idea of a world financial authority to regulate global finance (Ben-Ami 1998).

²⁶¹ Some recent statistics on inequality can be found in Atkinson 1997.

Part four - Reform

“[A] profession that ignores the social good undermines its own sense of dignity.”

Carlin (1997)

Remarks in this section will be mostly confined to the profession of solicitor in England and Wales, although some ideas impact much more widely. The discussion of substantive reform will be prefaced by a few comments to contextualise the difficulty of reform.

When considering the legal profession in England and Wales, Sheinman (1997:141) poses the question “How are we to identify the ethics of the English legal profession, when the profession itself has never articulated an ethical framework?” He and Cranston (1995:33) set out fundamental (often overlapping) questions which have yet to be discussed in a systematic fashion by the profession:

- What is the function of lawyers? For whose benefit do they operate?
- What should the relationship between the expertise of lawyers and the autonomy of their clients be?
- What obligations should lawyers owe to third parties who are not their clients?
- When do the interests of others and the public interest trump devotion to the client’s interest?
- To what extent should the obligations (if any) of lawyers toward the court take priority over obligations to their clients?
- When should a lawyer question his or her client’s intentions and activities and be justified by code provisions in doing so?
- When should a lawyer cease to act for a particular client or indeed disclose suspected wrongdoing to the relevant regulatory agency?

Suggestions for reform are likely to be somewhat arbitrary if they are not firmly underpinned by some understanding of the profession's obligations. However, even if professional bodies embark on some kind of ethical project, they will find it difficult to answer these questions, partly as there is no arena for discussion and partly as there is no agreement at a high level of what lawyers *are* (Sheinman 1997:150). Reform itself may be extremely difficult to achieve - for instance, diversity within the profession (and between different nations) ensures not only the difficulty of reaching agreement, but also the difficulty of formulating proposals which will effectively regulate all (or most) forms of international legal practice.

The following thoughts should, therefore, be read as suggestions from which further discussion could continue - this is not a comprehensive outline of regulatory reform. The section begins by considering possible regulatory goals whilst the second half of the section focuses on how 'ethical practice' might be promoted using different types of regulation.

Regulatory goals

If regulation as a concept is broadly construed, the regulation of international legal practice could pursue a variety of ends. Here are a few:

1. Client protection

As mentioned at several points in this thesis, little research exists on the clients of international legal services; this means that comments on client protection are bound to be speculative at this stage.

Nevertheless, two broad categories of client should be considered, namely private individuals and business entities. I would agree with Hanlon and Shapland (1997:119) that many private clients are ignorant of the service they are purchasing. This, together with the one-off nature of these services, ensures that

there is a need for some form of regulation, to protect clients from a legal profession “embroiled in an increasingly competitive and cost conscious market”.

But what protection might private clients need when engaging a lawyer to undertake work (with an international element) for them? As the European Commission recognise, the provision of adequate indemnity insurance is key although current standards even between European countries differ substantially - this is something the Commission is working on²⁶². One potential lacuna exists when foreign agents are instructed - the home state lawyer’s insurance may not cover the agent’s work. Hence reform should stipulate that lawyers should tell clients who is responsible for agents and whether their insurance extends to the agent’s work.

Other desirable regulation includes provision to govern lawyers established overseas. For instance, if lawyers are not qualified in the host state, then they should practise under home title (as the latest Establishment Directive dictates for

²⁶² The Commission is currently considering legislation to deal with compensation in respect of inadequate services, although it is uncertain whether legislation, if any is forthcoming, would apply to lawyers - the original proposals did not do so (Monti 1995). Instead, the Commission seems to be more keen to ensure that all the legal professions of Europe are obliged to take out indemnity insurance (ibid).

However, for the record, proposed legislation on services attempts to ensure that consumers are not at a disadvantage if a dispute arises with a service provider. Hence, the thrust behind the Commission’s policy is the need to enhance consumers’ confidence when dealing with professionals (Lovell White Durrant 1994).

In October 1994, the Commission issued a new policy statement, withdrawing a previous proposal. The policy statement sets out the following three possible new systems (Lovell White Durrant 1994):

- A with fault liability regime with a reversed burden of proof (ie the burden of disproving fault resting on the service provider);
- A with fault liability regime for obligations relating to the *means* to be employed by the service provider and strict (without fault) liability for obligations as to the *results* to be achieved; or
- A with fault liability regime with a reversal of the burden of proof coupled with the introduction of the concept of “defective service” - defective service would be defined in relation to legitimate expectations and would have to be proved by the consumer.

This discussion is still at the policy stage and so it may, in any event, be some time before a draft directive is issued.

EU lawyers) so that clients are not misled as to the lawyer's experience. Clients should be made aware of whether these foreign lawyers are regulated by the host state professional association.

Further thought should be given to whether private clients are falling through the net of regulatory protection²⁶³ and, if so, whether some form of supra-national compensation fund should be set up²⁶⁴.

To consider commercial clients, the literature review earlier discussed whether the regulator's assumption that they could look after themselves was justified. It was then stated that there may be some forms of business, particularly small enterprises, which might not be as well protected as regulators implied. Such businesses would benefit from the regulation suggested above for private clients. The needs of larger business clients will be considered in the section below about the protection of economies.

2. Protection of other societal or supra-company aims, such as:

A. Protection of the environment

As seen above, the legal profession has not articulated when the interests of others and the public interest "trump devotion to the client's interest". It is likely, however, that different societal goals will often conflict. For instance, regulation aimed at protecting the environment would suggest that much global business should be discouraged (so many environmentalists would be critical of lawyers' work which services multi-national business and would support regulation

²⁶³ It would be useful if cases could be documented where clients were not well served by national regulation - this might necessitate the development of information-sharing structures between national regulatory authorities.

²⁶⁴ One interesting future project would be to ask lawyers to complete diary entries (or to fill in a modified version of their time-sheets) on a daily basis, to find out how when they work supra-nationally. These detailed accounts of lawyers' work may, for instance, help to build up a picture of international lawyering and when it should be regulated.

restricting their international practice) whereas regulation designed to promote economic growth will tend to support the opposite conclusion.

This is not to say that the decision about what is acceptable work to undertake should be left to the individual decisions of law firms. Even if law firm counsel were inclined to act as the conscience of their clients (and, as has been seen, they show little sign of doing so at present), the opportunity to do so has diminished as a result of the rise of internal counsel within corporations and the changing, more transitory nature of relationships with corporate clients (Nelson 1988:5). This discussion will be picked up again in the section on types of regulation below, where it will be argued that (notwithstanding the pessimism of Nelson) the reform of legal education, codes and legal practice can be useful. Nevertheless, if regulation on issues such as environmental protection are to be pursued, then it is likely that businesses should be *primarily* regulated directly, rather than through their professional advisors.

Some commentators and regulators have, however, considered using professionals such as lawyers as 'whistle-blowers', in specific circumstances. For instance, the European Parliament's Committee on Legal Affairs and Citizens' Rights recently produced a draft report on the implementation of the 1991 money laundering directive. The report recommends that provisions on reporting suspicious transactions should be extended to cover professions at risk of being involved in money laundering, such as lawyers and accountants (Editorial 1999). Solicitors in the UK are already subject to a number of obligations to report suspicious transactions²⁶⁵.

Unfortunately, the effectiveness of such provisions cannot be easily predicted. Kraakman (quoted in Luban 1995:977), for instance, has argued that attempting to regulate an industry by extending the whistleblowing obligations of lawyers or

²⁶⁵ In the UK, the Public Interest Disclosure Act came into force in 1999 (Dehn 1999), which aims to protect almost all workers in the UK from victimisation and dismissal when they "sound the alarm" on many kinds of suspected wrongdoing.

accountants working for businesses will be unsuccessful if clients can easily switch to less principled providers. Consequently, regulators should determine what barriers there are to stop clients from switching to these providers before imposing such provisions. They should impose rules to make it more difficult for dishonest clients to switch to less scrupulous advisers.

In effect, it may be that there are some circumstances in which professionals can be given whistle-blowing obligations, but I believe that more energy should be directed towards ensuring that businesses find it harder to evade their obligations in the first place. The next section considers this.

B. Protection of economies

Hanlon and Shapland have argued (1997:117) that large law firms have offered an increasingly wide range of services to clients in a very entrepreneurial way in the last twenty years. However, if lawyers today become so creative that the outcome of legal disputes becomes totally unpredictable, then business may well opt for other, more certain mechanisms of dispute resolution and/or contract creation.

Regulation should concentrate upon the “problematic and nebulous task of protecting the state from large scale capital employing large professional service firms to circumvent rules and regulations laid down by the state, using ‘creative’ solutions to commercial problems” (ibid)²⁶⁶. The ways in which these forms of regulation can be delivered cannot be identical. At the level of the large firm, the problem is to organise sufficient stability and predictability within the legal/monetary system that commercial companies and international capital will

²⁶⁶ Although, as was discussed when Dezalay’s (1991) thoughts on demand creation were noted in the first literature review, much international work is not so creative. Commercial lawyers on each side of a transaction may more often be engaged by large companies (of similar resources) to *minimise* (perhaps contractually) the risks of business.

feel safe trading within the UK (ibid)²⁶⁷. They believe that “stabilising rules and regimes” will need to be backed by the major monetary institutions and the government, not by professional associations (as professional associations are not equipped to deal with team-working in large organisations, nor multi-professional team-working)²⁶⁸.

This topic is further pursued in the burgeoning literature on responsible corporate governance (see, for example, Bavly and Porter 1999, Clarkson 1998, Blair 1994 and Mitchell and Sikka 1996), and critiques of free trade, as seen above.

C. Achievement of a just distribution of legal services

As long as lawyers' services are allocated through market methods, problems of patronage and adversarial imbalance seem inevitable (Rhode 1985:637). Large law firms may strengthen this imbalance - by efficiently assembling great concentrations of talent and resources and placing them at the service of the powerful economic actors (and occasional rich individuals) who can afford their fees, large law firms may accentuate the disparity in ability to use the legal system (Galanter and Palay 1995a:193). These firms are also likely to do less public interest work at an international level (although some do not perform such work even at a national level) and *may* disrupt the provision of legal services to local clients in some of the jurisdictions where they set up foreign offices.

However, it is difficult to conceive of radically different allocative structures which would unquestionably prove preferable, let alone politically feasible (Rhode 1985:637). Legal need is a highly elastic, socially contingent concept,

²⁶⁷ It may be, though, that developments in IT may ensure that many lawyers in the future spend more time advising (perhaps through software packages - see Susskind 1998) clients on how to prevent legal disputes rather than how to resolve existing disputes.

²⁶⁸ Commentators elsewhere (such as Korten, seen in the section on free trade) have argued that this will require the drastic reform of free trade rules formulated under the auspices of supra-national bodies such as the WTO.

requiring limiting principles. But who should design those principles and by what criteria is highly problematic (ibid).

Still, the proposal of initiatives designed to improve 'access to justice' and increase the leverage of underrepresented interests, at a national level, is not a novel development. Further, if incoming large law firms polarise host legal markets, as some writers suggest, then national bodies may wish to consider how far the following 'antidotes', listed by Hazard and Rhode (1994:441), may be of use:

"There are three principal ways of approaching inequalities of legal position. One is to reduce barriers to competition that impede efficient delivery of legal assistance. These barriers include certain restrictions on lawyer advertising and solicitation, as well as non-lawyer provision of law-related services. A second approach is to subsidize various kinds of assistance for individuals of low or moderate income. Providing civil legal aid, court-appointed counsel for indigent criminal defendants, ombudsmen, "pro bono" representation, alternative forms of dispute resolution, and tax incentives for employer-subsidized legal insurance are common examples²⁶⁹. A third possibility is to restructure substantive or procedural²⁷⁰ laws in directions that favor the relatively less affluent. Examples include simplifying legal processes, redistributing transaction costs or altering legal entitlements. For instance, no-fault divorce reforms assist pro se litigants and truth-in-lending acts reallocate transaction expenses, while rent control and minimum wage requirements seek to transfer real income."

Other measures include raising legal awareness in the wider community, perhaps by community legal education programmes (as used in Canada - Hardy 1994), school citizenship classes, and so on. Developments in IT are also likely to encourage innovative legal provision; for instance, legal advice packages may be accessed via the internet.

The next section continues the theme of protecting national legal cultures.

²⁶⁹ In addition, in Australia and some parts of the US there exists a well developed technique to use interest on general client accounts to fund subsidised legal services and legal education (Cranston 1995:29).

²⁷⁰ Increasing liberalisation of court rules allowing the representation of third party interests (as happened in the recent Pinochet trial) would also be a step forward.

D. Protection of national legal cultures

Lash and Urry (1994) assumed the demise of the nation state under the pressure of globalisation, although supra-national regulation may actually affirm the continued validity of national regulation (as in the Diplomas Directive, seen above). Nevertheless, the question remains of how far, and in which circumstances, national legal provision should be overridden when international legal practice is considered.

To consider first the governance of the professional conduct of foreign lawyers based overseas, host state rules should make it clear to what extent these lawyers are subject to host state regulation. I would argue that host state regulators should retain their national sovereignty to this extent, as regulation should be sensitive to the cultural diversity of different nations. Thus, for example, I would not *necessarily* lament (as Ogliati (1995) appears to) the retention of national systems of regulation under EU legislation at this moment in time, partly as it seems to be the only politically acceptable option right now. However, future developments may make further standardisation more attractive and regulators should be open to this. In the meantime, the development of effective systems of client protection should be taken seriously.

As regards establishment, and on the assumption that international legal practice is not to be discouraged, the literature review (in the section headed “Should international work be regulated?”) considered possible methods of protecting host state professions and stated that procedures designed to facilitate the requalification of foreign lawyers in the host state should be “reasonable”. This would mean, for instance, that the EU should take action against those states which try to unduly restrict the requalification of foreign lawyers.

Comment

This listing of the potential goals of regulation did not attempt to be exhaustive. Goals may also suggest conflicting outcomes, as where the prescriptions of different 'societal' goals are incompatible.

The decision as to which goals should have precedence over others, and when, is ultimately a political one, dependent upon on broad social, economic and political value judgments. At present, there is no arena (beyond academia) where such issues are systematically discussed (Sheinman 1997) but a strong case can be made for the establishment of a body (of wide membership, which is not dominated by lawyers) which would begin to debate these questions, and those posed by Sheinman and Cranston at the start of this section.

Types of regulation and the promotion of ethical practice

The next part of the chapter considers how certain forms of regulation might be designed to encourage ethical practice - hence the focus is on how lawyers are trained and how lawyers practise.

1. Legal education²⁷¹

Although the situational pressures of the workplace influence lawyers' conduct greatly, I am not convinced that all attempts to bring ethics into the law curriculum are necessarily doomed to failure, as legal education is bound to have no influence on practice. Still, measuring the impact of education upon subsequent practice would be difficult.

²⁷¹ I have not considered the potential effects of attempts to widen access to undergraduate legal education here as I believe that considering how that might alter the ethical nature of practice would prove to be too speculative.

I agree with Rhode (1985:649) that law students should be taught legal ethics as ethics and not as etiquette. I am not alone in this - at present "there is in almost every corner of the globe a resurgence of interest in the teaching of ethics to future members of the legal profession" (Economides 1998:xix).

How to achieve this is another matter. Experience from the States is equivocal. For instance, Rhode (1985:650) says that "the "pervasive method of instruction, in which ethical dialogue infuses the entire curriculum, has almost never proved pervasive," but that a truly pervasive education in professional responsibility should still be attempted. She argues that law students should be exposed systematically to "forms of moral reasoning." In addition, examination of normative issues through clinical experience, case histories, or well-crafted hypothetical problems may sensitize students to ethical concerns before they enter practice and encounter pressures for particular resolutions (1995:651). In Britain, in the short-term, such an integrated approach to teaching ethical issues is likely to prove difficult given "our lack of expertise in ethics" (Cranston 1995:32).

Other ideas to broaden the curriculum include taking out some of the subjects currently treated as core to a legal education and including other courses, such as modules on society, the profession in practice and so on, to try to ensure that law students have a wider understanding of the rôle of law and legal practice in society.

Whether skills training will help in this ethical project is unclear. Although Nicolson and Webb state that work on legal skills has started to address ethical issues (1999), MacFarlane argues (1997) that work today is limited. MacFarlane (ibid) argues that early skills advocates believed that skills education could be a vehicle for law schools to assert some of their own thinking about legal practice, such as the promotion of ethical professional behaviours and a public service ethos in practice. In a recent book on the subject of teaching legal skills edited by Webb and Maughan, however, she felt that there was little consideration of how

the skill of “reflection in action” “makes a person a different or better lawyer”. Perhaps this is because writers today are cautious about asserting causal links which will be difficult to prove.

2. Codes

It was seen earlier that the various codes analysed conflicted with each other; for instance, they sometimes did not make it clear which code should take precedence over the other. These are issues which should be clarified.

