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Professional Ethics and Alternative and New Law Business Structures joint committee news

Newsletter of the International Bar Association Section on Public and Professional Interest

MARCH 2017

INTERNATIONAL CONVENTION CENTRE (ICC SYDNEY)

IBA 2017 Sydney

8–13 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

The 2017 IBA Annual Conference will be held in Sydney, Australia's leading global city. Recognised internationally as a future-focused and innovative business centre, Sydney provides headquarters for almost 40 per cent of the top 500 Australian corporations.

The city combines natural beauty with buzzing urban villages and a city centre that's home to some of the world's most recognisable and iconic structures such as the Opera House and Sydney Harbour Bridge.

As one of the world's most multicultural and connected cities, Sydney will be an ideal location for the largest and most prestigious event for international lawyers, providing an abundance of business and networking opportunities, as well as the chance to explore one of the most beautiful cities on Earth.

What will Sydney 2017 offer you?

- Gain up-to-date knowledge of the key developments in your area of law which you can put into practice straight away
- Access to the world's best networking and business development event for lawyers – attracting over 6,000 individuals in 2016 representing over 2,700 law firms, corporations, governments and regulators from over 130 jurisdictions
- Build invaluable international connections with leading practitioners worldwide, enabling you to win more work and referrals
- Increase your profile in the international legal world
- Hear from leading international figures, including officials from the government and multilateral institutions, general counsel and experts from across all practice areas and continents
- Acquire a greater knowledge of the role of law in society
- Be part of the debate on the future of the law

To register your interest:

Visit: www.ibanet.org/Form/Sydney2017.aspx Email: ibamarketing@int-bar.org

To receive details of the advertising, exhibiting and sponsorship opportunities for the IBA Annual Conference in Sydney email: andrew.webster-dunn@int-bar.org

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IN THIS ISSUE

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This newsletter is intended to provide general information regarding recent developments relating to professional ethics, multidisciplinary practices and the legal profession. The views expressed are not necessarily those of the International Bar Association.

Welcome

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We would like to congratulate all of you for your participation and contributions to the IBA during 2016 and extol your continued commitment to the IBA for 2017 and the years to come. The officers and members of the advisory boards of your committees thank you. Further, we wish to acknowledge that 2016 was a seminal year for both of the committees.

This newsletter is the second annual combined committee publication. We extend an open invitation for other SPPI committees to join in this effort to expand the readership and information, and compound the success of combined newsletters.

Commencing in 2017, there will be new and additional officers and advisory board members of both the committees. We wish to thank all of those individuals who have contributed greatly to the past successes and wish them well in their future activities. In addition, we wish to encourage the incoming officers in their new or continuing roles, as well as advisory board members, to 'keep up the good work'. If anyone wishes to assist please reach out – your effort would be gratefully accepted.

Lastly, Alberto's term as chair of the Professional Ethics Committee ended on 31 December 2016. We wish to thank him for his support, leadership and great humour. We also wish to acknowledge that Steven Stevens has declined to accept the advancement to Chair of the Committee for personal reasons. We thank Steven for his contributions and wish him all the best.

Let us wish all of you good health, good times and great success for 2017.

Alberto Navarro
Immediate Past Chair, Professional Ethics Committee

Steven M Richman
Co-Chair, Alternative and New Law Business Structures Committee

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From the Co-Editors

Our second joint publication

We are pleased to announce the publication of this second joint newsletter of the Professional Ethics Committee and Alternative and New Law Business Structures Committee (formerly the Alternative Business Structures Committee).

In this issue, we update readers on the activities of the two committees, and provide original content and analysis on a variety of topics affecting our profession, including the publication of the winning essays from each of the Committee's Annual Conference scholarship programmes. We also provide a summary of activities at the recent Annual Conference in Washington, DC. Finally, we look ahead to activities planned for 2017.

We would like to remind readers that the thoughts and opinions of the contributors of each article and other writings contained in this newsletter are the thoughts and opinions of the applicable contributors, and not necessarily reflective of the thoughts and opinions of their respective law firms, the IBA, Professional Ethics Committee or Alternative and New Law Business Structures Committee.

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Professional Ethics Committee

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DESCRIPTION OF THE COMMITTEES

Professional Ethics Committee

Professional ethics involves an area that all lawyers must be familiar with regardless of their field of practice. The Professional Ethics Committee seeks to promote the high standards of professional conduct and ethics on a global basis.

The Committee provides a forum for all international lawyers who are interested in discussing and debating issues affecting the practice of law. In today's world, a lawyer may face conflicting duties, and the application of professional standards may be far from apparent.

The Committee focuses on developments of international significance, and seeks active collaboration with other committees and constituents in providing programmes at IBA conferences.

The forum seeks to facilitate relevant networking, and information and experience sharing opportunities, and encompasses the social and collegial interests of both members and potential members with other regional fora, the Corporate Counsel Forum, Young Lawyers' Committee, and all Legal Practice Division committees in general.

Alternative and New Law Business Structures Committee

The Alternative and New Law Business Structures Committee was first created as the Multidisciplinary Practices Committee, a President-appointed committee, to follow the developments of multidisciplinary practices (MDPs) in different jurisdictions. It developed recommendations for IBA Resolutions as to the requirements to be met when allowing MDPs, to ensure that the core values of the legal profession are not undermined. At present, the mechanisms for the delivery of legal services have taken new and varied forms as a result of technology and a growing pressure to provide access to justice to broader populations.

Aims of the Committee

The Committee aims to bring together legal professionals and other interested individuals from many and various jurisdictions and backgrounds to monitor, discuss and shape the developments of new and modified structures, and the rules to which they are subject around the world.