To consider codes more broadly, the literature review discussed the work of several writers who have argued that codes should be rewritten in an attempt to ensure that law is practised ethically. Rhode is one such commentator, believing that (1985:643):

“A more ethically reflective form of legal practice will require different ideological foundations. Lawyers must assume personal moral responsibility for the consequences of their professional actions. At its most fundamental level, such a redefinition abandons Durkheim’s faith in the ability of insular occupational communities to generate adequate normative visions ... [A]ttorneys must confront the consequences of their decisions against a realistic social backdrop, in which wealth, power and information are unevenly distributed, and democratic, adversarial and market processes function imperfectly.”

Yet this does not mean that lawyers would be accountable for every adverse consequence that flows from client representation or collegial relationships (ibid:644). Moral responsibility would depend upon a variety of factors, including the significance, likelihood and magnitude of harm, the agent’s degree of involvement, knowledge and capacity to affect action and the personal and social costs that corrective action would impose. Among those costs, the possible loss of client or collegial trust is entitled to weight (ibid:645).

Unfortunately, it remains unclear how feasible such ideas are. ‘Ethical codes’ may confront situations which are too open ended and practice which is too diverse for implementation to be successful, although codes may be used as aspirational documents. Hence Sheinman argues (1997:150) that concentration

on the dilemmas and choices of lawyers themselves could create an invidious, almost impossible set of conditions for their operation and could not account for the many different sets of circumstances in which lawyers operate²⁷². Moreover, Cranston (1995:5) feels that those who argue for the primacy of ethical considerations do not give enough attention to their contingency in real life. One person's immorality is another's standard practice. Indeed, tying legal ethics to positive morality provides no room for those who would criticise current values (Sampford and Parker 1995:16).

To this it must be replied that both Luban (1995) and Rhode (1985) acknowledged the difficulties of formulating moral judgements in practice. Luban, however, argued that there were three instances where the "excuse" of indeterminacy was too weak, and these instances included situations in which the lawyer was confronted with daily evidence that her/his actions were socially harmful and those s/he was working with were indifferent to questions of social responsibility. Rhode (1985) also stated that conceding the indeterminacy of ethical analysis does not establish its futility. Indeed, she recognised that moral responsibility in law firms depended upon a variety of factors, including the agent's degree of involvement in a case. Perhaps, too, ethical codes (or, indeed, codes in general), promulgated with disciplinary sanctions, might seek to avoid scapegoating individuals in large law firms by providing that disciplinary proceedings should be taken against a lawyer's firm (rather than against the individual lawyer) when the alleged wrongdoing occurred in a firm of a certain size. The *prima facie* presumption could be that large law firms are liable for their lawyers' breaches of ethical codes unless specified acts or circumstances rebut that presumption.

At this stage, it should be acknowledged that this debate would benefit from the input of further empirical research, carried out in several jurisdictions, which

²⁷² See also Sampford and Parker (1995:16). They believe, though, that aspirational codes can help to raise standards of behaviour and disciplinary codes are important, although the latter should be recognised as being part of legal regulation rather than morality.

would investigate when third party interests might justifiably trump clients' interests. Such research should pay close attention to the types of work undertaken by large law firms and how this work is undertaken. It may also prove to be particularly enlightening if the merits and demerits of Luban and Rhode's suggested guidelines on moral responsibility were widely discussed²⁷³.

For the moment, some tentative conclusions may be drawn. There are grounds for asserting that the scope of codes could be expanded, although such reform should be accompanied by other initiatives, such as changes in how large law firms operate (see the next section) and the reform of legal training. For example, there are several provisions encountered in the Model Rules of the American Bar Association (and the New York Code) which could be included in the codes regulating English solicitors. One is the rule that lawyers should "cultivate knowledge of law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education". Another is the American ethical rule (seen in the New York Bar's Code) whereby a lawyer might explicitly base advice to a client on his or her personal views of morality and similar non-legal values. Additional provisions on, for instance, discrimination and harassment could also be added to codes such as the CCBE code²⁷⁴ and some thought should

²⁷³ In Britain, Nicolson and Webb (1995) have recently argued that ethical codes could lay down broad norms whilst explaining their rationale and purpose. Such codes should specify considerations lawyers should take into account in deciding how to apply the principles. The idea would be to avoid leaving gaps in the codes and allowing lawyers to abdicate moral responsibility.

The founding of the journal *Legal Ethics* may act as a spur to further work in this field.

²⁷⁴ The amount of compensation awarded in some sexual harassment cases in the States may be causing US firms to be more vigilant in this area (Tyler 1998b), although women lawyers are very reluctant to pursue claims (Thornton 1996).

The New York State Bar Association Code provides that a lawyer shall not: "Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation."

be given to the question of whether there should be more exceptions to the rules on confidentiality²⁷⁵ and conflicts of interest²⁷⁶.

Another suggestion, which takes into account the increasing heterogeneity of the profession, would be to extend the provision of specialist panels to which solicitors can belong if they possess the appropriate experience or training (Allaker and Shapland 1994:vii). Different documents could then be created to target appropriate information and advice at specialist groups, whilst retaining an overall base document for disciplinary/reference purposes²⁷⁷.

Some further thought should be given to the question of whether broader ethical codes should be drafted and also whether such provisions should be subject to disciplinary sanctions (as opposed to being purely aspirational in nature). This debate will be returned to in the conclusion.

To reiterate, such reform should be seen as part of a programme of reform which would raise ethical awareness more generally (as discussed in the sections on legal education and law firm practice, above and below) because (as O'Dair (1998:162) argues) ever more detailed regulation is wont to carry the message that all ethics are simply a matter of minimalistic compliance with the rules²⁷⁸, leading lawyers to adopt a formalistic response.

²⁷⁵ Schneyer (1992:135), for example, poses the question of whether lawyers would accept broader ethical discretion to protect third parties through disclosure if they could be sure that disclosure would not result in legal action against them.

²⁷⁶ As briefly discussed earlier, rules on conflicts of interest *may* unduly restrict large law firm practice.

²⁷⁷ These might come in the form of codes of good practice or commentaries, as they are easier to change than codes of conduct (which require agreement between practitioners and need to be relatively constant as disciplinary procedures are founded upon them - Allaker and Shapland 1994:18).

²⁷⁸ Nicholson and Webb (1999) argue that it might be useful to separate out matters of "mere regulation" (such as professional indemnity rules) from "core" ethical principles (such as the duty not to mislead the court), to avoid giving the impression that lawyers need only follow detailed rules on matters of mere regulation, leaving them free to resolve ethical dilemmas as they deem fit.

Finally, lawyers should not have free hand in writing codes (due to the potential danger of lawyers acting in their own self-interest). Consequently, there should be some democratic mechanism additional to the Lord Chancellor's Committee on Legal Education and Conduct for ensuring that what is contained in codes is subject to public scrutiny and is seen as being of benefit to society as a whole (Cranston 1995:6).

3. Law firm practice

It has been previously noted that situational pressures greatly constrain how lawyers practise; for instance, if relationships with business clients are of an increasingly transitory nature, then the opportunity for lawyers to take on an ethical advisory rôle may diminish.

However, some elements of law firm practice are within the control of law firms.

As Rhode argues (1985:642):

“More humane and morally reflective working environments than those currently available to most practitioners are clearly feasible. Greater sensitivity to the consequences of representation, less competitive up-or-out promotion policies, fewer rigid status hierarchies, and increased options for those with competing private or public commitments, are not irreconcilable with reasonably remunerative practice.”

For example, the culture of ‘face-time’ should be altered and firms’ management should ensure that the budgets set for partners are realistic and do not place them under such stress that they are led into breaches of ethical rulings (Nosworthy 1995:67).

Indeed, professional responsibility should be a matter of ongoing professional concern, so that practitioners begin to perceive ethical dilemmas not as aberrant, episodic events but rather as the inevitable consequences of bureaucratic pressures, adversarial frameworks and social inequalities (Rhode 1985:651). In

this regard the profession must create more opportunities for normative interchange not only in law schools but also in law firms and bar associations.

Nosworthy, a partner in a large Australian law firm, illustrates what law firms can do (1995:65). She believes that firms should provide regular training in legal ethics²⁷⁹ for both partners and staff - this is particularly important in firms where young lawyers do not feel that they have ready access to partners with whom they can freely talk through ethical issues. This should include not only lectures but also regular informal discussions on an ad hoc basis²⁸⁰ (although it may be that many lawyers in these firms, initially at least, may believe these discussions to be a waste of time). A culture should be developed where staff have confidence to raise ethical issues in the knowledge that they will be taken seriously. Mentors should also be allocated to young lawyers, so they have someone other than the person/s they are working for to talk to. Young lawyers should be regularly reminded that the maintenance of ethical standards predominates over financial objectives (ibid:68).

In respect of the pressure to maintain client relationships, the whole burden of maintaining a relationship with a particular client should not fall on one partner (ibid:67). A partner who does not regularly do work for the client should be introduced as an “auditor” of the relationship, looking at work done and monitoring the relationship through discussion with the client (ibid). Relations between partners themselves should be based upon respect, courtesy, equity and trust (as should relations with staff). If these relationships are not good, the firm will be divided and unhappy (ibid:68).

²⁷⁹ Presumably, legal ethics should be broadly defined.

²⁸⁰ Sampford and Parker (1995) also argue that a critical morality should be fostered, in which lawyers can debate, discuss and criticise majority values, internalising their own values and acting on them. This could take place in work environments, with lawyers working their way through real and hypothetical problems in “ethical circles”. This would allow lawyers to develop their own critical morality and move towards a shared morality.

Finally, large law firms should consider their contribution to the wider community (ibid:71):

“For example: what ethical standards should the firm adhere to in its activities in the community? Should the firm support charitable, benevolent, educational or political causes? If so, should the firm do so simply because it is the right thing to do or should it only do so when it will be ‘good for business’?”

I would argue that such policies should also apply to firms’ overseas offices - developments in IT make this less problematic than it once was.

Regulatory enforcement

We have already seen (in the section entitled “Will there be a supra-national regulatory agency for lawyers in the future?”) that there is little enthusiasm within the professional community at present for the establishment of a supra-national regulator empowered to enforce regulations affecting cross-border/international practice.

This does not, of course, establish that such a regulator would not be of value. Further research would need to be undertaken before a regulator was established, both to investigate more fully whether a regulator is in fact needed²⁸¹ and, if so, how the regulator/regulatory agency should be structured and work. That project may materialise if some event triggers a major regulatory crisis in the future.

For the present, however, a few comments may be made. If individuals and corporations continue to require international legal services, then the need for such an agency may become more apparent. This regulator might take on a variety of tasks. For instance, the regulator might act as an international Ombudsperson, investigating cases of alleged malpractice²⁸² which do not appear

²⁸¹ On the basis of current information, it is impossible to determine how many clients fall through the nets of national regulation.

²⁸² Such a scheme should comply with the public law values of independence, fairness, openness and accessibility (see James 1997). The Ombudsperson might have powers which would include the inspection of foreign offices’ accounts.

to have an adequate national remedy. Alternatively, a committee of members from several countries might be established, to constitute an additional or alternative forum for disputes. As has been mooted before, this body might also have powers to decide which conduct provision applies when professional codes conflict.

Clearly, further work is needed before it can be determined whether such a body should be established.

Comment

This chapter has analysed the regulation applying to the international practice of the lawyers investigated and has often found it wanting. Ideas for reform have been suggested, although there currently seems to be little prospect of fundamental change.

This sets the scene for the last chapter of the thesis and returns us to the question posed in the introduction - *Can* we ultimately conclude that commercial global lawyering is a good thing, of general benefit both to lawyers and to societies as a whole? This is the final issue to be tackled next in the conclusion.

Chapter five - Conclusions

"I have had my vision."

From *To the Lighthouse*, by Virginia Woolf (1992)

The thesis has covered a broad terrain; it has moved through a web of issues, from the initial examination of the nature of globalisation to reform of the regulation of international lawyering. Thus it might be wise to refresh the reader's mind of some of the main points raised in the discussion to date, before final conclusions are drawn in part two of the chapter.

First, however, it should be reiterated that the thesis has been selective in its choice of subject-matter. For instance, barristers were not studied as I wanted to concentrate on lawyers who are more likely to work in foreign offices (barristers have few such offices). Nevertheless, studying the international work of barristers could provide particularly interesting information on matters such as advocacy in foreign and international institutions, in cases where not only commercial clients but also private clients might be represented. A whole new series of regulatory issues might thus be uncovered.

Foreign non-US lawyers in London were not interviewed, as I decided to focus on the biggest group of foreign lawyers in the City (US lawyers). However, interviewing non-US lawyers could have proved useful, perhaps providing contrasting stories (to those of the US interviewees) of their development in the City.

Finally, the international practices of smaller UK law firms were largely ignored, as my main concern was to look at forms of international practice which can be seen most tangibly abroad in the work of the largest law firms. This is not to say that the work of smaller firms is not interesting - indeed, they are more likely to represent individuals and so research here might provide an opportunity to look at issues such as the international protection of private clients.

However, difficult choices did have to be made so that a manageable research project could be designed. There is, therefore, much left for future research to tackle.

Part one - The story so far

The first part of the thesis discussed the nature of globalisation and the shift to services. It was stated that the processes of globalisation have intensified in the last thirty years or so. Globalisation was said to be a reflexive process, as people are increasingly aware of societal changes. It involves the “relativization of individual and national reference points to general and supranational ones” (Waters 1995:42).

Services have contributed increasingly to nations’ GDPs, although less developed countries tend to undertake low-skill service work whilst financial services are concentrated in a few OECD countries. The time horizons of both private and public decision making have also shrunk. Some writers have argued that this is part of a shift from Fordism to a period of flexible accumulation (although the completeness of such a transition was questioned) which rests on “flexibility with respect to labour processes, labour markets, products and patterns of consumption” (Harvey 1989:147); such developments aim to generate higher profits for global capital.

These processes have impacted upon the worlds of professionals, including those of solicitors in the UK and attorneys in the States. Corporate clients have become more demanding, pursuing profits more aggressively, as they have moved from owner-manager structures to multi-divisional structures, and they have treated services more as commodities. Large law firms have come to value commercial criteria more than technical ability - hence entrepreneurial skill is valued highly and the pressure is on to provide clients with all that they desire.

The profession in England and Wales has also reacted to policies adopted by the state. The 'New Right' in Britain championed moves to a more flexible regime of accumulation and promoted policies such as the expansion of international free trade and the rolling back of the public sector. Indeed, large law firms emerged in response to the enterprise culture fostered by government policy in the 1980s - they absorbed the commercial ethic of that period and were major beneficiaries of policies such as privatisation and deregulation of the financial markets.

Increased commercialism and the internationalisation of business are also witnessed in the opening up of foreign offices by law firms. This was the preferred vehicle for structuring the foreign practices of the UK and US firms interviewed and for most of the German firms, although foreign offices were not unproblematic entities - for instance, staffing and finance might pose particular difficulties. International expansion was both proactive and reactive, as firms followed clients and sought 'greenfield' sites overseas²⁸³. Overseas offices did vary, however, in their size and what they actually did (which queried the notion of 'one firm' culture and begged the question of whether offices were adequately regulated).

There is some evidence that Germany is moving away from its commitment to a social market economy to embrace greater 'flexibility' in business. For instance, writers have recently reported that an increasing number of people are working freelance, in a move which Ulrich Beck has named "the Brazilianisation of the German workplace" (see Spiewak and Uchatius 1999). These workers include lawyers, who have no paid holiday rights or rights to sickpay²⁸⁴.

The German economy is also increasingly internationalising, and German companies are becoming more willing to ship jobs overseas to lower wage

²⁸³ Firms' cultures and financial resources were instrumental in determining whether and in what form expansion would occur.

²⁸⁴ One example is given of a newly qualified lawyer who is paid on an hourly basis by her law firm employer, at 25 DM per hour (roughly £9 - Spiewak and Uchatius 1999).

economies and to invest abroad. Many companies are engaged in restructuring, selling off subsidiaries which no longer fit what they determine to be their 'core' business and are looking to the international capital markets for funds. Service sector employment is also predicted to increase.

The largest German law firms have over tripled in size in the last decade (following the liberalisation of regulation and bearing out the eagerness of firms to grow), becoming more specialised, bureaucratic and opening foreign offices. The interviews provided some data which suggested that some firms are beginning to act in a more entrepreneurial fashion and that commercial clients are becoming more assertive. Reasons for these clients' changed attitudes included their international experience of other ways of working, the fact that some had/were moving away from owner-manager structures (so old relationships were breaking down as professional business managers took over from firms' owners) and the increased competition amongst lawyers in Germany (which was probably partly due to the presence of Anglo-American firms in Germany).

For lawyers themselves, the developments outlined above are likely to mean that they come under increasing pressure to innovate. They must also respond to heightened time pressures and changing client demands (whilst also becoming more entrepreneurial). Some may find that their working conditions become less secure (as firms farm out some of their work to contract lawyers) or more flexible, as IT facilitates practice away from the office.

Some have argued that changes wrought by globalisation and increasing commercialism might mean that lawyers move firms more often as they take greater responsibility for their own careers. Indeed, we have seen that an increasing amount of lateral hiring is taking place in the US, UK and, most recently, Germany. For instance, lateral hiring (of UK solicitors) by US firms in London has increased over the last five years or so, although firms' strategies did differ (as will be noted below) whilst foreign firms in Frankfurt have hired German lawyers. Further, lawyers in German firms might disagree with their

firms' international policies and move to other firms whilst associates in City firms might move to the London offices of US firms which will pay them more.

Yet this increased hiring of lawyers of different nationalities does not necessarily mean that their national grounding is irrelevant. For example, in Frankfurt it has taken time for many German clients to become convinced that Anglo-American law firms have the expertise to undertake national work. Lawyers are more nationally orientated than most other professionals. Indeed, in London and Frankfurt foreign firms did not arrive and overwhelm the local legal profession (as the force of some of Dezalay's work would suggest). One reason for this is that the local professions in both locations were strong. This confirms one of the conclusions drawn in the first literature review, that globalisation does not necessarily involve homogenisation - differences in the social, political and economic structures and cultures of countries and their legal professions significantly influence what happens when overseas offices are established.

Still, such an account runs the risk of over-generalising. Whilst firms may share common experiences and whilst some may structure and people²⁸⁵ their practices similarly, it is important not to forget that which divides firms too.

To first summarise some broad features of 'mega-firm' practice, UK and US law firms tend to be much bigger than German firms, although UK (City) firms are the most international (as judged by the number of lawyers they have overseas). Almost 85% of German lawyers who work overseas are in Europe, as opposed to 48% of overseas English solicitors. These differences are probably due to the more recent expansion of German law firms abroad and historical factors, such as trading patterns and cultural ties.

Firms' cultures should also be considered when attempting to explain the choices they have made - social values and norms (and economic forces) vitally influence

²⁸⁵ Lawyers in 'mega-firms' tend to come from high socio-economic classes.

the development of professional practices. For example, the City firm of Slaughter and May has not followed other 'magic circle' firms which have expanded much more extensively overseas and this is largely because the firm is reluctant to take on board lawyers from other firms, thus diluting its culture.

The strategies of US firms differed; those concentrating on capital markets work were more reluctant to move beyond their (highly profitable) core work than their more generalist contemporaries. German firms also follow different strategies; some are more culturally reluctant to potentially compromise their independence than others. Hence, a variety of strategies may be pursued and diverse outcomes result when globalising forces are engaged with.

Nevertheless, some ideas may be more widely held than others. One such notion is that there is a strong likelihood that in the next decade a smaller number of law firms than at present will be able to service what lawyers rather imprecisely refer to as "big ticket" international work. This is one of the reasons behind the series of link-ups between English and German law firms witnessed over the past two years, as some German firms hope not to lose out in the scramble for international work and as City firms hope to spread their international net wider.

The idea that the Big Five firms of accountants pose a threat to the most lucrative work of the largest law firms has also gained ground over the past five years or so, although lawyers did weight that challenge differently. Whether lawyers' visions are likely to become (a successful) reality is, however, another matter. Lawyers often are thought to be poor strategists whilst formulating international strategy can be particularly difficult.

Visions of professionalism held by lawyers may also differ. Much was made by Anglo-American interviewees in Frankfurt of what they labelled the "traditional German lawyer". This lawyer was thought to work in a more academic²⁸⁶ fashion

²⁸⁶ Legal education in general in Germany was felt to be more academic, more centred on the state and the judiciary.

than Anglo-American lawyers, concentrating on the quality of advice given, working individualistically and remaining aloof from clients.

It is difficult to put such views into context as there is little writing on the development of German law firms. However, Rueschemeyer argued in the seventies (1973) that German lawyers did not tend to identify with their clients as they were closer to the “broader community of university-trained professionals” (1973:67).

Yet this does not necessarily mean that German lawyers acted as some kind of mediator in the legal system. Those engaged predominantly in commercial law might have been willing to apply themselves to the goals of their clients even if they expected to be treated with some reverence. The independence of these lawyers may have related to their autonomy in carrying out work rather than, as Rueschemeyer appears to suggest, their distance from client wants.

There is little evidence to suggest that German lawyers took on a socially oriented rôle in the past or of the existence of the kind of partially public service orientated habitus which several writers believed to exist from the thirties to the late seventies in the UK. It has been argued that German lawyers have shown little concern to widen their services to cover the more needy. It also seems that Germany has relied more (than the USA) on the state’s social provision. Hence the strength of the state may provide part of the reason why German lawyers have not engaged in public interest work.

However, as has been seen, practice in the largest German law firms does appear to be becoming more bureaucratic (for example, as lawyers introduce more complex management structures as their firms increase in size) and they may have to respond to a less deferential client base and increased competition. Consequently, increasingly commercialised conceptions of professionalism may be taking root.

Discussion of commercial approaches to legal practice was not limited to the first half of the thesis. Various writers in the chapter on regulation built on the notion that commercial lawyers are likely to be very close to their clients. Several features of large law firm practice were thought to be particularly worrying, including the long hours worked by lawyers, lawyers' reliance on a small number of clients and their lack of consideration of anything other than their clients' immediate interests.

Yet large law firms were also seen to be largely beyond the regulatory concerns of professional associations, raising the issue of the legitimacy of the current system²⁸⁷. Further, those provisions on professional conduct which did cover the international practices of these firms were enforced (if at all) at the national level, there being no supra-national regulator empowered to regulate international legal work. Regulatory provisions often overlapped, were limited in scope and were sometimes unclear.

At the supra-national level, the EU has enacted rather limited legislation relating to lawyers' rights to practise and requalify in the EU, although regulation is implemented at the national level. In relation to the GATS, its influence has so far been limited and it has yet to lead to the formulation of regulation which helps to articulate what protection, if any, clients of international legal services need. It presently operates to promote free trade (a controversial phenomenon in itself).

Effectively, regulation as it stands lags behind the international practices of these firms. This led to the final section of chapter four setting out possibilities for reform, which included examining what might be appropriate regulatory goals and discussing more concrete suggestions to reform/change legal education, codes and large law firm practice. However, it was recognised that there is a need

²⁸⁷ Lawyers looked to their colleagues (rather than to their professional associations) to find out how they should act and argued that they practised in a way that would preserve their reputation in "the market".

for much more research on ethics and regulation - fundamental questions such as ‘When do the interests of others trump devotion to the client’s interest?’ need to be systematically addressed.

Part two - Discussion

The introduction posed, *inter alia*, the following questions: “What might the future of these professionals hold?” and “*Can* we conclude that commercial global lawyering is a good thing?” Some evaluation of the developments outlined in the thesis will now be attempted.

Most of the firms studied had opened foreign offices, although it was often difficult to gauge whether they had had a negative impact upon the host state (as discussed in the chapter on regulation). Certainly, within the jurisdictions of England and Wales and Germany, it did not seem that the incoming foreigners were able to colonise the new territory although these offices may test the limits of existing regulation (see below).

It has been seen that some consolidation is taking place amongst the largest global law firms. The Big Five firms of accountants may also take an increasing share of the market for these services. Clients may find that such entities helpfully provide integrated services or alternatively find that their choice of professional is limited and that some form of oligopoly has been created/strengthened.

More generally, such developments appear to indicate that large law firm practice is becoming increasingly commercialised. Collegiality is threatened as lawyers become less loyal and move firms more often. Lawyers may decide, in this climate of waning loyalty, that they should put their short-term goals first and seek the highest remuneration they can attain. Such tendencies may be heightened by the increased insecurity lawyers may feel, particularly if they believe they are only worth as much as their current billings. Lawyers, for

instance, may believe that they could lose their place in the firm if they do not make enough profit; those who fall behind may end up pursuing other employment, some perhaps as freelance/contract lawyers (thus slipping from the core to the periphery).

It is also likely that lawyers will become even more close to their clients and compliant with their demands as they need to build relationships which will increase their own market value and standing within and outside their firm - again raising the spectre of 'clientelism'. Indeed, Nicolson and Webb (1999:21) argue that in this harder commercial climate "doubts as to the morality of how profit is made are likely to be regarded as commercial naivety."

Consequently, the pursuit of profit may intensify collectively at the firm level. Firms may become more highly leveraged (and some may incorporate²⁸⁸) whilst lawyers who are less able/willing to play by these rules may become marginalised (women with home-care responsibilities being one possible group). This may leave a core of lawyers within the firm who have few extra-professional interests and commitments (Kronman 1993), who object least to the heightened pursuit of profit. Might they then lose their sense of perspective and so be more likely to act unethically?

To focus now on developments in Germany, it is unlikely that German commercial law firms in the past acted as the social conscience of their clients (as has been discussed before). Nevertheless, increasing firm size and moves to greater bureaucracy are likely to magnify the ethical issues large law firm practice creates. For instance, if firms become more highly leveraged, cases may become more fragmented and lawyers may feel less accountable for the ultimate

²⁸⁸ Clifford Chance will, in fact, become a limited liability partnership under New York law when it merges with Rogers & Wells (Callister and Farrell 1999).

consequences of their work (Rhode 1985). Increased specialisation can raise further ethical problems²⁸⁹.

Such developments may split the German profession further, as the commercial élite move in a completely different world to their contemporaries in smaller firms (as has occurred in the US and UK). Small firms may no longer be able to undertake commercial work, as the largest firms dominate this sector of the market. This *might* have some effect on the availability of low cost legal insurance, and thus narrow individuals' access to legal advice, as discussed before²⁹⁰. Alternatively, the provision of cheap legal advice may expand under the pressures of de-regulation and developments in IT, perhaps threatening some of the traditional work of private client lawyers and further undermining the position of medium sized firms.

The largest German law firms might develop more commercialised versions of professionalism, as suggested earlier. This might mean that they would work in a less academic, aloof and individualistic²⁹¹ fashion, engaging more proactively in their clients' business. At present, however, it is not easy to determine how far such a development amounts to the rise of (a) new hegemonic form/s of

²⁸⁹ Nicolson and Webb (1999:122) argue that: "increasing specialisation within the legal profession reinforces the tendency of lawyers to see their work solely in terms of skill rather than also involving issues of morality."

Specialisation, particularly as witnessed in the growth of industry teams in law firms, is also likely to increase the volume of conflict of interest problems. Although some industries are more sensitive to conflicts than others (one example being industries where competition turns on vital information, as when competitive tendering is used), case law in general in England and Wales is becoming stricter (see Chambers, Jones and Wilkins 1999).

²⁹⁰ In a similar vein, Hanlon (1999:187) argued that the new commercialised professionalism in Britain "with its emphasis on ability to pay and profit, will further empower the already privileged while further marginalising those groups that are already suffering the worst excesses of a flexible economy with its attendant peripheralisation of large areas of work."

²⁹¹ Within the firm, indicators of declining individualism might include lawyers working increasingly in teams, sharing precedents more widely and launching firm-wide marketing initiatives. Nevertheless, and conversely, developments elsewhere suggest that other forms of individualistic behaviour may increase. For example, if collegiality within firms becomes increasingly strained, lawyers may take greater control of their own career paths (as has been seen).

professionalism, partly as there is little historical material to draw upon to contextualise the interviewees' opinions. Indeed, when discussing notions of professionalism, the temptation to over-generalise is real, and this risks ignoring the diversity to be found within and between firms. The experiences of a range of German law firms which undertake commercial work should continue to be monitored in the future if a deeper historical understanding of this issue is to be formed.

This discussion leads on to the perhaps wider issue of how far the practices of large law firms are homogenising in response to global pressures. To recall the work of Waters (1995) and Robertson (1992), they argued that globalisation involved the 'relativisation of national reference points to supranational ones', but this (contra Lash and Urry 1994) did not mean that national society would wither away.

The thesis has noted several instances where it does seem that the national grounding of the lawyer and law firm is significant even when cross-national/international work is undertaken. Thus lawyers often stated that the national basis of their skills/knowledge was important, although they might develop further skills to service international work. It was also seen that overseas clients seeking law firms in Germany would often choose German firms - it took some time for clients to be convinced of the ability of Anglo-American firms in Germany to undertake national work.

Further, UK and US firms in Germany altered some aspects of their practice so as to appeal to German clients, as when they shortened their documentation. Similarly, City firms were said to have altered their approach to work, under the tutelage of US clients, although US law firms arriving in the City were often keen to play down the image of 'brassy' American incomers. All this lends some weight to Lash and Urry's (1994) argument that increased internationalisation often entails increased sensitivity to local features.

On the other hand, the issue has often been raised as to whether German law firms are also altering their ways of working, under the pressure of increased competition which has been partly generated by the greater sophistication of clients (many of whom have international experience and have become more demanding partly as a result of this) and the presence of foreign law firms in Germany. Several German firms have also merged with City practices, largely as an attempt to respond to 'global forces'. Moreover, some areas of work appear to be becoming more accessible to lawyers of different nationalities, one example being international commercial arbitration, and there may be moves to standardise documentation in such areas.

Hence, it seems that we are witnessing several parallel trends, which do not move comfortably together in the same direction. Whilst there are some developments which push legal practice towards greater uniformity, at the same time other aspects of national practice may be reinforced.

The situation is similarly complex in relation to regulation. There are provisions which seemingly underscore the continued importance of the nation state, as when national rules such as the OPRs do not challenge the national sovereignty of other countries to regulate lawyers on their soil. Other provisions are more complex - for instance, EU legislation aims to liberalise the practice of law throughout Europe yet it may also confirm some national sovereignty, such as nations' rights to decide in which subjects lawyers should be qualified. Application of the supra-national CCBE code is also not entirely straightforward - whilst its stated intention is to override national provision, German regulation has provided that the CCBE code only applies when its provisions do not conflict with German national law.

In any event, the regulatory system as it stands may not be able to cope with many changes engendered by globalisation. International developments, moves to even larger law firms (and MDPs) and the increasing complexity of IT will render the task of regulators ever more difficult, if they choose not to ignore large

law firms. Intensified clientelism may further undermine the legitimacy of the professional monopoly. New fields ripe for regulation will surface and hard choices will have to be made. The outcome of such developments is uncertain; for instance Flood suggests (1995:141) that the profession may lose its rights to self-regulation as “a *laissez-faire* climate or one of external state or super-region driven regulation” may result.

The picture that has been painted may have left the reader with the impression that these developments are being forced on mega-firms, that some form of global determinism is at work which leaves little room for manoeuvre. This is misleading - as I noted earlier, when considering the issue of long working hours:

“This account does stress the agency of lawyers, that the corollary of ‘time-space compression’ and the increased commercialism of practice does not always have to be that lawyers are unable to control the structure and practice of work. There are still choices to be made ...”

In effect, a juggernaut of change might not be bearing down as hard upon the profession as some would have us believe. Part one of this chapter, for example, summarised some of the differences between the strategies of the firms investigated, thus emphasising the variety of choices made. However, firms may sometimes deliberately publicly portray their policies to be merely reactive, as rather passive responses to external factors such as ‘client demands’ or ‘globalisation’, rather than conscious entrepreneurial choices²⁹². In so doing, they may, for example, wish to avoid the burden of blame if their policies fail or may find it easier to convince doubtful colleagues of the ‘inevitable’ need for action.

Yet might not such behaviour also (and somewhat perversely) scare their competitors into copying their strategies? For if strategic choices are presented in such a fashion, then other firms might wonder whether they have missed something. For example, they may become convinced that they should follow

²⁹² Conversely, the failure to draw up policies may be disguised by stating that the firm is subject to forces beyond its control. For example, firms might wish to present the increased working hours of their lawyers to be the inevitable result of developments in IT and client pressure, thus avoiding forming policies which could reduce the pressures facing their employees.

their competitors and open up foreign offices, as they too are subject to the phenomenon of 'globalisation'. This analysis is speculative, but it has been seen before that law firms are inordinately interested in each other, and this might be partly²⁹³ accounted for by the difficulties they experience in effectively formulating their own policies.

Nevertheless, some firms may decide to grapple with such issues in a more active fashion. Some firms may decide, for instance, that they will try to retain their collegial spirit as much as possible, perhaps collectively deciding to take lower profit shares than would otherwise be possible. Moreover, as Rhode earlier commented (1985:642), more humane and morally reflective working environments than those currently available to most practitioners are clearly feasible and are not irreconcilable with "reasonably remunerative" practice. Hence one task for the future will be to design creatively such working environments and to convince the most highly paid members of the legal profession that such change is in their own interests²⁹⁴.

Chapter four gave several examples of how more humane working environments might be built. I believe that firms should take these issues seriously and give greater thought to how *all* their offices function. Thus, it would not be enough to set up, for example, support systems (such as mentor schemes and confidential sources of ethical advice) only for associates in the largest (home) office without giving serious thought to how associates in foreign offices might best be included. For if law firms' assertions that they act as "one firm", quality

²⁹³ Other reasons for such inquisitiveness include lawyers' preoccupation with status.

²⁹⁴ Many large law firms, for example, have labour law departments which usually advise employers. Part of this work involves providing advice on how to prevent legal disputes - for instance, by complying with legislation such as the new Directive on maximum working hours and by establishing effective procedures to deal fairly with alleged cases of harassment. If law firms themselves do not abide by their own counsel of best practice, perhaps relying on their employees not to rock the boat for fear of prejudicing their careers, then their credibility is seriously endangered. As Dezalay argued (1995:1): "... professionals of law who describe themselves as guardians of public order are only credible if they start by imposing upon themselves the rules of conduct that they wish to impose upon others."

controlled from within, are not to be treated as empty rhetoric, then they should be prepared to prove that they are taking their responsibilities as “one firm” seriously.