Who does the Committee represent?

Members are as varied as the backgrounds from which they come. Many are alternative and new law business structures lawyers practicing in their country, whereas others are, or would like to be, partners in alternative and new law business structures.

Committee activities

The Committee meets during the IBA Annual Conference and will post news regarding various developments in different jurisdictions on the IBA website. The Committee led two sessions at the IBA Annual Conference in Washington, DC and worked closely on other sessions with the Professional Ethics Committee and Law Firm Management Committee.

International Bar Association Conferences 2017




5–7 MARCH 2017 INTERCONTINENTAL, LONDON, ENGLAND
18th Annual International Conference on Private Investment Funds (SOLD OUT)

6–7 MARCH 2017 CLARIDGES, LONDON, ENGLAND
22nd Annual International Wealth Transfer Practices Conference (SOLD OUT)

15 MARCH 2017 COLEGIO PUBLICO DE ABOGADOS DE LA CAPITAL FEDERAL, BUENOS AIRES, ARGENTINA
2nd Annual Latin American Bar Leaders' Summit

15–17 MARCH 2017 SHERATON BUENOS AIRES HOTEL & CONVENTION CENTER, BUENOS AIRES, ARGENTINA
Mergers and Acquisitions in Latin America: New Opportunities in a Changing Scenario

29 MARCH 2017 LOS ANGELES, USA
IBA/ABA Environmental Summit of the Americas

29–31 MARCH 2017 JW MARRIOTT RIO DE JANEIRO, RIO DE JANEIRO, BRAZIL
9th Annual Real Estate Investments Conference

30–31 MARCH 2017 THE MILLENNIUM HOTEL MAYFAIR, LONDON, ENGLAND
Challenges for the Insurance Industry Conference

30–31 MARCH 2017 MILAN MARRIOTT HOTEL, MILAN, ITALY
20th Annual International Arbitration Day

5–7 APRIL 2017 BARCELONA, SPAIN
IBA/ABA 17th Annual Tax Planning Strategies – US and Europe

23–25 APRIL 2017 LE PARKER MERIDIEN, NEW YORK, USA
28th Annual Conference on the Globalisation of Investment Funds

24–25 APRIL 2017 HOTEL DE ROME, BERLIN, GERMANY
28th Annual Communications and Competition Conference

26–28 APRIL 2017 THE SWISSÔTEL, QUITO, ECUADOR
RMMLF/IBA International Mining and Oil & Gas Law, Development & Investment

27–28 APRIL 2017 INTERCONTINENTAL, LISBON, PORTUGAL
IBA Annual Employment and Discrimination Law Conference 2017

3–5 MAY 2017 MARRIOTT HOTEL, ZURICH, SWITZERLAND
IBA Annual Litigation Forum Conference

7–9 MAY 2017 MARRIOTT HOTEL, COPENHAGEN, DENMARK
23rd Annual IBA Global Insolvency and Restructuring Conference

9 MAY 2017 CUSTOMS HOUSE, PORTO, PORTUGAL
Pre-International Competition Network Forum

9–10 MAY 2017 JW MARRIOTT, WASHINGTON, DC, USA
33rd Annual IBA/IEA Joint Conference on International Franchising

17–19 MAY 2017 THE SHERATON HOTEL, LISBON, PORTUGAL
20th Annual IBA Transnational Crime Conference

17–19 MAY 2017 SWISSÔTEL, TALLINN, ESTONIA
34th International Financial Law Conference

18–19 MAY 2017 HILTON SÃO PAULO MORUMBI, SÃO PAULO, BRAZIL
5th Biennial Technology Law Conference

21–23 MAY 2017 MARRIOT HOTEL, PARIS, FRANCE
3rd IBA Global Entrepreneurship Conference

24–25 MAY 2017 BELFAST WATERFRONT, BELFAST, NORTHERN IRELAND
IBA 12th Annual Bar Leaders' Conference

6–7 JUNE 2017 THE PLAZA, NEW YORK, USA
16th Annual International Mergers & Acquisitions Conference

7–9 JUNE 2017 SHERATON RIO DE JANEIRO HOTEL, RIO DE JANEIRO, BRAZIL
Maritime and Transport Law Conference: Shipping, Energy and Commodities

13–14 JUNE 2017 OECD, PARIS, FRANCE
15th Annual IBA Anti-Corruption

14–16 JUNE 2017 MIAMI, USA
IBA/ABA 10th Annual US – Latin America Tax Planning Strategies

15–16 JUNE 2017 FOUR SEASONS HOTEL, SEOUL, SOUTH KOREA
13th IBA Competition Mid-Year Conference

16–17 JUNE 2017 WESTIN GAS LAMP QUARTER HOTEL, SAN DIEGO, USA
5th Annual IBA World Life Science Conference

21–23 JUNE 2017 WALDORF HILTON, LONDON, ENGLAND
6th IEL/SEERIL International Oil and Gas Law Conference

22–23 JUNE 2017 MARRIOTT HOTEL, PARIS, FRANCE
3rd Annual IBA Investing in Africa Conference

10–14 JULY 2017 VIENNA, AUSTRIA
3rd IBA-VIAC CDRC Negotiation and Mediation Competition

8–9 SEPTEMBER 2017 ST REGIS, FLORENCE, ITALY
21st Annual Competition Conference

15–16 SEPTEMBER 2017 HILTON BRUSSELS GRAND PLACE, BRUSSELS, BELGIUM
6th Construction Projects from Conception to Completion Conference

8–13 OCTOBER 2017 INTERNATIONAL CONVENTION CENTRE, SYDNEY, AUSTRALIA
IBA Annual Conference 2017