Yet this is not just an issue for law firms. As commercial law firms can be intensely competitive environments, other provision should exist which attempt to sensitise lawyers to ethical dilemmas which occur in practice. Law schools have a part to play in this, as do continuing education programmes for practitioners. Might some form of well-thought out, sensitively taught (perhaps away from the firm, away from the potentially limiting presence of colleagues) compulsory course on ethics (widely construed) be useful, particularly in the early years of practice?

There is a need for further research on many of the issues covered in the thesis. The literature I have referred to had to be pieced together from different bodies of work as there is little writing which so far has combined theory on globalisation, the professions and regulation. Further multi-disciplinary (and multi-professional) work would be useful, perhaps drawing on literature from the fields of corporate governance, the sociology of the professions, ethics, regulation and so on. Effectively, this is a plea for work in this area to involve more of what the British government rather ubiquitously calls “joined up thinking”.

The thesis will now close in perhaps a less parochial fashion. The final issue to be (briefly) examined has been touched upon throughout the thesis but a few last thoughts will be gathered together. This issue is how positive a phenomenon global business (as it currently operates) is and what rôle/s large law firms can and should play within it.

It should be emphasised at the outset that developments engendered by globalisation may be liberating or repressive (Lash and Urry 1994:325). However, at this point we might recall that a variety of writers have critiqued the operation of global business. Development theorists talked about the exploitation

of non-core workers, as jobs were shipped overseas to increase profits. More recently, Lash and Urry (1994) have argued that workers privileged and marginalised by global developments can be found even within the most developed nations. Sassen has also argued that the existence of highly dynamic financial service sectors indirectly creates low-wage jobs, thus polarising the income distributions of nations²⁹⁵. Indeed, unless global businesses use their strength to raise the living and working standards of developing country producers to acceptable levels (rather than reduce home-base standards to theirs) the profit benefits of their strategies may be short-lived as workers at all levels below the “profit seeking elite” may no longer be able to buy the goods and services produced overseas (Perkin 1996:118).

Environmentalists have also challenged the assumption that continuously promoting economic growth will provide overwhelming benefits for all - they cite the increased environmental degradation which has occurred under global capitalism and look to alternative ways of providing for the needs of the world's peoples (as seen in the section on free trade in chapter four).

Yet whether all global business is necessarily destructive is questionable. At the beginning of the thesis, Perkin (1996:xv) listed what he believed to be the gains made by what he terms “professional societies”; many of these achievements were global in nature. To recap, gains have included (ibid):

“... longer and healthier life; more comfort and enjoyment than any previous age; solutions to many of the problems and diseases - even genetic ones - faced for centuries by humanity; incomparable mobility at unprecedented speeds; instant communication with friends and relations around the globe; push-button access to worldwide entertainment, sport, music, opera, and theatre; and electronic recovery of information from global data banks and libraries.”

²⁹⁵ Perkin argues that both Reaganomics and Thatcherism reinforced success and failure exponentially, producing an ever-widening gap between the rich and poor (1996:192). In Britain, income inequality has grown faster since 1977 than in any comparable industrialised country (Perkin 1996:74). While average real wages increased by 35% in the period from 1975 to 1995, wages for the lowest paid were lower in real terms in 1995 than in 1975 (ibid). Yet the unequal distribution of resources may lead to the collapse of morale and with it economic success (Perkin 1996:xiv).

Be that as it may, the thesis has suggested that the commercial lawyers servicing global capital give little thought to the wider merits of their clients' objectives. Is such behaviour justifiable? Should lawyers fulfil some mediating rôle in business, perhaps acting as some kind of ethical auditor of their clients' affairs?

There are several arguments which might be levied against this idea. First and foremost, business might be most effectively regulated directly - resources might be more efficiently allocated to the task of ensuring that companies find it harder to evade their obligations in the first place. Secondly, and beyond the pragmatic argument that lawyers in large commercial law firms would probably be extremely reluctant to act in such a fashion, it might also be argued that lawyers are not best placed to take on this rôle. They often have little input into the formulation of businesses' strategies and so arrive on the scene too late to act as an effective auditor of clients' decisions; for instance, they may be lower down the 'pecking order' of advisers than others such as accountants and perhaps in-house lawyers²⁹⁶. Still, circumstances may exist when lawyers are more directly involved in the formation of their clients' strategies than at other times. For example, they might suggest to a company which had previously financed its business solely through domestic banks that it should seek capital in the US capital markets. In such instances, law firms actively promote forms of internationalisation/globalisation and profit from the resultant opportunities. There is a need for further research to determine when exactly (and how often) lawyers move from acting as the mere servants of global capital, to become its strategic advisers. It would also be helpful to know when (and how frequently) lawyers are called upon to help their clients creatively evade state regulation. However, if relations with clients become increasingly transitory, then this might make it even more difficult for out-house lawyers to act as the conscience of their clients.

²⁹⁶ Further research is needed on the changing rôles of in-house lawyers.

Further, it has been seen that most commercial lawyers never even perceive moral dilemmas in their work. For instance, the majority of tasks they undertake involve parties of equal status and resources and lawyers may have little wider awareness as to whether either side's strategy is more worthy than the other's. Whilst lawyers could become more aware of broader inequalities in society, perhaps through compulsory courses in academic legal training, it might be argued that in practice it may be difficult to judge the merits of clients' cases.

This, indeed, is one of the criticisms levelled at Luban (1995) and Rhode's (1985) arguments. To recap, they believe that morality should be put back into legal practice, that lawyers have substantial moral responsibilities to parties other than the client. Other writers had criticised this idea, one argument being that it is often hard for lawyers to know whether the effects of their work will be positive or negative. Yet whilst Luban and Rhode acknowledge that ethical analysis is indeterminate, they believe that this does not negate its value. Luban, in fact, argued that there were three instances where the 'excuse' of indeterminacy was too weak. To repeat, these are situations:

- a) Where the action the lawyer is helping the client to perform is unlawful (the *presumption* should be that if the conduct is unlawful, then it is wrong);
- b) Where the lawyer suspects that her/his actions are socially harmful and is confronted with daily evidence that those s/he is working with are indifferent or hostile to questions of social responsibility; and
- c) When "common sense and honesty" do not permit the lawyer to plead ignorance sincerely.

Similarly, Rhode (1985) argued that lawyers' moral accountability should depend upon a variety of factors, which would include the significance, likelihood and magnitude of harm and the lawyers' knowledge and degree of involvement in the case.

In effect, *even if* commercial lawyers are not the advisers best placed or equipped to act as their clients' consciences, the conclusion is that this does not entitle them to abdicate all moral responsibility for their actions.

At this point, I can only reiterate my earlier plea for further discussion of such issues. As *fin de siècle* soul searching appears to be blossoming all around me, it does seem that now is as good a time as any to be re-examining what lawyers should ideally be.

Right now, the existence of a regime of global capitalism (serviced by legal mercenaries) which pays lipservice to environmental and humanitarian concerns as it intensifies its quest for increased profit, is unpalatable to many (myself included). The pressure is on to find new sustainable solutions to curb the excesses of capitalism, whilst retaining some of the gains of development. I believe that the success of this quest will be of critical importance to the lives of billions across the globe, in the twenty-first century and beyond.

Bibliography

- Abbott, Andrew (1988) The System of Professions Chicago: The University of Chicago Press
- Abel, Richard L (1988) The Legal Profession in England and Wales Oxford: Basil Blackwell Ltd
- Abel, Richard L (1988a) "Lawyers in the civil law world" in Abel, Richard L and Lewis, Philip S C (eds) Lawyers in Society Vol 2 The Civil Law World Berkeley: University of California Press
- Abel, Richard L (1989) American Lawyers New York: Oxford University Press
- Abel, Richard L (1994) "Transnational Law Practice" 44 (2) Case Western Reserve Law Review 737
- Abercrombie, Nicholas, Hill, Stephen and Turner, Brian S (1994) The Penguin dictionary of sociology London: Penguin
- Adams, Michael (1994) "Die Usurpation von Aktionärsbefugnissen mittels Ringverflechtung in der "Deutschland AG"" 4 AG 148
- Adamson, Hamish (1992) Free Movement of Lawyers London: Butterworths
- Adamson, Hamish (1998) Free Movement of Lawyers (second edition) London: Butterworths
- Albrow, Martin (1998) "Faults and Defaults: Sociological Narratives for the Global Age" BSA Network January 8
- Allaker, Janet and Shapland, Joanna (1994) Organising UK professions: Continuity and change (Research Study No. 16) London: The Law Society
- Allen, Michael (1988) The goals of universities Milton Keynes: The Society for Research into Higher Education and the Open University Press
- Allen, John (1992) "Post-Industrialism and Post-Fordism" in Hall, Stuart, Held, David and McGrew, Tony (eds) Modernity and its futures Cambridge: Polity Press in association with the Open University
- Alvesson, Mats (1993) Cultural perspectives on organisations Cambridge: Cambridge University Press
- Arber, Sara (1993a) "Designing samples" in Gilbert, Nigel (ed) Researching social life London: Sage
- Arber, Sara (1993b) "The research process" in Gilbert, Nigel (ed) Researching social life London: Sage
- Ardagh, John (1995) Germany and the Germans London: Penguin Books
- Argyle, Michael (1989) The social psychology of work London: Penguin Books
- Aristotle (1992) The Politics London: Penguin
- Ascarelli, Silvia (1998) "Shared future: Stock-exchange deal offers clear glimpse of Euroland market" The Wall Street Journal Europe 8 July 1
- Atkinson, Mark (1997) "While some clean up, others simply clean" The Guardian 2 March 3

- Bain, Richard and Marriage, Jeremy (1994) "An Office Abroad" in Donaldson, Emma and Hopkin, David (eds) European Notes for Guidance - Networking London: The Law Society
- Baker, Peter (1998) "Get a life. Turn the hourglass on its side" The Observer (Business: Work) 4 October I
- Baldwin, Robert (1996) Rules and Government Oxford: Clarendon Press
- Baldwin, Robert (1997) Regulating Legal Services LCD Research Series No 5/97 London: Lord Chancellor's Department
- Baldwin, Robert, Scott, Colin and Hood, Christopher (1998) "Introduction" in Baldwin, Robert, Scott, Colin and Hood, Christopher (eds) A reader on regulation Oxford: Oxford University Press
- Balzer, Arno and Sören, Jensen (1996) "Mandate, Macht und Mammon" Manager Magazin October 76
- Banks, Howard (1997) "Global Lawyers" Forbes 3 November 340
- Baran, Paul Alexander and Sweezy, Paul Marlor (1966) Monopoly Capital New York, London: Monthly Review Press
- Barnard, Henry (1990) "Bourdieu and Ethnography: Reflexivity, Politics and Praxis" in Harker, Richard, Mahar, Cheleen and Wilkes, Chris (eds) An introduction to the work of Pierre Bourdieu: The practice of theory Basingstoke and London: Macmillan
- Barrett, Paul M (1999) "Cross-border merger talk descends on law business" The Asian Wall Street Journal 19 March 6
- Barrett, Christopher and Cason, Jeffrey W (1997) Overseas research: A practical guide Baltimore, Maryland and London: John Hopkins University Press
- Bates, Stephen (1997) "Housewives in southern Europe lament their lot" The International Guardian 30 May 9
- Baudelaire, Charles (1993) Baudelaire: Poems London: David Campbell
- Bavly, Dan and Porter, Roger B (1999) Corporate governance and accountability: What role for the regulator, director and auditor Westport: Quorum Books
- Beardsley, Alison (1998) "Bright lights beckon the best" The Lawyer 20 October 30
- Beck, Ulrich (1986) Risikogesellschaft. Auf dem Weg in eine andere Moderne Frankfurt: Suhrkamp Verlag
- Becker, Howard Saul (1970) Sociological Work Chicago: Aldine
- Bell, Colin (1978) "Studying the locally powerful" in Bell, Colin and Encel, S (eds) Inside the whale: Ten personal accounts of social research Oxford: Pergamon Press
- Bell, Daniel (1973) The Coming of Post-Industrial Society New York: Basic Books
- Bell, John (1999) "Articulating standards in law school: The contribution of Law Benchmark standards" Paper presented to the Institute of Advanced Legal Studies' Legal Skills Research Group, London, 23 March
- Ben-Ami, Daniel (1998) "Cowardly capitalism" Prospect December 63

- Becquer, Gustavo Adolfo (1977) Rimas y Leyendas Salamanca: Ediciones Almar
- Berends, Miek (1992) "An elusive profession? *Lawyers in Society*" 26 (1) Law and Society Review 161
- Bermingham, Vera, Hall, Claire and Webb, Julian (1996) Access to and participation in undergraduate legal education: An exploratory study Bristol: University of the West of England Legal Education and Professional Skills Research Unit
- Bierwirth, Gerhard (1998) "Observations on the German University System" Paper presented to the GB Business Network, Johann Wolfgang Goethe-Universität, Frankfurt, 13 May
- Blair, Margaret M (1994) Ownership and control: Rethinking corporate governance for the twenty-first century Washington: Brookings Institution Press
- Blankenburg, Erhard and Schulz, Ulrike (1995) "German advocates: A highly regulated profession" in Abel, Richard (ed) Lawyers in Society: An overview Los Angeles: University of California Press
- Bohl, Elke (1998) "Der Einheitsjurist soll bleiben" Frankfurter Allgemeine Zeitung 26 September 4
- Bohlander, Michael, Blacksell, Mark and Born, Karl Martin (1996) "The legal profession in East Germany - past, present and future" 3 (3) International Journal of the Legal Profession 255
- Böhlhoff, K (1994) "Reflections on the New Global Market Place" in Strategic Directions for International Legal Practice Proceedings of the Second Global Legal Conference, presented by Human Resource Services, Inc., Brussels, April 20-22
- Böhmert, Karin (1998) "Quantensprung im M&A-Markt" Börsen-Zeitung 5 February 6
- Bond, M (1994a) "Asia's dark satanic mills" Amnesty November/December 12
- Bond, Robert (1994b) "Networking the World" in Donaldson, Emma and Hopkin, David (eds) European Notes for Guidance - Networking London: The Law Society
- Boon, Andrew and Abbey, Robert (1997) "Moral Agendas? *Pro Bono Publico* in Large Law Firms in the UK" 60 (5) MLR 630
- Bottomore, Tom (1993) Élites and Society London: Routledge
- Bourdieu, Pierre (1973) "Cultural reproduction and social reproduction" in Brown, R (ed) Knowledge, education and cultural change London: Tavistock
- Bourdieu, Pierre (1995) "Foreword" in Dezalay, Yves and Sugarman, David (eds) Professional competition and professional power: Lawyers, accountants and the social construction of markets London: Routledge
- Bowley, Graham (1998) "Germany's new shop window" The Financial Times 20 November 15
- Bowring, Philip (1998) "In the economic turmoil, blame the financial institutions" The International Herald Tribune 10/11 October 8
- Boxell, James (1998) "UK legal forces advance on European territory" The Lawyer 6 January 5
- Boyle, David (1998) "Confessions of a global gambler" The New Internationalist October 9
- Braun, Anton (1993) "Sozietäten" 4/1993 BRAK/Mitt. 185

- Braverman, Harry (1974) Labor and monopoly capital New York: Monthly Review Press
- Brennan, Lisa (1999) "Merger may spur some smaller alliances" New York Law Journal 1 June 1
- Brittain, Victoria and Elliott, Larry (1996) "'Close the gap between rich and poor'" The Guardian 16 July 11
- Brown, C J F and Sheriff, T D (1979) "De-industrialisation: a background paper" in Blackaby, Frank (ed) De-industrialisation London: Heinemann
- Brummer, Alex and King, Ian (1997) "Big business just got bigger" The Guardian 14 October 17
- Buckingham, Lisa (1998) "Future of work: "The only certainty is uncertainty"" The Guardian 28 April 17
- Buckley, Richard (1996) Germany United: Champions of the New Europe? Cheltenham: Understanding Global Issues Ltd
- Buckley, Richard (1996a) Fairer Global Trade? The challenge for the WTO Cheltenham: Understanding Global Issues Ltd
- Buckley, Richard (1997) Multinational Business: Beyond government control? Cheltenham: Understanding Global Issues Ltd
- Buckley, Richard (1998) The Global Village: Challenges for a shrinking planet Cheltenham: Understanding Global Issues Ltd
- Bundesrechtsanwaltskammer (1997) Berufsordnung und Fachanwaltsordnung Bonn: Bundesrechtsanwaltskammer
- Burrage, Michael (1996) "From a gentlemen's to a public profession: Status and politics in the history of English solicitors" 3 (1/2) International Journal of the Legal Profession 45
- Butterworths Law Directory (1993) London: Martindale-Hubbell
- Cain, Maureen (1983) "The general practice lawyer and the client: towards a radical conception" in Dingwall, Robert and Lewis, Philip (eds) The sociology of the professions London: Macmillan
- Cain, Maureen (1994) "The symbol traders" in Cain, Maureen and Harrington, Christine (eds) Lawyers in a Post Modern World: Translation and Transgression Buckingham: Open University Press
- Callister, Fiona (1999) "Capitalising on shoddy legal service in Europe" The Lawyer 22 February 10
- Callister, Fiona (1999a) "City firms cash in on German middle-tier flotation boom" The Lawyer 1 March 9
- Callister, Fiona (1999b) "Lovells plots Boesebecks marriage" The Lawyer 5 July 1
- Callister, Fiona and Farrell, Sean (1999) "Tony Williams steps down as Clifford Chance becomes LLP" The Lawyer 19 July 1
- Campbell, Catherine (1991) "Integration of the German legal professions in a united Germany" 11 Yearbook of European Law 339

- Carlin, John P (1997) Review of "No contest: Corporate lawyers and the perversion of justice in America" Vol 34 (2) Harvard Journal on Legislation 611
- Carmichael, Colin (1998) "Stopping the rot at Linklaters' alliance" The Lawyer 11 August 16
- Carr, Josephine (1995) "European union? Not among lawyers" The Independent 31 May 29
- Carr, Josephine and Frederickson, Adam (1999) "How to succeed in the European mating dance" European Counsel April 28
- Carr-Saunders, A M and Wilson, P A (1933) The professions Oxford: Clarendon Press
- Cartwright, Susan and Cooper, Cary L (1997) Managing Workplace Stress London: Sage
- Chambers, Michael, Jones, Matthew and Wilkins, Patrick (1999) "Conflicts of interest: The growing climate of distrust" The Commercial Lawyer June 26
- Chambers, Michael and Wilkins, Patrick (1999) "Partners on the move" The Commercial Lawyer February 28
- Chomsky, Noam (1995) "The free market myth" 3 Open Eye 8
- Clarkson, Max (1998) The corporation and its stakeholders: Classic and contemporary readings Toronto: University of Toronto Press
- Clegg, Jeremy (1993) "Investigating the determinants of service sector foreign direct investment" in Cox, Howard, Clegg, Jeremy and Ietto-Gillies, Grazia (eds) The growth of global business London: Routledge
- Coleman, Brian and Aalund, Dagmar (1998) "Deutsche Bank plan may shake Germany" The Wall Street Journal Europe 16 December 13
- Commission of the European Communities (1996) Report to the European Parliament and the Council on the state of application of the general system for the recognition of higher education diplomas Brussels: Commission of the European Communities
- Cone III, Sydney M (1995) "The common code of conduct from an American perspective" in Daly, Mary C and Goebel, Roger J (eds) Rights, liability, and ethics in international legal practice New York and the Netherlands: Transnational Juris Publications and Kluwer Law and Taxation Publishers
- Cowe, Roger and Buckingham, Lisa (1996) "How the Murdoch global tax maze leads to a fortune in savings" The Guardian 16 July 5
- Cox, Howard, Clegg, Jeremy and Ietto-Gillies, Grazia (1993) "The growth of global business: Three agendas" in Cox, Howard, Clegg, Jeremy and Ietto-Gillies, Grazia (eds) The growth of global business London: Routledge
- Crace, John (1998) "Vanishing world" The Guardian (Education) 13 October 10
- Cranston, Ross (1995) "Legal ethics and professional responsibility" in Cranston, Ross (ed) Legal ethics and professional responsibility Oxford: OUP
- Crawley, Alison and Bramall, Christopher (1995) "Professional rules, codes, and principles affecting solicitors (or what has professional regulation to do with ethics?)" in Cranston, Ross (ed) Legal ethics and professional responsibility Oxford: OUP

- Dahrendorf, Ralf (1967) Society and Democracy in Germany London: Weidenfeld and Nicolson Ltd
- Daintith, Terence (1988) Law as an instrument of economic policy: Comparative and critical approaches Berlin: Walter de Gruyter
- Daniels, P W, Leyshon, A and Thrift, NJ (1986) Working papers on producer services No 1 UK producer services: The international dimension Lampeter and Liverpool: St Davids University College and University of Liverpool
- Davidson, Elizabeth (1998) "Wilde Sapte homes in on teleworking for partners" The Lawyer 31 March 8
- Davis, Evan, Hanlon, Gerard and Kay, John (1993) "What internationalisation in services means: The case of accountancy in the UK and Ireland" in Cox, Howard, Clegg, Jeremy and Ietto-Gillies, Grazia (eds) The growth of global business London: Routledge
- Dehn, Guy (1999) "Protecting the whistleblowers" The Guardian (G2) 29 June 8
- Derber, Charles (1982) "Professionals as new workers" in Derber, C (ed) Professionals as workers: Mental labour in advanced capitalism Boston: G K Hall
- Deutsche Bank (1997) Mid-Year Review Frankfurt: Deutsche Bank
- Deutscher Anwalt Verein (1996) Anwaltsverzeichnis 1996/97 Bonn: Deutscher Anwaltverlag
- Dezalay, Yves (undated) "Between the state, law, and the market: The social and professional stakes in the construction and definition of a regulatory arena" An unpublished paper translated by Sol Picciotto
- Dezalay, Yves (1991) "Territorial Battles and Tribal Disputes" 54 MLR 54
- Dezalay, Yves (1995) "Introduction" in Dezalay, Y and Sugarman, D (eds) Professional competition and professional power: Lawyers, accountants and the social construction of markets London: Routledge
- Dezalay, Yves and Garth, Bryant (1995) "Merchants of law as moral entrepreneurs: Constructing international justice from the competition for transnational business disputes" 29 (1) Law and Society Review 27
- Dezalay, Yves and Garth, Bryant, G (1996) Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order London and Chicago: University of Chicago Press
- Dezalay, Yves and Garth, Bryant, G (1997) "Law, lawyers and social capital: 'Rule of Law' versus relational capitalism" 6 (1) Social and Legal Studies 109
- Dezalay, Yves and Trubek, David M (1993) "Global restructuring and the law: The internationalization of legal fields and the creation of transnational arenas" Paper presented to the National Assembly on the future of the Legal Profession, April
- Dicken, Peter (1992) Global Shift London: Paul Chapman Publishing
- Dignan, Chris and Whalley, Jill (1999) "Charting the new legal landscape" The Lawyer 26 April 10
- Dingwall, Robert (1983) "Introduction" in Dingwall, R and Lewis, P (eds) The Sociology of the Professions London: Macmillan

- Disterer, Georg (1998) "Amerikanische Grosskanzleien: Die "Top 30"" 1/1998 BRAK-Mitt. 39
- Drucker, P (1988) "Management and the world's work" Harvard Business Review September/October 75
- Durkheim, Emil (1957) Professional ethics and civil morals New York: The Free Press
- Easterby-Smith, Mark, Thorpe, Richard and Lowe, Andy (1991) Management Research: An Introduction London: Sage
- Eccles, Robert G and Crane, Dwight B (1988) Doing deals: Investment banks at work Boston, Massachusetts: Harvard Business School Press
- Economides, Kim (1998) "Legal ethics - three challenges for the next millennium" in Economides, Kim (ed) Ethical challenges to legal education and conduct Oxford: Hart Publishing
- Economist Survey (1992) "The Legal Profession" The Economist 18 July 3
- Editorial (1997a) "Erste grenzüberschreitende Fusion einer deutschen Anwaltskanzlei" Frankfurter Allgemeine Zeitung 20 November 27
- Editorial (1997b) "Assistant solicitors air their disquiet" The Lawyer 16 September 14
- Editorial (1998) "Erste Fusion einer deutschen Anwaltskanzlei mit englischer Sozietät" Frankfurter Allgemeine Zeitung 26 January 19
- Editorial (1999) "European Parliament in favour of extending reporting requirements of money laundering Directive to lawyers" Brussels Agenda February 2
- Editorial (1999a) "Banking" The American Lawyer January/February 101
- Edwards, Jeremy (1995) "Appearances can be deceptive" Legal Business September 40
- Edwards, Jeremy (1999) "The emperor's new clothes" Legal Business May 30
- Edwards, Jeremy (1999a) "The global game - and the cost of playing" Legal Business March 36
- Edwards, Rosalind (1993) "An education in interviewing: Placing the researcher and the research" in Renzetti, C and Lee, R (eds) Researching sensitive topics London: Sage
- Edwards, Rosalind and Ribbens, Jane (1998) "Living on the edges: Public knowledge, private lives, personal experience" in Ribbens, J and Edwards, R (eds) Feminist dilemmas in qualitative research London: Sage
- Eggers, Carsten (1995) "Germany" in Godfrey, Edwin (ed) Law without Frontiers London: International Bar Association
- Eggert, Roswita (1998) "Rechtsanwältinnen im Bezirk der Rechtsanwaltskammer Frankfurt am Main" in Rudolf Lauda (ed) Rechtsanwälte und ihre Selbstverwaltung Frankfurt: Deutscher Fachverlag
- Ehrenreich, Barbara and Ehrenreich, John (1979) "The professional-managerial class" in Walker, Pat (ed) Between labor and capital Boston: South End Press
- Eidenmüller, Horst (1990) "Deregulating the market for legal services in the European Community: Freedom of establishment and freedom to provide services for EC lawyers in the Federal Republic of Germany" 53 (5) MLR 604

- Elliott, Larry (1995) "Banking: Square mile of financial power" The Guardian Education Supplement 7 March 10
- Elliott, Larry and Atkinson, Mark (1997) "Asian meltdown" The Guardian 25 November 15
- Elliott, Larry and Brittain, Victoria (1998) "The rich and the poor grow further apart" The Guardian 9 September 18
- Encel, S (1978) "In search of power" in Bell, Colin and Encel, S (eds) Inside the whale: ten personal accounts of social research Oxford: Pergamon Press
- Erlichman, James (1997) "A hard price for free trade" The Guardian (G2) 13 May 17
- Farrell, Sean (1999) "Clifford Chance in merger vote" The Lawyer 26 April 1
- Farrell, Sean (1999a) "Cameron McKenna loses Moscow lawyer to US firm as it unveils details of Euro alliance" The Lawyer 3 May 2
- Farrell, Sean (1999b) "Clifford Chance shuns tradition with plc-style governing board" The Lawyer 2 August 1
- Farrell, Sean and Callister, Fiona (1999) "CC in Pünders merger vote" The Lawyer 5 July 1
- Fenge, Hilmar, Cramer-Frank, Bettina and Westphal, Thomas (1995) "Legal education and training in Europe: Germany" 2 (1) International Journal of the Legal Profession 95
- Fennell, Edward (1995a) "Boardroom revolutions" The Times 20 June 39
- Fennell, Edward (1995b) "In-house rivals oust City firms" The Times 7 November 37
- Fennell, Edward (1996) "A message in the image" The Times 3 December 41
- Fennell, Edward (1997) "Birth of the mega-biz?" The Times 20 May 43
- Ferguson, Nick (1997) "What the client demands" International Financial Law Review December 33
- Feuerich and Braun (1999) Kommentar zur Bundesrechtsanwaltsordnung München: C H Beck
- Fielding, Nigel (1993) "Qualitative Interviewing" in Gilbert, Nigel (ed) Researching Social Life London: Sage
- Fielding, Nigel G and Lee, Raymond M (1998) Computer analysis and qualitative research London: Sage
- Fisher, Andrew (1998a) "German M&A deals hit record in 1997" Financial Times 9 January 20
- Fisher, Andrew (1998b) "London link offers way into top tier" Financial Times 8 July 28
- Fitzpatrick, James F (1989) "Legal future shock: The role of large law firms by the end of the century" 64 (3) Indiana Law Journal 461
- Flintoff, John-Paul (1995) "Top 25: foreign offices open and close" Legal Business September 12
- Flood, John (1989) "Megalaw in the U.K.: Professionalism or corporatism? A preliminary report" 64 (3) Indiana Law Journal 569

- Flood, John (1991) "Doing Business: The management of uncertainty in lawyers' work" 25 (1) Law and Society Review 41
- Flood, John (1995) "The cultures of globalization" in Dezalay, Y and Sugarman, D (eds) Professional competition and professional power: Lawyers, accountants and the social construction of markets London: Routledge
- Flood, John (1996) "Megalawyering in the global order: The cultural, social and economic transformation of global legal practice" 3 (1/2) International Journal of the Legal Profession 167
- Form, William H (1973) "Field problems in comparative research: The politics of distrust" in Armer, Michael and Grimshaw, Allen D (eds) Comparative social research: Methodological problems and strategies New York: John Wiley & Sons
- Forster, Richard (1997a) "New York firms seek the world's business" International Financial Law Review December 36
- Forster, Richard (1997b) "Wachtell, Davis Polk and Linklaters head M&A tables" International Financial Law Review July 21
- Forster, Richard (1998) "US firms continue to dominate European issues" International Financial Law Review September 17
- Frank, André Gunter (1981) Crisis: In the Third World London: Heinemann
- Freedman, James O (1978) Crisis and legitimacy Cambridge: Cambridge University Press
- Freidson, Eliot (1970) Profession of Medicine New York: Dodd Mead
- Freidson, Eliot (1975) Doctoring together: A study of professional social control New York, London and Amsterdam: Elsevier
- Freidson, Eliot (1988) Professional Powers: A Study of the Institutionalization of Formal Knowledge Chicago and London: University of Chicago Press
- Freidson, Eliot (1989) "Theory and the professions" 64 (3) Indiana Law Journal 423
- Galanter, Marc (1983) "Mega-law and mega-lawyering the contemporary United States" in Dingwall, R and Lewis, P (eds) The Sociology of the Professions London: Macmillan
- Galanter, Marc and Palay, Thomas (1991) Tournament of lawyers: The Transformation of the Big Law Firm Chicago: University of Chicago Press
- Galanter, Marc and Palay, Thomas (1995) "Public service implications of evolving law firm size and structure" in Katzmann, Robert A (ed) The law firm and the public good Washington DC: Brookings Institution
- Galanter, Marc and Palay, Thomas (1995a) "Large law firms and professional responsibility" in Cranston, Ross (ed) Legal ethics and professional responsibility Oxford: OUP
- Gershuny, Jonathon I (1978) After industrial society? Emerging self-service economy London and Basingstoke: Macmillan
- Gherardi, Silvia (1995) Gender, Symbolism and Organizational Cultures London: Sage
- Gilbert, Nigel (1993) "Writing about social research" in Gilbert, Nigel (ed) Researching social life London: Sage

- Gilpin, Robert (1987) The Political Economy of International Relations Princeton: Princeton University Press
- Gilson, Ronald J and Mnookin, Robert (1985) "Sharing among the human capitalists: An economic inquiry into the corporate law firm and how partners split profits" 37 Stanford Law Review 313
- Gilvarry, Evlynne (1992) "Relax MNP rules plea" The Law Society Gazette 26 August 4
- Godfrey, Edwin (ed) (1995) Law without Frontiers London: International Bar Association
- Goebel, Roger J (1995) "Lawyers in the European Community: Progress toward community-wide rights of practice" in Daly, Mary C and Goebel, Roger J (eds) Rights, liability, and ethics in international legal practice New York and the Netherlands: Transnational Juris Publications and Kluwer Law and Taxation Publishers
- Goldberg, Stephanie B (1993) "The British go global" American Bar Association Journal April 50
- Goode, William J (1957) "Community within a community: The professions" 22 American Sociological Review 194
- Gordon, D (1988) "The global economy: New edifice or crumbling foundations?" 168 New Left Review 24
- Gordon, Jeffrey (1998) "Globalisation will kill off equal pay" The Lawyer 17 November 13
- Gordon, Robert W and Simon, William H (1992) "The redemption of professionalism?" in Nelson, Robert L, Trubek, David M and Solomon, Rayman L (eds) Lawyers' Ideals/Lawyers' Practices: Transformations in the American legal profession New York: Cornell University Press
- Gow, David (1998) "The sick man of Europe dances a jig" The Guardian 12 August 15
- Gow, David (1999) "Power of state sector shrinks away" The Guardian 8 July 11
- Grabosky, Peter and Braithwaite, John (1986) Of manners gentle: Enforcement strategies of Australian business regulatory agencies Melbourne: Oxford University Press
- Greed, Clara (1990) "The professional and the personal: A study of women quantity surveyors" in Stanley, Liz (ed) Feminist Praxis: Research, theory and epistemology in feminist sociology London: Routledge
- Green, Duncan (1995) Silent Revolution: The rise of market economics in Latin America London: Latin American Bureau
- Greenlaw, Lavinia (1998) "What's a nice poet like you doing in a place like this?" The Observer (Review section) 4 October 3
- Greenwood, Royston, Hinings, C R and Brown, John (1994) "Merging professional service firms" 5 (2) Organization Science 239
- Griffiths, Catrin (1992) "The Main men" Legal Business July/August 27
- Griffiths, Catrin (1996a) "Why the Yanks are coming over here" The Times 6 August 35
- Griffiths, Catrin (1996b) "Wall Street turns tables on the City" The Times 29 October 39