IBA 2017 Sydney

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4–5 NOVEMBER 2017 LONDON, ENGLAND
IBA-ELSA Law Students' Conference 2017

6–7 NOVEMBER 2017 SÃO PAULO, BRAZIL
Latin American Anti-Corruption Enforcement and Compliance

10 NOVEMBER 2017 MOSCOW, RUSSIAN FEDERATION
9th Annual 'Mergers and Acquisitions in Russia and CIS' Conference

15–17 NOVEMBER 2017 LONDON, ENGLAND
8th Biennial Global Immigration Conference

Full and further information on upcoming IBA events for 2017 can be found at: **bit.ly/IBAConferences** **@IBAevents**

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Professional Ethics outeach programme continues 13–14 March 2017, Buenos Aires

On behalf of the Professional Ethics Committee, we are very pleased to continue supporting an outreach programme in various forms. The Committee has already completed its participation in outreach programmes in the Pacific and Caribbean, and in March 2016, Rio de Janeiro.

We are delighted to support and be involved in another innovative outreach programme to be held on 13–14 March in Buenos Aires.

The programme is organised by the Buenos Aires Bar (*Colegio Público de Abogados de la Capital Federal*) and supported by the Colegio de Abogados de la Ciudad de Buenos Aires; both entities are current members of the IBA.

The programme, entitled '21st century challenges and threats faced by legal practitioners: a multijurisdictional perspective', will consist of six sessions dealing with ethical hot issues, such as:

- conflicts of interest within the scope of the legal profession: interpretations, trends and regulations set by law and bar associations;
- safeguarding of the professional secret: its scope and interpretation in Argentina and other jurisdictions – the value of the label 'private and confidential' and differences with respect to this between civil and common law systems regarding 'attorney-client privilege';
- ethics principles applicable to the practice of law under different formats: from traditional practice, work in big law firms and in-house law practice in companies, and the different – if any – standards to apply according to each situation, in addition to the case of attorneys who become members of the board of directors of client companies, and the situation of general counsel and lawyers subject to labour laws;
- referral fees and different types of payments to colleagues and other third parties for work dragging;
- advertising and promotion of legal services in the current world and their limits; the offer of multidisciplinary services; limits to journalistic notes and other publicity with traditional and non-traditional media; and the use and abuse of the internet and social networks;
- the association of attorneys with other professionals; neighbour countries' experiences and current vehicles to offer professional services;
- modern misconduct that bastardises the profession, and disciplinary powers and application of sanctions by judges and bar associations; and
- lawyers and corruption.

There will be no charge for attendees, although registration is mandatory.

The event will take place the same week as the IBA Latin American Bar Leaders' Summit (15 March 2017) and the IBA M&A in Latin America Conference organised jointly by the Latin American Forum and the Corporate M&A Law Committee (16 and 17 March 2017), providing a great occasion to come to Buenos Aires, stay the whole week and participate in a number of professional events.

We are also very pleased that, in addition to the anticipated presence of the Professional Ethics Committee leadership consisting of Marty Kovnats (Chair from 1 January 2017), and Rachel McGuckian and Carlos Valls (Co-Chairs), Alberto Navarro (past Chair of the PEC) and Steven Richman (Advisory Board Member), we also expect the presence of both Horacio Bernardes (IBA Vice-President) and Michael Reynolds (IBA Past President).

To date, around 25 prestigious local and international speakers have been confirmed, including private practitioners, general counsel, academics, judges and international firms' local practitioners. Regional bar leaders from neighbouring countries are also expected to come.

We very much look forward to this event as part of the Professional Ethics Committee outreach initiative, which will not only benefit the attendees, Argentina and regional bars, but also the Committee membership and the entire legal profession. We expect to record all panel discussions to make them available to our membership on the committee's website.

If you have any questions please contact Alberto Navarro at anavarro@navarrolaw.com.ar.

IBA2016 18–23 SEPTEMBER WASHINGTON, DC

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

CONFERENCE REPORTS

Professional Ethics Committee and Alternative and New Law Business Structures Committee Sessions

Both the Professional Ethics Committee and Alternative and New Law Business Structures Committee (formerly the Alternative Business Structure Committee) were very active at the 2016 IBA Annual Conference.

The Professional Ethics Committee's representatives participated in seven sessions, an increase of two on the previous year. Alternative and New Law Business Structures Committee representatives also participated in a significant number of sessions.

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Law firm networks: strength in numbers – wishful thinking or the future of law

Presented by the Alternative and New Law Business Structures Committee and the Law Firm Management Committee

Monday 19 September 2016

Session Chair
Stephen McGarry *Association of International Law Firm Networks, Houston*

Moderator
Amar Sarwal *Association of Corporate Counsel, Washington, DC*

Speakers
Dalton Albrecht *Couzin Taylor, Toronto*
Stephen Denyer *The Law Society of England and Wales, London*
Nancy Jessen *UnitedLex, Washington, DC*
Fernando Peláez-Pier *Hoet Peláez Castillo & Duque, Caracas*

The session was divided into two parts. The first part involved each panellist discussing his or her firm's structure and the second part consisted of two case studies. The purpose of this session was to explore the different types of networks that provide global legal services; the diversity of the panel provided a rich discussion.

Stephen McGarry introduced the session and explained that there are different levels of networks, such as best friends networks, more structured networks (eg, Lex Mundi) and vereins (eg, Dentons). McGarry highlighted that the different types cannot be grouped together in the same category or listed in order of superiority. The effectiveness of a structure is largely dependent on whether it meets expectations and fulfils objectives in particular circumstances.