- Grondine, Robert F (1994) "Foreign law firms in Japan thwarted" International Financial Law Review July 11
- Groot-van Leeuwen, Leny E de (1997) "Polishing the Bar: the Legal Ethics Code and disciplinary system of the Netherlands, and a comparison with the United States" 4 (1/2) International Journal of the Legal Profession 9
- Hagan, John and Kay, Fiona (1995) Gender in Practice: A study of lawyers' lives New York and Oxford: Oxford University Press
- Hall, Stuart (1992) "Introduction" in Hall, Stuart and Gieben, Bram (eds) Formations of modernity Cambridge: The Open University Press in association with the Polity Press
- Halliday, Terence C and Karpik, Lucien (1997) "Postscript: Lawyers, political liberalism, and globalisation" in Halliday, Terence C and Karpik, Lucien (eds) Lawyers and the rise of western political liberalism Oxford: Clarendon Press
- Halpern, David (1994) Entry into the legal professions: The law student cohort study years 1 and 2 (Research Study No. 15) London: The Law Society
- Hammersley, Martyn (1992) What's wrong with ethnography? Methodological explorations London: Routledge
- Hancher, Lee and Moran, Michael (1989) Capitalism, culture and economic regulation Oxford: Clarendon Press
- Handy, Charles B (1993) Understanding organizations Harmondsworth: Penguin
- Hanlon, Gerard (1994) The commercialisation of accountancy: Flexible accumulation and the transformation of the service class Basingstoke and London: Macmillan
- Hanlon, Gerard (1997) "A profession in transition? - Lawyers, the market and significant others" 60 (6) MLR 798
- Hanlon, Gerard (1998) "Professionalism as enterprise: Service class politics and the redefinition of professionalism" 32 (1) Sociology 43
- Hanlon, Gerard (1999) Lawyers, the state and the market Basingstoke and London: Macmillan
- Hanlon, Gerard and Shapland, Joanna (1997) "Professional disintegration? The case of law" in Broadbent, Jane, Dietrich, Michael and Roberts, Jennifer (eds) The end of the professions? The restructuring of professional work London: Routledge
- Hardy, Gordon (1994) "Improving access to legal information: The potential for public legal education" Paper presented to the conference "Shaping the future: New directions for legal services" held at City University, London, 12 November
- Harrington, Christine B (1994) "Outlining a theory of legal practice" in Cain, Maureen and Harrington, Christine (eds) Lawyers in a Post Modern World: Translation and Transgression Buckingham: Open University Press
- Harrington, Mona (1993) Women lawyers: Rewriting the rules New York: Plume
- Hartmann, Michael (1990) Juristen in der Wirtschaft: Eine Elite im Wandel München: C. H. Beck
- Harvey, David (1989) The condition of postmodernity Oxford: Basil Blackwell

- Haskell, Paul G (1998) Why lawyers behave as they do Boulder, Colorado and Oxford: Westview Press
- Hazard, Geoffrey C Jr. and Rhode, Deborah L (1994) The legal profession: Responsibility and regulation Westbury, New York: Foundation Press
- Heaney, Mary (1998a) "Getting the German strategy right" The Lawyer 3 February 12
- Heaney, Mary (1998b) "Minorities shut out of US firms" The Lawyer 11 August 36
- Heinz, John P and Laumann, Edward O (1994) Chicago Lawyers: The Social Structure of the Bar Evanston, Illinois and Chicago: North Western University Press and the American Bar Foundation
- Held, David (1992) "Liberalism, Marxism and democracy" in Hall, Stuart, Held, David and McGrew, Tony (eds) Modernity and its futures Cambridge: Polity Press in association with the Open University
- Hickman, Lucy and Watkin, Tim (1999) "Family demands set to affect firms' fortunes" The Lawyer 7 June 12
- Hiday, Jeffrey L (1998) "Global flux chokes M&A deals" The Wall Street Journal Europe 30 September 11
- Hinings, C R, Brown, John L and Greenwood, Royston (1991) "Change in an autonomous professional organization" 28 (4) Journal of Management Studies (July) 375
- Hommerich, Christoph (1988) Die Anwaltschaft unter Expansionsdruck Bonn: Deutscher Anwaltverlag
- Hoogvelt, Ankie (1997) Globalisation and the Postcolonial World London: Macmillan
- Hornsby-Smith, Michael (1993) "Gaining access" in Gilbert, Nigel (ed) Researching social life London: Sage
- Hoselitz, Bert F (1960) Sociological aspects of economic growth New York: Free Press
- Hoult, Philip (1998) "Matchmaker on a mission" The Lawyer 11 August 15
- Hoult, Philip (1998a) "Why going global will not change the world" The Lawyer 10 November 17
- Hoult, Philip and Lindsay, Robert (1998a) "An annus mirabilis" The Lawyer 25 August 12
- Hoult, Philip and Lindsay, Robert (1998b) "Ambitions on an international scale" The Lawyer 8 September 5
- Huberman, A Michael and Miles, Matthew B (1998) "Data management and analysis methods" in Denzin, Norman K and Lincoln, Yvonna S (eds) Collecting and interpreting qualitative materials London: Sage
- Hughes, Everett C (1963) "Professions" 92 Daedalus 655
- Hughes, Ted (1972) Selected poems 1957-1967 London and Boston: Faber & Faber
- Hunt, Luke and Heinrich, Karen (1996) Barings Lost: Nick Leeson and the Collapse of Barings plc Singapore: Butterworth-Heinemann Asia

- Hutton, Will (1996) The State we're in London: Vintage
- Hutton, Will (1998) "Free market paradise lost as trauma forces rethink" The Observer (Business) 4 October 5
- IBA General Professional Program Committee (1994) Proposed Guidelines for Foreign Legal Consultants (Memorandum to the IBA Council, August 15, 1994)
- Inaraja, Fernando Herrera (ed) (1993) Legal studies in Europe 1992/3 Brussels: Bruylant
- International Financial Law Review Editorial (1996) "Clifford Chance opens in Bangkok" February 5
- International Financial Law Review 1000 Directory (1993) London: Euromoney Publications
- James, Rhoda (1997) Private Ombudsmen and public law Aldershot: Dartmouth
- Jenkins, John (1997) "This Legal Lifesyle" 94/16 Law Society Gazette 23 April 20
- Johnson, Alex M (1997) "The underrepresentation of minorities in the legal profession: A critical race theorist's perspective" 95 (5) Michigan Law Review 1005
- Johnson, Terence, J (1972) Professions and Power London: Macmillan
- Jones, Carol A G (1994a) "Capitalism, Globalisation and Rule of Law: An alternative trajectory of legal change in China" 3 Social and Legal Studies 195
- Jones, Medwyn (1994b) "The Nature of the Network" in Donaldson, Emma and Hopkin, David (eds) European Notes for Guidance - Networking London: The Law Society
- Jordan, Dearbail (1999) "Ashursts adds Andersens partner to Frankfurt office" The Lawyer 26 April 2
- Joy, Peter (1999) "Take-off for Germany's capital markets" The Commercial Lawyer May 16
- Junius, Andreas G (1995) "The German system" in Daly, Mary C and Goebel, Roger J (eds) Rights, liability, and ethics in international legal practice New York and the Netherlands: Transnational Juris Publications and Kluwer Law and Taxation Publishers
- Keane, Georgina (1998) "Good news for the overworked" The Lawyer 6 October 10
- Kelly, Michael J (1994) Lives of lawyers: Journeys in the organizations of practice Michigan, USA: University of Michigan Press
- Keogh, Malcolm (1994) "EEIGs for Lawyers" in Donaldson, Emma and Hopkin, David (eds) European Notes for Guidance - Networking London: The Law Society
- Keohane, Malread (1996) "The untouchables" European Corporate Lawyer November/December 25
- Kime's International Law Directory (1993) London: Longman
- King, M, Israel, M and Goulbourne, S (1990) Ethnic minorities and recruitment to the solicitors' profession Uxbridge: Brunel University
- Klatch, Rebecca E (1988) "The methodological problems of studying a politically resistant community" in Burgess, Robert G (ed) Studies in qualitative methodology Vol. I: Conducting social research Greenwich, Connecticut and London: JAI Press

- Kohn, Melvin (1989) "Cross-national research as an analytic strategy" in Kohn, Melvin L (ed) Cross-national research in sociology London: Sage
- Korten, David, C (1995) When Corporations Rule the World London: Earthscan
- Krause, Elliott A (1996) Death of the Guilds: Professions, states, and the advance of capitalism, 1930 to the present New Haven and London: Yale University Press
- Kronman, Anthony T (1993) The lost lawyer: Falling ideals of the legal profession Cambridge, Massachusetts: Harvard University Press
- Kurczewski, Jacek (1994) "Legal professions in transformation in Poland" Paper presented at the Annual Meeting of the Research Committee on the Sociology of Law, Rouen, France, July
- Lace, Susanne (1998) "Widening access to higher education in the UK: The praxis and significance of Access courses" in Walther, A and Stauber, B (eds) Lifelong Learning in Europe Tübingen: Neuling Verlag
- Landers, Renée M, Rebitzer, James B and Taylor, Lowell J (1996) "Rat race redux: Adverse selection in the determination of work hours in law firms 86 (3) American Economic Review 329
- Lang, Tim (1995) "GATT: The end of the citizen?" 3 Open Eye 14
- Lang, Tim and Hines, Colin (1993) The New Protectionism: Protecting the future against free trade London: Earthscan
- Larson, Magali Sarfatti (1977) The rise of professionalism: A sociological analysis Berkeley: University of California Press
- Lash, Scott and Urry, Richard (1987) The end of organized capitalism Cambridge: Polity Press
- Lash, Scott and Urry, John (1994) Economies of Signs and Space London: Sage
- Law Society (1994a) The Law Society Directory of England and Wales London: The Law Society
- Law Society of England and Wales (1994b) Panorama of EU Industry Brussels: European Commission
- Lee, Paul (1997a) "Setting the law firm standard" International Financial Law Review November 16
- Lee, Paul (1997b) "US firms embrace English law capability" International Financial Law Review April 30
- Lee, Paul (1998) "The global players revealed" International Financial Law Review November 23
- Lee, Robert G (1992) "From profession to business: The rise and rise of the city law firm" 19 Journal of Law and Society 31
- Lever, Jeremy (1998) "Freedom to provide services in the integrated market" Lawyers' Europe Winter/Spring 2
- Lewis, Jane and Keegan, Jill (1997) Defining Legal Business: Understanding the work of the largest law firms (Research Study No. 27) London: The Law Society

- Lewis, Verity (1996) Trends in the Solicitors' Profession: Annual Statistical Report 1996 London: The Law Society
- Lindsay, Robert (1998a) "Slaughters makes hay..." The Lawyer 25 August 5
- Lindsay, Robert (1998b) "Freshfields first to raid US firm in its own backyard" The Lawyer 15 September 3
- Lindsay, Robert (1998c) "Simpson Thacher looks to Europe" The Lawyer 22 September 48
- Lindsay, Robert (1998d) "Few firms will realise global aspirations, say consultants" The Lawyer 22 September 48
- Lindsay, Robert (1998e) "Club of nine's magic circle breaks down" The Lawyer 6 January 1
- Lindsay, Robert (1998f) "The perfect match that never was" The Lawyer 9 June 2
- Locke, John (1976) The second treatise on government Oxford: Basil Blackwell
- Lonbay, Julian (1990) Training Lawyers in the European Community London: The Law Society
- London Economics Ltd (1994) The competitive advantage of law and accountancy in the City of London London: The Corporation of London
- Lovecy, Jill (1995) "Global regulatory competition and the single market for professional services: the legal and medical professions in France and Britain" 2 (3) Journal of European Public Policy 514
- Luban, David (1984) "The adversary system excuse" in Luban, David (ed) The good lawyer Totowa, NJ: Rowman & Allanheld
- Luban, David (1995) "The social responsibilities of lawyers: A green perspective" 63 (6) George Washington Law Review 955
- Luce, Edward (1998) "Liffe is overtaken by German exchange" Financial Times 3 June 21
- Lutz, Robert E (1995) "American perspectives on the duty of competence: Special problems and risks in advising on foreign law" in Daly, Mary C and Goebel, Roger J (eds) Rights, liability, and ethics in international legal practice New York and the Netherlands: Transnational Juris Publications and Kluwer Law and Taxation Publishers
- Lyle-Smith, Pauline (1994) Chambers and Partners' Directory of the Legal Profession 1994/5 London: Chambers
- MacDonald, Duncan A (1989) "Speculations by a customer about the future of large law firms" 64 (3) Indiana Law Journal 593
- MacDonald, Keith M (1995) The sociology of the professions London: Sage
- MacErlean, Neasa (1998) "Long hours: a sign of poor practice" The Lawyer 6 October 11
- MacFarlane, Julie (1997) "The legal skills movement ten years on: Triumph or compromise?" 24 (3) Journal of Law and Society 440
- Major, Lee Elliot (1998) "Oxbridge landings" The Guardian (Higher) 28 April i
- Major, Lee Elliot (1999) "Divided they stand in the posh stakes" The Guardian (Higher) 12 January iii

- Makki, Toni and Braithwaite, John (1995) "In and out of the revolving door: Making sense of regulatory capture" 1 Journal of Public Policy 61
- Maley, Nicole (1995) "Divided they stand on Euro legal practice" The Lawyer 12 December 9
- Manaster, Guy J and Havighurst, Robert J (1972) Cross national research: Social-psychological methods and problems Boston: Houghton Mifflin
- Manz, Gerhard and MacGregor, Anne (1996) "The Legal Professions in Germany" in Tyrell, Alan and Yaqub, Zahd (eds) The Legal Professions in the New Europe London: Blackwell
- Markovits, Inga (1996) "Children of a lesser god: GDR lawyers in post-socialist Germany" 94 (3) Michigan Law Review 2270
- Marks, Sarah (1995) "Foreign lawyers poised to exploit New York market" International Financial Law Review August 22
- Martindale-Hubbell International Law Directory (1995) New Providence and London: Martindale-Hubbell
- Martindale-Hubbell International Law Directory (1996) New Providence and London: Martindale-Hubbell
- Martindale-Hubbell International Law Directory (1997) New Providence and London: Martindale-Hubbell
- Marx, Karl (1990) Capital (Volume One) London: Penguin
- Mason, John (1999) "European legal group adds Italian link" The Financial Times 17 July 3
- Matteson, W B (1994) "Strategic Planning: The view from outside counsel" in Strategic Directions for International Legal Practice Proceedings of the Second Global Legal Conference, presented by Human Resource Services, Inc., Brussels, April 20-22
- May, Tim (1997) Social research: Issues, methods and process Buckingham and Philadelphia: Open University Press
- Mayson, Stephen (1997) Making sense of law firms: Strategy, structure and ownership London: Blackstone Press Limited
- McCahery, Joseph and Picciotto, Sol (1995) "Creative lawyering and the dynamics of business regulation" in Dezalay, Yves and Sugarman, David (eds) Professional competition and professional power: Lawyers, accountants and the social construction of markets London and New York: Routledge
- McGlynn, Claire (1998) The Woman lawyer: Making the difference London: Butterworths
- McLachlan, Alan Campbell (1985) Admission of Commonwealth Lawyers London: Commonwealth Secretariat and Commonwealth Lawyers' Association
- McLachlan, Alan Campbell (1989) "Legal practitioner mobility in the Commonwealth" in Dhavan, Rajeer, Kibble, Neil and Twining, William (eds) Access to legal education and the legal profession London: Butterworths
- McRae, James W (1996) "The law firm of the future" Law Practice Management October 20

- Medhurst, Kenneth and Moyser, George (1987) "Studying a religious elite: The case of the Anglican episcopate" in Moyser, George and Wagstaffe, Margaret (eds) Research methods for elite studies London: Allen and Unwin
- Melia, Kath, M (1997) "Producing 'Plausible Stories': Interviewing Student Nurses" in Miller, Gale, and Dingwall, Robert (eds) Context and Method in Qualitative Research London: Sage
- Mendick, Robert (1998) "Police probe City firms' links to organised crime" The Lawyer 24 November 1
- Mendick, Robert (1998a) "City accusations send sparks flying" The Lawyer 1 December 11
- Menkel-Meadow, Carrie (1989) "Feminization of the legal profession: The comparative sociology of women lawyers" in Abel, R L and Lewis, P (eds) Lawyers in Society Volume 3 Comparative theories Berkeley and Los Angeles: University of California Press
- Menkel-Meadow, Carrie (1995) "Portia redux: Another look at gender, feminism and legal ethics" in Parker, Stephen and Sampford, Charles (eds) Legal ethics and legal practice: Contemporary issues Oxford: Clarendon Press
- Miles, Matthew and Huberman, A Michael (1994) Qualitative data analysis: An expanded sourcebook London: Sage
- Mills, Kate (1999) "Ready, jetset, go!" Legal Business February 32
- Mitchell, Austin and Sikka, Prem (1996) Corporate governance matters London: The Fabian Society
- Monti, Mario (1995) "The liability of lawyers as suppliers of services" New Law Journal Practitioner 6 October 1473
- Moore, Lois (1995) "English perspectives on the duty of loyalty: Comparisons with the American view" in Daly, Mary C and Goebel, Roger J (eds) Rights, liability, and ethics in international legal practice New York and the Netherlands: Transnational Juris Publications and Kluwer
- Moran, Michael (1991) The Politics of the Financial Services Revolution London: Macmillan
- Morris, John E (1998) "King Arthur's march on Europe" The American Lawyer June 49
- Morris, John E (1999) "Just when you thought it was safe..." The American Lawyer April 5
- Morris, Thomas B (1995) "The United States of America" in Godfrey, Edwin (ed) Law without Frontiers London: International Bar Association
- Moyser, George (1988) "Non-standard interviewing in elite research" in Burgess, Robert G (ed) Studies in qualitative methodology Vol. I: Conducting social research Greenwich, Connecticut and London: JAI Press
- Moyser, George and Wagstaffe, Margaret (1987) "Studying elites: Theoretical and methodological issues" in Moyser, George and Wagstaffe, Margaret (eds) Research methods for elite studies London: Allen and Unwin
- Nelson, Robert L (1988) Partners with Power Berkeley, Los Angeles and London: University of California Press
- Nelson, Robert L (1994) "The futures of American lawyers: A demographic profile of a changing profession in a changing society" 44(2) Case Western Reserve Law Review 345

- Nelson, Robert, L and Trubek, David M (1992a) "Introduction: New problems and new paradigms in studies of the legal profession" in Nelson, Robert L, Trubek, David M and Solomon, Rayman L (eds) Lawyers' Ideals/Lawyers' Practices: Transformations in the American legal profession New York: Cornell University Press
- Nelson, Robert L and Trubek, David M (1992b) "Arenas of professionalism: The professional ideologies of lawyers in context" in Nelson, Robert L, Trubek, David M and Solomon, Rayman L (eds) Lawyers' Ideals/Lawyers' Practices: Transformations in the American legal profession New York: Cornell University Press
- Newell, Rosemarie (1993) "Questionnaires" in Gilbert, Nigel (ed) Researching social life London: Sage
- New York State Bar Association (1994) The Lawyer's Code of Professional Responsibility Albany, New York: New York State Bar Association
- Nicolson, Donald and Webb, Julian (1999) "Taking lawyers' ethics seriously" 6 (1) International Journal of the Legal Profession 109
- Nosworthy, Elizabeth (1995) "Ethics and large law firms" in Parker, Stephen and Sampford, Charles (eds) Legal ethics and legal practice: Contemporary issues Oxford: Clarendon Press
- Oakley, Ann (1981) Subject Women London: Fontana Press
- O'Dair, Richard (1998) "Recent developments in the teaching of legal ethics: A UK perspective" in Economides, Kim (ed) Ethical challenges to legal education and conduct Oxford: Hart Publishing
- O'Donnell, Mike (1992) A New Introduction to Sociology Edinburgh: Thomas Nelson and Sons
- Ogus, Anthony (1993) "Regulation of the legal profession in England and Wales" in Faure, Michael, Finsinger, Jörg, Siegers, Jacques and Van der Berg, Roger (eds) Regulation of professions: A law and economics approach to the regulation of attorneys and physicians in the US, Belgium, the Netherlands, Germany and the UK Antwerpen: Maklu
- Ogus, Anthony I (1994) Regulation : Legal form and economic theory Oxford: Clarendon Press
- Ogliati, Vittorio (1994) "The Latin-type notary and the process of European unification" Paper presented at the ISA Research Committee on Sociology of Occupational Groups' World Conference on 'Regulating Expertise: Professionalism in Comparative perspective' Paris, April 14/5
- Ogliati, Vittorio (1995) "Process and policy of legal professionalization in Europe: The deconstruction of a normative order" in Dezalay, Yves and Sugarman, David (eds) Professional competition and professional power: Lawyers, accountants and the social construction of markets London and New York: Routledge
- Orzack, Louis H (1992) International authority and the professions: The state beyond the nation state Florence, Italy: The European Policy Unit at the European University Institute
- Page, Nigel (1994) "Accepting and managing cultural diversity" International Law Firm Management Special Supplement September 3
- Painter, Richard W (1994) "The moral interdependence of corporate lawyers and their clients" 67 (3) Southern California Law Review 507
- Pallister, David (1998) "No sweeteners added" The Guardian 17 April 18

- Pandya, Nick (1999) "Lawyers duck EU work time directive" The Guardian (Jobs and Money) 30 January 25
- Parsa, T Z (1999) "Brief Grief" New York 21 June 24
- Parsons, Talcott (1954) Essays in sociological theory Glencoe: Illinois Free Press
- Parsons, Talcott (1964) The Social System New York: The Free Press
- Passenberger, Jürgen (1996) "STAR: Berufliche und wirtschaftliche Situation von Rechtsanwältinnen" 2/1996 BRAK-Mitt. 50
- Passenberger, Jürgen and Kaimer, Steffen (1996) "STAR: Überörtliche Anwaltssozietäten im Zahlenspiegel" 4/1996 BRAK/Mitt. 136
- Paterson, Alan (1996) "Professionalism and the legal services market" 3 (1/2) International Journal of the Legal Profession 13
- Peet, Richard (1991) Global Capitalism - Theories of Societal Development London: Routledge
- Pelzman, Sam (1989) "The economic theory of regulation after a decade of deregulation" Brookings papers on microeconomics 1
- Perkin, Harold (1989) The rise of professional society London: Routledge
- Perkin, Harold (1996) The third revolution: Professional elites in the modern world London: Routledge
- Perkins, Anne (1999) "The battles of Derry" The Guardian (G2) 2 March 2
- Picciotto, Sol (1989) "Slicing a shadow: Business taxation in an international framework" in Hancher, Lee and Moran, Michael (eds) Capitalism, culture and economic regulation Oxford: Clarendon Press
- Picciotto, Sol (1995) "The construction of international taxation" in Dezalay, Yves and Sugarman, David (eds) Professional competition and professional power: Lawyers, accountants and the social construction of markets London and New York: Routledge
- Pierce, Jennifer L (1995) Gender Trials: Emotional lives in contemporary law firms Berkley: University of California Press
- Plender, John (1997) "When capital collides with labour" The Financial Times 24 October 16
- Pritchard, John (1994) The Legal 500 London: Legalease Ltd
- Pritchard, John (1997a) The European Legal 500 London: Legalease Ltd
- Pritchard, John (1997b) Kanzleien in Deutschland London: Legalease Ltd
- Pritchard, John (1999) "Finally, a qualitative assessment of US firms" Legal Business May 15
- Pye, Shaun (1999) "Pros and cons" The Lawyer 10 May 24
- Pykett, Oliver (1995) "Border wars" Legal Business September 62
- Quarry, Gareth (1998) "A legal future of doom or boom" The Lawyer 16 June 9

- Rasor, Alexander (1998) "Vom Einzelanwalt zur überörtlichen Sozietät" in Lauda, Rudolf (ed) Rechtsanwälte und ihre Selbstverwaltung Frankfurt: Deutscher Fachverlag
- Rauch, Jonathan (1998) "Being grown up about Clinton" Prospect November 65
- Reichman, Nancy (1992) "Moving backstage: Uncovering the role of compliance practices in shaping regulatory policy" in Schlegel, Kip and Weisburd, David (eds) White-collar crime reconsidered Boston: North Eastern University Press
- Reinharz, Shulamit (ed) (1992) Feminist methods in social research Oxford: Oxford University Press
- Reisinger, Evelyn and Davies, Pat (1994) The access and participation of adults in higher education in Germany London: Department of Continuing Education, City University
- Remmert, Frank René (1996) Anwaltschaft zwischen Tradition und Wettbewerb: Das Berufs- und Standesrecht der Rechtsanwälte in England und Deutschland Bonn: Deutscher Anwalt Verlag
- Rerrich, Maria S (1996) "Modernizing the patriarchal family in West Germany: Some findings on the redistribution of family work between women" 3 The European Journal of Women's Studies 27
- Rhee, Christopher Sclafani (1996) "Pro Bono, Pro Se" 105 Yale Law Journal 1719
- Rhoads, Christopher (1999) "Staid Deutsche Bank becomes innovator with modernization" The Wall Street Journal Europe 1
- Rhode, Deborah L (1985) "Ethical Perspectives on Legal Practice" 37 Stanford Law Review 589
- Rhode, Deborah L (1994) "Ethics by the pervasive method" in Hazard, Geoffrey C Jr. and Rhode, Deborah L (eds) The legal profession: Responsibility and regulation Westbury, New York: Foundation Press
- Rice, Robert (1997) "Hotter competition in the global law race" The Financial Times 17 June 14
- Rice, Robert (1998a) "Freshfields to set up German law alliance" The Financial Times 26 January 16
- Rice, Robert (1998b) "Forging alliances with German companies" The Financial Times 26 May 22
- Rice, Robert (1998c) "Salans steps out beyond the alliance" The Financial Times 22 September 14
- Richards, Lyn and Richards, Tom (1999) "Welcome to QSR NVivo" A demonstration and discussion held at the Tavistock Institute, London, 30 March 1999
- Richardson, Michael (1996) "Comment" International Financial Law Review January 9
- Rieder, Uwe (1997) "Anwaltssozietäten streben zunehmend nach Grösse" Handelsblatt 20 November 5
- Riger, Stephanie and Gordon, Margaret (1981) "Dilemmas in the practice of feminist research" Paper presented at the Annual Meeting of the American Psychological Association
- Ritzer, George (1992) The McDonaldization of Society London: Sage
- Robertson, Roland (1992) Globalization: Social theory and global culture London: Sage

- Rogowski, Ralf (1994) "Auditors and lawyers in Germany: Co-evolution, not competition" 1 (1) International Journal of the Legal Profession 13
- Rogowski, Ralf (1995) "German corporate lawyers: Social closure in autopoietic perspective" in Dezalay, Y and Sugarman, D (eds) Professional competition and professional power: Lawyers, accountants and the social construction of markets London: Routledge
- Roodyn, David (1994) "Networking in the EU" in Donaldson, Emma and Hopkin, David (eds) European Notes for Guidance - Networking London: The Law Society
- Rosenberg, Geanne (1997) "Bring in the Lawyers" Investment Dealers' Digest 3 November 18
- Rostow, Walt Whitman (1971) The Stages of Economic Growth - A non-communist manifesto London: Cambridge University Press
- Rousseau, Jean-Jacques (1968) The social contract London: Penguin
- Rowe, Dorothy (1998) "Heart of gold" The New Internationalist October 13
- Rueschemeyer, Dietrich (1973) Lawyers and their society: A comparative study of the legal profession in Germany and the US Cambridge, Mass: Harvard University Press
- Rueschemeyer, Dietrich (1989) "Comparing legal professions: A state centred approach" in Abel, Richard and Lewis, Philip (eds) Lawyers in Society Vol III Berkley: University of California
- Salaman, Graeme (1995) Managing Buckingham: Open University Press
- Sampford, Charles and Parker, Christine (1995) "Legal regulation, ethical standard-setting, and institutional design" in Parker, Stephen and Sampford, Charles (eds) Legal ethics and legal practice: Contemporary issues Oxford: Clarendon Press
- Sampson, Anthony (1995) "Stuck in the nervous nineties" The Observer 4 June 23
- Sassen, Saskia (1991) The Global City Oxford: Princeton University Press
- Schack, Haimo (1991) "The role of the legal profession in Germany" Paper presented at the conference on "The social role of the legal profession" held by the International Colloquium of the International Association of Legal Science in Tokyo, Japan, 3-6 September
- Schatzman, Wendy B (1998) "Some US firms thrive, while others fade, in European Community capital" Los Angeles Daily Journal 16 December 5
- Scheifele, Bernd (1994) "Privatisation in East Germany and the Czech Republic: A comparative analysis" in Shapland, Joanna and Le Grys, Rosie (eds) The Changing Shape of the Legal Profession Sheffield: Institute for the Study of the Legal Profession, Sheffield University
- Schneyer, Ted (1991) "Professional discipline for law firms?" 77 (1) Cornell Law Review 1
- Schneyer, Theodore (1992) "Professionalism as politics: The making of a modern legal ethics code" in Nelson, Robert L, Trubek, David M and Solomon, Rayman L (eds) Lawyers' Ideals/Lawyers' Practices: Transformations in the American legal profession New York: Cornell University Press
- Schraven, J (1994) "Significant Trends and developments in the Legal Profession: A view from inside counsel" in Strategic Directions for International Practice Proceedings of the Second Global Legal Conference, presented by Human Resource Services, Inc., Brussels, April 20-22

- Schultz, Ulrike (1989) Frauen im Recht Hagen, Germany: Fernuniversität
- Schultz, Ulrike (1997) "Legal ethics in Germany" 4 (1/2) International Journal of the Legal Profession 55
- Scott, Peter (1998) "Take the lead or take the consequences" The Lawyer 13 January 10
- Sellers Klein, Martha (1999) "US and them" Legal Business April 45
- Seron, Carroll (1996) The business of practising law: The work lives of solo and small-firm attorneys Philadelphia: Temple University Press
- Seron, Carroll and Ferris, Kerry (1995) "Negotiating professionalism: the gendered social capital of flexible time" 22 (1) Work and Occupations 22
- Shaffer, Teri Root and O'Hara, Bradley S (1995) "The effects of country of origin on trust and ethical perspectives of legal services" 15 (2) Service Industries Journal 162
- Shakespeare, William (1997) Othello Walton on Thames: Thomas Nelson & Son
- Shapiro, Martin (1990) "Lawyers, corporations and knowledge" 38 The American Journal of Comparative Law 683
- Shapland, Joanna (1996) "How do lawyers accomplish cross-national lawyering?" Paper presented at the Law and Society Association conference, Glasgow, 10-13 July
- Shapland, Joanna and Sorsby, Angela (1996) Professional Bodies' Communications with Members and Clients Vol 1 London: Office of Fair Trading
- Shattock, Michael (1998) "Shape of things to come: 2020 vision - the future of higher education" The Guardian Higher 3 March ii
- Sheinman, Leslie (1997) "Looking for legal ethics" 4 (1/2) International Journal of the Legal Profession 139
- Sheldon, M (1994) "Significant Trends and developments in the Legal Profession: A view from outside counsel" in Strategic Directions for International Practice Proceedings of the Second Global Legal Conference, Presented by Human Resource Services, Inc., Brussels, April 20-22
- Sherr, Avrom and Webb, Julian (1989) "Law students, the external market, and socialization: Do we make them turn to the City?" 16 (2) Journal of Law and Society 225
- Sherr, Avrom and Webley, Lisa (1997) "Legal ethics in England and Wales" 4 (1/2) International Journal of the Legal Profession 109
- Shiner, Michael (1997) Entry into the legal professions: The law student cohort study year 4 (Research Study No.25) London: The Law Society
- Shiner, Michael and Newburn, Tim (1995) Entry into the legal professions: The law student cohort study year 3 (Research Study No.18) London: The Law Society
- Sidaway, Judith and Cole, Bill (1996) "The State we are in" 93/25 Law Society Gazette 3 July 24
- Silverman, David (1993) Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction London: Sage
- Silverman, David (1997) "The logics of qualitative research" in Miller, Gale, and Dingwall, Robert (eds) Context and Method in Qualitative Research London: Sage

- Silverman, David (1998) "Quantitative/Qualitative" in Jenks, Chris (ed) Core sociological dichotomies London: Sage
- Simmons, Michael (1995) "Pressures on partnerships" The Law Society Gazette 8 March 20
- Simon, Hermann (1996) Hidden Champions: Lessons from 500 of the world's best unknown companies Boston, Massachusetts: Harvard Business School Press
- Simonian, Haig (1998) "Four months of fortune that favoured the brave" The Financial Times 14 May 19
- Sklair, Leslie (1991) Sociology of the Global System Hemel Hempstead: Harvester Wheatsheaf
- Slinn, Judy (1987) Linklaters and Paines - The first one hundred and fifty years London: Longman
- Smigel, Erwin O (1964) The Wall Street Lawyer: Professional organization man? New York: Free Press
- Snider, Anna (1998) "Watching Top Ten firms grow, learn over past decade" New York Law Journal 14 December 13
- Solomon, Rayman L (1992) "Five crises or one: The concept of legal professionalism, 1925-1960" in Nelson, Robert L, Trubek, David M and Solomon, Rayman L (eds) Lawyers' Ideals/Lawyers' Practices: Transformations in the American legal profession New York: Cornell University Press
- Sommerlad, Hilary and Sanderson, Peter (1998) Gender, choice and commitment Aldershot: Ashgate
- Spangler, Eve (1986) Lawyers for hire: Salaried professionals at work New Haven and London: Yale University Press
- Spar, Debora L (1997) "Lawyers abroad: The internationalization of legal practice" 39 (3) California Management Review 8
- Spiewak, Martin and Uchatius, Wolfgang (1999) "Der Mensch als Firma" Die Zeit 8 July 15
- Spencer, Gary (1973) "Methodological issues in the study of bureaucratic elites: A case study of West Point" 21 (1) Social Problems 90
- Stanley, Liz (1990) Feminist Praxis: Research, theory and epistemology in feminist sociology London: Routledge
- Stanley, Liz and Wise, Sue (1993) Breaking Out Again: Feminist Ontology and Epistemology London: Routledge
- Stevens, M (1987) Power of attorney: The rise of the giant law firms New York: McGraw-Hill
- Stewart, Patrick (1998a) "Freshfields seeks to make its mark in Germany" The Lawyer 3 February 5
- Stewart, Patrick (1998b) "Making friends and influencing trends" The Lawyer 24 February 22
- Stewart, Patrick and Lindsay, Robert (1998) "Euro threat prompts CC merger talks" The Lawyer 31 March 1