Dalton Albrecht spoke about EY and how the law firm part of the company operates and is integrated. Practice areas are linked and EY can move quickly from a client engagement point of view. While there are relatively extensive protocols to engage a new client, once a client is engaged, then EY is able to provide a smooth, quick and seamless service across the different offices and practice areas.

Fernando Peláez-Pier provided some insight into being a member firm of a network such as Lex Mundi. The network works hard to put together training and development programmes, distribute best practice guidance and organise annual meetings to maintain communication. Being part of the network can be demanding because it involves a fee and requires active engagement. The network supervises member firms and reviews membership to determine if firms are meeting their obligations.

Nancy Jessen, as a representative of an alternate legal services provider, offered some insight from the perspective of a non-lawyer. Jessen's work involves helping firms to determine their priorities and consider different operational models and how they should use internal and external networks. Jessen spoke about the growth of alternative legal service providers and how they complement services that law firms provide, rather than engage in legal practice themselves. Amar Sarwal explained that we should think about it as unlocking capability

rather than labour arbitrage. Jessen agreed and said it is important to recognise that law firms and alternative service providers commonly service the same client.

Stephen Denyer spoke about facilitating cross-border legal work and how he set up a global relationship for Allen & Overy. He explained that commentators previously said that there were two models – the best friends model (eg, Slaughter and May) and the global model (eg, Freshfields) – but that this is not the case any more. Firms need to think about how they are going to deliver a global service. Questions to consider include: Can we deliver a global service ourselves or are we going to do it through relationships with other firms? Who is going to be responsible for the relevant jurisdictions? How will we develop relationships, for example, through the law society, IBA and/or hosting events so firms bond and feel embraced? How will we back up these activities, for example, by establishing a sophisticated database, participating in joint pitches and/or developing techniques that measure contribution and client satisfaction? Denyer commented that the process will evolve as the firm progresses and the longer the firm engages in business development activities, the better it will become.

After some further discussion on the above topics, the panellists turned to considering two case studies for which the panellists discussed how they would assist the client in the respective scenarios.

Case study 1 regarded a company with operations in 26 countries. Several unsubstantiated allegations were made against the company about fraudulent records, slave labour and bribery, which caused the company's stock price to spiral downwards.

Dalton proposed that EY legal, consulting and accounting work together. Among other aspects, they could look at transfer pricing methodology and issue an opinion or report that could be privileged. The work could be done for a fixed fee that would cover all offices involved in the engagement.

Peláez-Pier, among other options, would recommend an alternative legal service provider and provide one point of contact, unless the client wanted different contacts in different jurisdictions. Jessen would scope the work and advise on the sort of team that would be required. Jessen's firm could also be engaged to assist with document review and to conduct portfolio analysis.

Denyer said that he would be the single point of contact, but would provide information about the experience and reputation of lead firms in relevant jurisdictions and offer the expertise of specialised desks in different countries.

Case study 2 involved a prospective transaction in which an American company was looking to acquire three target companies in low-tax jurisdictions in Europe. Each panellist provided separate responses and solutions, including recommending experts in the relevant jurisdictions, assisting with due diligence and document or regulatory review, and advising on tax structures and operational model efficiency.

Key takeaways:

- There is no one-size-fits-all approach; different firms have different objectives and thus different models will be appropriate depending on the circumstances.
- Each model has advantages and disadvantages; while there is some overlap with the services the models can provide, each one has a different offering.
- In determining which model to adopt, lawyers need to listen to their clients. They also need to consider their operational goals and challenges and how they will be measured in the market.
- Each firm needs to do its due diligence before it decides which strategy to pursue and which firms to develop relationships with so it can make informed decisions.

Developing relationships is an iterative process that requires ongoing investment.

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Departures from and lateral hires into law firms

Presented by the Professional Ethics Committee, the Alternative and New Law Business Structures Committee and the Law Firm Management Committee

Tuesday 20 September 2016

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Martin E Kovnats *Aird & Berlis, Toronto*

Speakers
Robert Bourns, *TLT and the Law Society of England and Wales, London*
Harvey Cohen *Dinsmore & Shohl, Cincinnati*
Carlos Dominguez *Hoet Peláez Castillo & Duque, Caracas*
Joseph M Donley *Clark Hill, Philadelphia*
Rachel McGuckian *Miles & Stockbridge, Rockville*
Koos Pretorius *ENSafrica, Cape Town*
Adam J Tejeda *K&L Gates, New York City*

In his opening address, Alberto Navarro welcomed the audience and indicated that each speaker would respond to individual questions that approached the panel topic from a particular perspective. He indicated that the goal was to explore several interrelated issues such as: does a client belong to the law firm or a particular lawyer, how do professionalism and contractual obligations interrelate, and what are the contexts of a lawyer's departure from the normal course of departure to a firm's failure? In completing the introduction, Martin E Kovnats noted that the panellists would be exploring the obligations that lawyers have to clients, other lawyers and their professional bodies in different jurisdictions, both civil and common law.

Adam J Tejeda began by emphasising that in the United States, attorneys are duty bound to do what is in the best interest of the client and that the lawyer has no property rights in its client. Therefore, no actions taken by the leaving lawyer, the old law firm or the new law firm can impair the client's ability to choose counsel. This led to an explanation of the specific duties of the aforementioned parties. After noting that other panellists would be exploring in greater detail the topic of complying with the duty to notify the client of an attorney's departure, Tejeda noted the fine line between notification and solicitation – which often comes down to timing. Tejeda concluded by emphasising that there are many obligations to comply with, including ethical rules and rules under contract, which may vary depending on the governing document of the business organisation (eg, a partnership agreement). Navarro and the panel members discussed how the situation would be complicated in jurisdictions with limited enforcement of the rules of professional conduct, such as those often found in Latin and South America.

Rachel McGuckian then explored the rules regarding announcements and the transfer of clients when a partner or group of partners leaves an organisation. McGuckian explained Model Rule 1.4 of the American Bar Association, which relates to a lawyer's responsibility to keep clients informed in advance of a departure and that when deciding which clients must be informed of

a lawyer's departure, the US rule is that each client with a substantial personal relationship with the leaving lawyer must be informed. This is the person who is the client's trusted adviser, which is a subjective standard. Kovnats then asked the panellists, in their view, whether the client 'belongs' to the lawyer or to the firm and the panel agreed that while clients are not chattels, lawyers act on behalf of their law firms, whether as fiduciaries or otherwise, and therefore the relationship with the client is generally on behalf of the firm.

Carlos Dominguez proceeded to explore the issue that although there may not be a property right in a client, what about work-in-process and receivables? Dominguez reiterated that the client's rights are paramount and the client will be the final decider and can discharge the lawyer or firm at any point. That said, his personal view was that in Venezuela and potentially in Latin and South America, the firm has certain rights due to its investment in branding and client development, and as such, has a 'better' right to keep the client than the lawyer. Dominguez then explored a range of factors that will affect the client's decision to choose a law firm, including expertise, relationships, the location/jurisdiction of offices, seniority of the lawyer leaving and potential conflict of interest.

Harvey Cohen then addressed what procedures apply as to the timing of notice to a law firm of a lawyer's departure, the timing and location of any discussion of other lawyers and staff, and the conflicts issues that can arise. Cohen indicated that best practice is for law firms in which a lawyer is incoming to have a set of policies and procedures developed to address these issues, which can specify the requirement and content for written directions from clients, the use of off-site facilities for transition periods in order for the new law firm to avoid the appearance of aiding or abetting any possible breach of fiduciary duties of the departing lawyer to its old firm. Cohen indicated that the old firm should consider having a risk questionnaire, its own loss prevention counsel and an exit interview with the departing lawyer, and should send disengagement letters to each client, if such a client has chosen to follow the departing lawyer to the new law firm. Insurance companies that insure many large US law firms may require law firms to have certain procedures and questionnaires to avoid or otherwise limit liability with respect to hiring and departing lawyers.

Joseph M Donley followed by considering the implications of two or more firms being merged with respect to conflicts, accounts receivable and choice of law in the context of an international merger. Donley explained the duty to make sure that there are no conflicts with clients of the two merging firms, as described in principal 3.1 of the IBA International Principles on Conduct for the Legal Profession. When information must be shared between firms for the purpose of conflict checks, only the identity of the client and a brief summary of the matter should be shared, and only to the extent necessary to determine if a conflict exists. With mergers involving multiple jurisdictions, the firms must comply with all professional conduct rules in all jurisdictions, and in the case of conflicting/competing rules in common law versus civil law jurisdictions, they have to work out how to comply with each to satisfy both sets of rules. Donley concluded by discussing the Dewey & LeBoeuf dissolution, in which former partners were pursued for debts of the firm, and the new law firms to which such former partners landed were also pursued for fees paid by clients when the fees followed lawyers to the new firm.

Robert Bourns then addressed the question of the internal approach within a firm when a lawyer has left a particular firm, or when a new lawyer has joined a particular firm. Speaking in his capacity as a practitioner, Bourns explained that, in the United Kingdom, courts have been very active to enforce contractual obligations regarding non-competition as an associate or partner. Bourns emphasised that effective communication within the firm and with clients is essential. The old firm is entitled to take some time to respond and then to contact clients in accordance with professional rules. Bourns also suggested that firms consider the impact on the lawyers and employees staying at the firm, as the firm's credibility may be impacted if a firm mistreats a departing lawyer. There is an opportunity to empower the remaining lawyers for increased opportunity created by the departure of a former colleague, and equally, an opportunity for law firms to build relationships with existing clients. With regard to the new law firm, existing lawyers and employees can be unsettled by a new arrival, and a lot of work is required to integrate and mentor new lawyers, while not undermining the home-grown talent as a new lawyer is leapfrogging normal progression.

Koos Pretorius concluded the panel's prepared remarks by addressing the role of firm culture and competing firm subcultures in the context of multijurisdictional or international law firm mergers. Pretorius provided a regional perspective from the African continent, where his law firm completed a merger across eight countries and 15 offices, with an objective to achieve full integration in operations, finances and brand. Pretorius explained some of the challenges that were addressed in the merger, including different legal regimes (French, English, Portuguese, etc), cultural differences, technology differences, compensation in a single profit pool, and conflicting rules and duties of professional conduct in various jurisdictions. Pretorius indicated that emphasis was placed on clients being clients of the firms, not of a particular lawyer, country or business unit. This meant that lawyers across all offices were required to establish relationships with and gain entry points into client groupings and service their requirements in a consistent manner with the same standards of quality and efficiency across all jurisdictions.

The session then concluded with some additional questions and answers from the audience, followed by concluding remarks from the Co-Chairs thanking all of the panellists and audience members for being a part of an interesting session with such a lively and enthusiastic discussion.

The panel discussion was featured in an article in the 21 and 23 September 2016 editions of *IBA Daily News* (the Washington, DC Annual Conference newspaper). Copies of which can be viewed on the IBA website.