- Stigler, George (1971) "The theory of economic regulation" 2 Bell Journal of Economy and Management Science 3
- Stracher, Cameron (1999) "All Board the Mommy Track" The American Lawyer March 126
- Strange, Susan (1986) Casino Capitalism Oxford: Blackwell
- Strati, A (1992) "Organisational Culture" in Szell, G (ed) Concise Encyclopedia of Participation and Co-management Berlin: de Gruyter
- Sugarman, David (1993) "Simple images and complex realities: English lawyers and their relationship to business and politics, 1750 - 1950" 11 (2) Law and History Review 257
- Sugarman, David (1994) "Blurred boundaries: The overlapping worlds of law, business and politics" in Cain, Maureen and Harrington, Christine (eds) Lawyers in a Post Modern World: Translation and Transgression Buckingham: Open University Press
- Susskind, Richard (1998) The Future of Law Oxford: Oxford University Press
- Swallow, Matheu (1999) "UK firms go for US-style bonuses to keep lawyers" The Lawyer 14 June 14
- Tannen, Deborah (1994) Talking from 9 to 5: Women and men at work: Language, sex and power London: Virago
- Taylor John G (1979) From modernization to modes of production London: Macmillan
- Taylor, Nicola (1993) (ed) The Guide to the professional conduct of solicitors London: The Law Society
- Taylor, Nicola (1996) (ed) The Guide to the professional conduct of solicitors London: The Law Society
- The Guardian Editor (1999) "£1,000,000-plus" The Guardian (The Editor section) 23 January 22
- Thornton, Margaret (1996) Dissonance and distrust: Women in the legal profession Melbourne, Oxford, Auckland and New York: Oxford University Press
- Toulmin, John (1995) "A worldwide common code of professional ethics?" in Daly, Mary C and Goebel, Roger J (eds) Rights, liability, and ethics in international legal practice New York and the Netherlands: Transnational Juris Publications and Kluwer Law and Taxation Publishers
- Townsend, Abigail (1999) "CC calls off Mallesons talks" The Lawyer 26 July 1
- Travis, Alan (1998) "Life is still a chore for women" The Guardian 1 December 5
- Troen, Per (1994) "Multinational Partnerships" in Donaldson, Emma and Hopkin, David (eds) European Notes for Guidance - Networking London: The Law Society
- Tsang, Linda (1998) "Q: When is a partner not *really* a partner?" The Lawyer 21 April 2
- Twining, William (1994) Blackstone's tower: the English law school London: Sweet and Maxwell
- Tyler, Richard (1998a) "Punder Group demise frees the way for A&O" The Lawyer 15 September 1
- Tyler, Richard (1998b) "Keeping up with US office politics" The Lawyer 1 September 9

- Tyler, Richard (1998c) "Tide turns for Linklaters in Europe" The Lawyer 28 July 52
- Tyler, Richard (1998d) "Continental merger creates first 'truly European firm'" The Lawyer 2 June 5
- Tyler, Richard (1998e) "Working to home rules" The Lawyer 2 June 18
- Tyler, Richard (1998f) "Over here - in partnership" The Lawyer 30 June 22
- Tyler, Richard (1998g) "Is flexible working a waste of time?" The Lawyer 6 October 13
- Tyrrell, Alan (1993) "The provisions of European Community law" in Tyrrell, Alan and Yaqub, Zahd (eds) The Legal Professions in the New Europe Oxford: Blackwell
- Tyrrell, Alan (1993a) "Professional duties and privileges" in Tyrrell, Alan and Yaqub, Zahd (eds) The Legal Professions in the New Europe Oxford: Blackwell
- Unattributed (1997a) "Allen & Overy set to double its capacity in Frankfurt" The Lawyer 7 October 5
- Unattributed (1997b) "Merger creates Bruckhaus Westrick Heller Löber" International Financial Law Review December 3
- Unattributed (1997c) "Big Six merger could unite over 1000 lawyers" International Financial Law Review October 3
- Unattributed (1997d) "IBA surprised by breakaway liberalisation move" The Lawyer 28 October 5
- Unattributed (1998a) "City firms get lion's share of 'mega deals'" The Lawyer 20 January 6
- Unattributed (1998b) "Linklater-Schön split official" The Lawyer 3 March 5
- Unattributed (1998c) "Freshfields and Deringer to merge" International Financial Law Review March 4
- Unattributed (1998d) "Angel and Eagle reveal secret" Global Competition Review February/March 3
- Unattributed (1998e) "Notare und Wirtschaftsprüfer gemeinsam" Frankfurter Allgemeine Zeitung 2 June 19
- Unattributed (1998f) "Der Finanzplatz Deutschland wird für englische Kanzleien interessant" Frankfurter Allgemeine Zeitung 6 August 17
- Unattributed (1998g) "Capital project" The Financial Times 30 March 14
- Unattributed (1998h) "Bei der Fusion Daimler Chrysler leisten die Anwälte Schwerarbeit" Frankfurter Allgemeine Zeitung 5 June 29
- Unattributed (1998i) "Grenzüberschreitende Zusammenarbeit" Frankfurter Allgemeine Zeitung 18 May 24
- Unattributed (1998j) "Linklaters & Alliance grösster europäischer Anwaltsverbund" Frankfurter Allgemeine Zeitung 24 July 18

Unattributed (1998k) "Schürmann & Partner fusionieren mit schwedischer Kanzlei" Frankfurter Allgemeine Zeitung 15 April 24

Unattributed (1998l) "IBA hammers out rights of establishment resolution" The Lawyer 3 March 44

Unattributed (1998m) "Female partner in running for election to top Linklaters post" The Lawyer 29 September 3

Unattributed (1998n) "Allen & Overy hires German partners" The Lawyer 1 September 40

Unattributed (1998o) "US firms in battle to increase profits" The Lawyer 25 August 36

Unattributed (1998p) "Hammonds talks to Boesebeck Droste" The Lawyer 23 June 3

Unattributed (1998q) "Punder pioneers management trio" The Lawyer 14 July 48

Unattributed (1998r) "Conference success" The Lawyer 13 January 5

Unattributed (1998s) "Global Bar conference aims to step up legal liberalisation" The Lawyer 12 May 5

Unattributed (1998t) "Freshfields doubles size of Big Apple base" The Lawyer 10 March 5

Unattributed (1998u) "Law Soc welcomes EU-US free trade area with trepidation" The Lawyer 31 March 5

Unattributed (1998v) "German firm opts for Euro-mergers" The Lawyer 30 June 5

Unattributed (1998w) "Niche M&A and tax firm to launch in Germany" The Lawyer 30 June 5

Unattributed (1998x) "EU lawyers face registration rule" The Law Society Gazette 25 November 6

Unattributed (1999a) "City firms break work time law" The Lawyer 8 March 9

Unattributed (1999b) "Brussels aims to make it easier for non-EU lawyers to provide legal services anywhere in the EU" Brussels Agenda April 3

Unattributed (1999c) "Sullivan & Cromwell hires first English lawyer" International Financial Law Review February 3

Unattributed (1999d) "OECD dicusses how competition policy affects professional services" 5 Brussels Agenda May 3

Unattributed (1999e) "OECD considers asking Member countries to remove barriers to cross-border trade in professional services" Brussels Agenda May 3

Unattributed (1999f) "Gleiss pulls out of merger with Stibbe" European Counsel March 8

Unattributed (1999g) "McDermott Will & Emery continues hiring spree" European Counsel April 19

Unattributed (1999h) "Coudert Brothers absorbs German firm" European Counsel April 19

Unattributed (1999i) "Grossfusion der Wirtschaftskanzleien" Handelsblatt 29 April 23

Unattributed (1999j) "Anwaltsfusion auf Europaebene" Handelsblatt 8 June 27

- Unattributed (1999k) "European Court of Justice asked whether fixed fees for lawyers are anti-competitive" Brussels Agenda July 2
- Unattributed (1999l) "Italy to be forced to remove obstacles faced by EU lawyers?" Brussels Agenda July 3
- Unattributed (1999m) "MDPs to be allowed in the US as well as in Europe?" Brussels Agenda July 3
- Unattributed (1999n) "New European quartet" European Counsel June 10
- Unattributed (1999o) "Trade in legal services between the EU and Latin America to be liberalised?" Brussels Agenda August 3
- Unattributed (1999p) "New top five Dutch firm" European Counsel June 10
- Unattributed (1999q) "White & Case opens in Frankfurt" European Legal Business July/August 5
- United Nations (1990) Global Outlook 2000: An Economic, social and environmental perspective USA: United Nations
- Vagts, Detlev F (1996) "The international legal profession: A need for more governance?" 90 (2) American Journal of International Law 250
- Van Wambeke, Wim, Franssen, Gerd and Van Loon, Francis (1996) "Internationalization of the legal professions in Belgium: Definitions, scope, conceptual framework" Paper presented at the Law and Society conference, Glasgow, 10/13 July
- Wagstaffe, Margaret and Moyser, George (1987) "The threatened elite: Studying leaders in an urban community" in Moyser, George and Wagstaffe, Margaret (eds) Research methods for elite studies London: Allen and Unwin
- Walker, Martin (1998) "Poverty belt jolts EU ideal" The Guardian 17 April 17
- Walker, Martin (1998a) "Left turn points Europe to Bonn" The Guardian 29 September 18
- Wallace, Jean E (1995) "Organizational and professional commitment in professional and nonprofessional organizations" 40 Administrative Science Quarterly 228
- Wallerstein, Immanuel (1974) The Modern World-System London: Academic Press Inc.
- Waters, Malcolm (1995) Globalization London: Routledge
- Watkin, Tim (1999) "Oppenhoffs considers restructure at the top" The Lawyer 10 May 2
- Watkin, Tim (1999a) "Oppenhoff & Rädler votes for radical shake-up of management structure" The Lawyer 24 May 9
- Webb, Julian (1998) "Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education" 25 (1) Journal of Law and Society 134
- Webb, Julian and Maughan, Caroline (1996) (eds) Teaching lawyers skills London: Butterworths
- Whelan, Christopher and McBarnet, Doreen (1992) "Lawyers in the market: Delivering legal services in Europe" 19 Journal of Law and Society 49
- Wilkins, David B (1992) "Who should regulate lawyers?" 105 Harvard Law Review 799

Wilkins, David B and Mitu Gulati, G (1996) "Why are there so few black lawyers in corporate law firms?" 84 (3) California Law Review 493

Wilkins, Patrick (1999) "German law firms in consolidation phase" The Commercial Lawyer February 66

Wilkins, Patrick (1999a) "Clifford Chance and Rogers & Wells: Hurdles cleared but risk factors remain" The Commercial Lawyer June 14

Williams, Heikes (1993) "The importance of researcher's gender in the in-depth interview - Evidence from two case studies of male nurses" Gender & Society June 280

Wilson, Jamie (1999) "Yemen lawyer 'tortured'" The Guardian 27 February 13

Wirtschaftsförderung Frankfurt GmbH (1996) Frankfurt: Preferred by Decision-Makers
Frankfurt: Wirtschaftsförderung Frankfurt GmbH

Witz, Anne (1992) Professions and Patriarchy London: Routledge

Woolf, Virginia (1992) To the lighthouse London: Vintage

Wouters, Jan (1999) "International liberalisation and regulation of financial services and the European internal market" Paper presented at the UK Association for European Law conference on "The right to provide services in EC law: Towards a unified freedom jurisprudence?", University of London, 24 May

Yuille, Mike (1998) "Capital markets experts braced for cuts" The Lawyer 27 October 13

Appendix one - The earth's three socio-ecological classes²⁹⁷

<i>Overconsumers</i> <i>1.1 billion</i> <i>(Cars, meat, disposables)</i>	<i>Sustainers</i> <i>3.3 billion</i> <i>(Living lightly)</i>	<i>Excluded</i> <i>1.1 billion</i> <i>(Absolute deprivation)</i>
Travel by car and air	Travel by bicycle and public surface transport	Travel by foot or donkey
Eat high-fat, high-calorie, meat-based diets	Eat healthy diets of grains, vegetables, and some meat	Eat nutritionally inadequate diets
Drink bottled water and soft drinks	Drink clean water plus some tea and coffee	Drink contaminated water
Use throwaway products and discard substantial wastes	Use unpackaged goods and recycle wastes	Use local biomass and produce negligible wastes
Live in spacious, climate-controlled, single-family homes	Live in modest, naturally ventilated homes, with extended or multiple families	Live in rudimentary shelters or in the open; usually lack secure tenure
Maintain image-conscious wardrobes	Wear functional clothing	Wear secondhand clothing or scraps

Lawyers working for “mega-firms” are most likely to have lifestyles which correspond with column one, the overconsumers. Car (taxi) and air travel may be common, as are late nights in the office, surviving on take-away meals²⁹⁸. Social status may also be displayed by wearing “image-conscious” clothing (and accessories) and in the (location of the) lawyer’s home.

²⁹⁷ Taken from Korten 1995:281.

²⁹⁸ This supports Sassen’s (1991) arguments on the creation of a low wage, service economy.

Appendix two - The most profitable UK and US law firms

The most profitable US firms (1997)²⁹⁹

<i>Firm</i>	<i>No of lawyers</i>	<i>No of foreign offices³⁰⁰</i>	<i>Average profits per partner (\$)</i>
Wachtell Lipton Rosen & Katz	139	Unknown	2,200,000 (£1,358,000)
Cravath Swaine & Moore	341	2	1,790,000 (£1,104,900)
Sullivan & Cromwell	410	6	1,450,000 (£895,000)
Cahill Gordon & Reindel	189	Unknown	1,445,000 (£891,975)
Davis Polk & Wardwell	447	5	1,295,000 (£799,380)
Skadden Arps ...	1,074	11	1,290,000 (£796,300)
Simpson Thacher & Bartlett	459	3	1,285,000 (£793,210)
Debevoise & Plimpton	360	4	1,105,000 (£682,100)
Cleary Gottlieb ...	463	6	1,060,000 (£654,320)
Robins Kaplan Miller & Ciresi	230	Unknown	1,010,000 (£623,460)

If this table is compared with table two earlier, which listed the 10 largest US firms worldwide, only one firm - Skadden Arps - appears in both. This would seem to suggest that, in the US, the larger the firm does not necessarily mean the more profitable the firm.

The next tables reveal that the most profitable UK firms are lagging behind their US counterparts.

²⁹⁹ Source: The Lawyer (Unattributed 1998o).

³⁰⁰ Figures in this column are from Martindale Hubbell 1996.

The most profitable UK firms (1997/8)³⁰¹

<i>Firm</i>	<i>No of fee-earners³⁰²</i>	<i>Average profits per partner (£)</i>	<i>Equity range (£)</i>
Slaughter & May	565	700,000	950,000-475,000
Allen & Overy	875	530,000	750,000-300,000
Freshfields	965	520,000	640,000-320,000
Clifford Chance	1,695	480,000	555,000-222,000
Linklaters	1,016	460,000	600,000-280,000
Macfarlanes³⁰³	174	450,000	625,000-250,000
Gouldens	142	397,000	460,000-115,000
S J Berwin	250	395,000	615,000-175,000
Herbert Smith	611	360,000	460,000-230,000
Richards Butler	301	358,000	380,000-165,000

Top 10 UK firms by gross fees (1997/8)³⁰⁴

<i>Firm</i>	<i>Gross fees (£m)</i>	<i>No of foreign offices³⁰⁵</i>	<i>No of fee-earners³⁰⁶</i>
Clifford Chance	370	19	1,695
Linklaters	260	7	1,016
Freshfields	232	11	965
Allen & Overy	218	14	875
Slaughter & May	190	5	565
Lovell White Durrant*	178	8	760
Eversheds	145	2	1,227
Herbert Smith	115	4	611
Dibb Lupton Alsop	111.5	3	894
Cameron McKenna	102.5	6	700

*NB Lovell White Durrant had average profits per partner of £340,000.

³⁰¹ Source: Hoult and Lindsay 1998a.

³⁰² This column's data are taken from The Lawyer Focus:VI (The Lawyer 28 October 1997).

³⁰³ Macfarlanes and Gouldens are corporate finance specialists.

³⁰⁴ Source: Hoult and Lindsay 1998a.

³⁰⁵ This column's data are from Martindale Hubbell 1995 and 1996.

³⁰⁶ This column's data are taken from The Lawyer Focus:VI (The Lawyer 28 October 1997).