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The changing landscape: key strategic challenges and choices

Presented by the Law Firm Management Committee

Tuesday 20 September 2016

Session Co-Chairs
Paul Cronheim *De Brauw Blackstone Westbroek, Amsterdam*
Charles Martin *Macfarlanes, London*

Speakers
Daniel Daeniker *Homburger, Zurich*
Adam Emmerich *Wachtell, Lipton, Rosen & Katz, New York*
Rachel Eng *WongPartnership, Singapore*
William H Voge *Latham & Watkins, London*
Jonathan Zhou *Fangda Partners, Shanghai*

This session considered major challenges and choices faced by the legal profession. The diversity of the distinguished panel made for a particularly interesting discussion as each panellist offered a different perspective, not only in terms of jurisdiction but also with respect to law firm models.

Charles Martin introduced the panellists and gave a brief introduction to the session, which covered the following topics:

- globalisation: multinationals versus independents, expansion versus consolidation or international networks, firm size and branding;
- people: recruitment, retention, diversity, millennials, remuneration and culture;
- clients: loyalty, and procurement and pricing; and
- disruption: digital disruption and disruption of the legal profession by the 'Big Four' and alternative legal service providers.

The format of the session made it very engaging. The discussion of each topic began with an introductory conversation/debate between two panellists, which was followed by a general conversation between panellists. There were also several questions from the audience.

Paul Cronheim introduced the first conversation, which was between Adam Emmerich and William H Voge, and asked: is globalisation frightening or does it provide opportunities? Voge spoke about the decision by Latham & Watkins to become a global law firm and the drivers of that decision, such as wanting to provide younger partners with exciting opportunities and not wanting to be marginalised as a firm. Emmerich explained that, in contrast, Wachtell has fostered relationships with external firms and creates a global team on an ad hoc basis instead of expanding globally.

Both Voge and Emmerich agreed that not many firms have the option of being a local firm and solely operating in their home jurisdiction any more, given how the world has globalised. Emmerich explained that independent firms tap into global capability by carrying around 'globalisation baggage', which includes knowing who to call and having a good rapport with key contacts.

The second conversation was between Rachel Eng and Daniel Daeniker, and considered people. The speakers started by discussing millennials and the new generation of lawyers who want to be taken seriously. Young associates want constructive feedback and work-life balance, which can be difficult when technology makes you contactable 24/7 and clients want a 24/7 service. Eng noted that millennials are looking for more than big pay cheques and firms need to think about how to motivate them. Voge commented that fewer are wanting to become partners and more are asking for different career paths, so the 'up or out' approach is no longer appropriate.

Eng and Daeniker also spoke about diversity and how it is probably the most important management topic in contemporary times. Daeniker said that there are many reasons why women leave, but flexibility is key in fostering loyalty. Eng indicated that many law firms have schemes in place to support female lawyers, but the schemes do not always function effectively. She felt that needed to be addressed because injecting diversity into an organisation can have many positive impacts on its dynamic.

The conversation then turned to a discussion about values. Daeniker's proposition was that values are what you aspire to and culture is what you have. The panel discussed compensation structures and to what degree they can be used to influence behaviour, loyalty and team spirit, and how they reflect the values of an organisation.

After a short break, the second part of the session kicked off with a conversation between Jonathan Zhou and Emmerich about clients. Zhou outlined two 'rules' with respect to clients: you need to be selective because you cannot work for everyone, and it is probably best not to work on every matter a client has, otherwise they may not appreciate your value. Cronheim's question about whether the panellists had a preference to work with boards or a general counsel prompted a discussion about the procurement process and managing the engagement.

Emmerich said that working with either can be satisfying, both in terms of relationships and financial gain, and warned that you can be pigeonholed if you enter at the wrong level. Zhou gave some insight into the strict procurement process for state-owned enterprises and how they are generally driven by price rather than loyalty. The conversation opened up an interesting discussion around whether law firms have market power and the common tension within a client entity between those who want low legal fees and those who want a good legal service.

The fourth conversation was between Voge and Daeniker. Voge started by noting that disruption is a topic that everyone in the room has in common. The 'Big Four' have very serious aspirations to practice law in the next five to 15 years, which will change how lawyers work. Zhou was not worried about the 'Big Four' because the most important factor of their success is scalability, but he was more worried about the impact of improvements in technology. Daeniker was confident that there will still be a need for a human element in the legal service chain; technological advancements may replace routine tasks but not sophisticated legal analysis.

Key takeaways:

- The change that the legal profession is facing creates both opportunities and challenges.
- Given how the world is globalising, the vast majority of corporate law firms will need to have international capability to survive. The best way to build such capability will depend on the circumstances of each firm.
- Regardless of how a law firm decides to globalise (eg, to become a global firm or remain independent), it needs to have a strategy.
- To attract and retain talent, law firms will need to be in tune with the new generation of lawyers.
- Diversity is a very important management consideration. Understanding the value of diversity and encouraging and supporting it will lead to a more dynamic workplace. The culture and values of a firm are important factors.
- Disruption will change the legal profession. In the face of change, the profession will also need to change. We cannot afford not to.

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Barbarians at the gate: the attack on professionalism

Presented by the Bar Issues Commission, the Forum for Barristers and Advocates, the Judges' Forum, the Professional Ethics Committee and the Young Lawyers' Committee

Tuesday 20 September 2016

Session Co-Chairs
Deborah Enix-Ross *Debevoise & Plimpton, New York, USA; Officer, Bar Issues Commission*
Steven M Richman *Clark Hill, Princeton, New Jersey, USA; Chair, Alternative Business Structures Committee*

Speakers
Geraldine Clarke *Gleeson McGrath Baldwin, Dublin, Ireland; SPPI Council Member*
Leonardo Melos *Bergstein Abogados, Montevideo, Uruguay*
Monty Raphael QC *Peters & Peters, London, England; Chair, Cybercrime Subcommittee*
Meg Strickler *Conaway & Strickler PC, Atlanta, Georgia, USA; IBA Liaison Officer, War Crimes Committee*
Claudio Undurraga *Prieto y Cia, Santiago, Chile; Latin American Regional Forum Liaison Officer, Professional Ethics Committee*
Eilidh Wiseman *The Law Society of Scotland, Edinburgh, Scotland; IBA Council Member, The Law Society of Scotland*

Part I: ethics versus professionalism

As pressure for work for lawyers increases as a result of globalisation and non-lawyers performing legal work, lawyers are becoming more competitive for business than ever before. Adversarial relationships, long marked by aggression tempered by professional courtesy, are more and more marked by hostility instead. This is not limited to the courtroom or in arbitration, but transactional negotiations at all levels.

Concern over the 'new normal' of behaviour has led some to seek to equate breaches of professionalism with breaches of ethical rules of conduct. Particularly in the international context, cultural issues also become important: one jurisdiction's acceptable behaviour is another jurisdiction's sanctionable conduct. Where are the lines? This programme explored these issues through two role-playing scenarios, in dispute resolution and the corporate world, with an informed discussion and commentary from the panellists, and ample opportunity for active audience participation and engagement.

Session Chair
Hon Justice Martin Daubney *Supreme Court of Queensland,*
Brisbane, Queensland, Australia; Chair, Judges' Forum

Speakers
Mariano Batalla *Batalla Salto Luna, San Jose, Costa Rica; Website*
and Newsletter Officer, Law Firm Management Committee
Maru Cortazar *Appleseed, Mexico City, Mexico*
Odette Geldenhuys *Webber Wentzel, Cape Town, South Africa*
Jim Jones *Pro Bono Institute, Washington, DC, USA*
Marc Kadish *Mayer Brown, Chicago, Illinois, USA*

Part 2: attack on professionalism

Are the conventions that have underpinned the practice of law now challenged by new paradigms or have they been displaced? Do traditional modes of entry into the profession meet contemporary expectations of law graduates? How has the rise of consumerism affected the ways in which lawyers act, advise and charge, and what are the implications for professional standards? In the 21st century, is a lawyer's duty to the administration of justice truly paramount or has it been overtaken by other duties? What does it now mean to be a lawyer? Is it any different now to be a member of the independent referral bar? Is the ancient model of the independent barrister – a sole practitioner who is expected to be honest, honourable and available to be retained by either side to a dispute – bad for business? Or should changes over the past 20 years simply be seen as the inevitable development of a profession that can trace its origins back to a time before Chaucer? And what is the response of judges and the courts – are they attuned to modern professional attitudes, practices and expectations? These questions, and more, were examined in a highly interactive session featuring international judges and bar leaders.

This programme featured several scenarios and addressed the issue of ethics versus professionalism by testing the limits of conduct, and also raised issues of the lawyer's personal reaction versus obligations of competency and to fully represent the client. The programme also highlighted whether the conduct reaches ethical (and disciplinary levels).

The first scenario portrayed a contract negotiation meeting involving two lawyers, each with their respective clients, and involved name calling, posturing, making accusations of lying, aggressive gestures and sexist remarks by both lawyers and clients alike.

The second scenario portrayed a courtroom scenario involving two lawyers and a judge interrupting one another, making accusations of lying, sexist remarks, inappropriate gestures and accusations of incompetence.

The third scenario portrayed an arbitration proceeding involving two lawyers, each with their respective clients, and an arbitrator, and involved name calling, posturing, making threats of physical violence, aggressive gestures by lawyers, clients and the arbitrator.

Following each scenario the audience was asked to consider a series of questions including: Do ethics rules really cover all these situations?

Should they?

- If not, is there value to codes of professionalism? Do such 'soft law' codes have value?
- Are the rules really all the same? Are they filtered through cultural/national 'traditions' and therefore have different applications?
- Is behaviour getting worse?
- At what point does behaviour become critical?
- Are there concerns that too much regulation impinges on free speech? Or zealous advocacy?
- Have we become too sensitive? Or are we too tolerant of bad behaviour?

Session Chair
Jill Yates *McCarthy Tetrault, Vancouver*

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How much is too much? Counsel fees and third-party funding in consumer class actions/collective redress

Presented by the Consumer Litigation Committee, the Judges' Forum and the Professional Ethics Committee

Tuesday 20 September 2016

Moderator
Professor Janet Walker *Osgoode Hall Law School and Arbitration Place, Toronto*

Speakers
Susan Dunn *Harbour Litigation Funding, London*
Myron Steele *Potter Anderson & Corroon, Delaware*
Jacob Varghese *Maurice Blackburn Lawyers, Melbourne*

Counsel fee arrangements

The session began with an overview of permitted counsel fee arrangements in Australia, England and the United States. Arrangements discussed included hourly fees, contingency fees, result-based uplift arrangements, success fees and bonuses. The duties owed to the class and court were discussed. The fact that fees must be approved by the court as fair and reasonable and in the best interests of the class in Australia, England and the US was confirmed. In Australia, an independent cost specialist who performs a forensic review of total fees paid is usually involved in fee approval. This often leads to a reduction in the fee paid. In the US, courts' fee approval is informed by an analysis that includes consideration of the novelty of the issue/innovation by counsel, level of expertise, size of the fund, regular hourly rate for others in the field, and the rate and time spent by counsel in this case.

Amount of counsel fees

In Australia, the highest fee paid to counsel was in a case on behalf of victims of bush fires in Australia. One hundred and seventy-three people died and there was extensive property damage. The allegation was that the power company had allowed a line to fall. The case settled for $800m, of which $75m went to counsel in fees.

In the US, the larger funds usually lead to smaller percentage recovery. The largest total amount of counsel fees paid involved a $3bn fund, of which $300m went on fees. Another example is a case in which there was a $35m fund of which $15m went on fees, so a much higher percentage recovery.

There are many practical considerations that go into whether a plaintiff's firm can fund a piece of litigation. These include:

- the duration of time needed to cover the costs;
  - the reality can be that a 25 per cent uplift (see above regarding Australian arrangements) doesn't cover the overdraft on the first year of carrying the costs of a case;
  - many firms cannot forego paying themselves for the life of a case; and
  - in a small firm, there are few individuals across whom risk can be spread;
- the amount of the costs that are being covered (eg, expert fees, own work in progress (WIP) and adverse costs);
- whether it is an important public interest case; and

• the risk involved in the case.

As a result of many of these factors, there are some in Australia who are pushing for contingency fees to be permitted. Contingency fees are already permitted in the US, Canada and England. Contingency fees reduce the impact of the above factors on counsel by increasing the total possible award to counsel.

Litigation funding

Litigation funders will cover all costs and share in the proceeds if there is a win. Harbour is currently funding in 13 jurisdictions around the world and takes 7.5–50 per cent of the proceeds depending on the size of the funding obligation and the budget for the work. It is possible to negotiate lower percentages, and it does happen that litigation funders compromise their fees in order to facilitate a settlement. Litigation funders only fund; they depend on the lawyer's presentation of the case and budget.

Harbour's focus when deciding whether to fund a case is to assess what is the minimum value that could be obtained (on a settlement or by order of the court) and what is counsel's budget for the case before looking at the merits of the case. The litigation funder must be good at valuing a case/assessing what it is worth.

The criteria a court uses to assess whether fees should be approved are unchanged by the involvement of a third-party funder. This suggests that the court is uninterested in the burden the case imposes on plaintiff's counsel; that doesn't change what remuneration is fair for plaintiff's counsel.

In Australia, until recently, the contract with the funder was a private arrangement. However, judges have begun to ask about litigation funding. As a result, counsel in Australia are trying to develop the law, including to have a litigation funder appointed as a creature of the court. In this way, there would not need to be a contract with individual members of the class. Litigation funding is a reality in most cases in Australia because of the small uplift on fees that is permitted. The amount that goes to the litigation funder is usually between 30–50 per cent. It is generally not the case that more control leads to better recovery; rather, the percentage depends on the value of the case and size of the budget. It is true that, by contrast with the rest of the world, litigation funders have more control in litigation in Australia. In Australia, funders are involved in settlement discussions. If they disagree with an offer, the issue is pushed to an independent barrister. Once a plaintiff has no risk, the plaintiff will often act without reference to risk of loss. The independent barrister is to countervail this tendency.

Litigation funders generally do not want control. Funders want counsel's views (and not the funders' own views) to be front and centre. If asked, funders will try to be useful but do not want to substitute their own views for counsel's views.

From an ethical perspective, litigation funders are third parties to the litigation. Funders cannot tell plaintiffs what to do or think and cannot make decisions. Funders can assist by giving context about uncertainty.

There are institutional investors looking at litigation funding as an opportunity. Often pension funds have very aggressive counsel; these are looking at litigation funding.

Generally, the role of a mediator is to get people to common ground based on facts a judge would apply. There is generally an exchange of information. There is generally no report to the court on mediation in Delaware or Australia. Mediators generally do not weigh in on costs and do not cast judgment on fees. Sometimes they will comment on the uplift and fees in the context of whether there is room for a settlement, but this is in the vein of applying pressure to settle, not on the issue of overall fairness.

Maurice Blackburn is starting to act as a litigation funder on cases in Europe, Australia, Japan, New Zealand and Canada. Litigation funding is based on a similar set of skills to plaintiff side litigation – making judgments about value, budget and merits. Lawyers are better equipped to do this than bankers. This is a business line, and so Maurice Blackburn does not fund its own cases. It is not acting as the driver on the cases it funds, but as navigational assistance.

There are important ethical issues raised by litigation funding. There was a White Paper produced by the Office of the Disciplinary Counsel in the US in February 2012. This is a good source of the law on this issue, including the role of the lawyer in this process. There are some concerns as they relate to Model Rules 1.7–1.11 relating to sharing information with the funder/informed consent; as well as 2.1 relating to the ability to exercise judgment and the role of candid legal advice, as well as the possibility of waiving privilege. There may also be conflicts issues that need to be identified.

The need for litigation funders, in the context of the possibility a litigation funder will refuse to assist with a case, could theoretically stifle the daring and creativity that collective redress/class actions need to proceed. Harbour funds two to five per cent of the cases that apply for funding, so it is true that there are many cases that shouldn't go forward (and don't). However, funding can help to create environments where cases that need to proceed can proceed.

One flashpoint in the debate on the internationalisation of collective redress is the fees that are earned by class counsel in North America. In Europe and elsewhere, where new forms of collective redress are being developed, there is a concerted rejection of the 'scandalous' levels of compensation for US class counsel. In North America, high fees are regarded as an integral feature of appropriate remuneration for the work required to achieve a good result on difficult cases, together with the need to finance the work, often for long periods before receiving an award of fees, and the risk involved. Third-party funding is also controversial. This session discussed fee and funding structures in various jurisdictions around the world, and the viability of alternatives that have been proposed.

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Creating lawyers who can work across civil and common law jurisdictions

Presented by the Academic and Professional Development Committee, the Bar Issues Commission and the Professional Ethics Committee

Wednesday 21 September 2016

Session Co-Chairs
Soledad Atienza Becerril *Instituto de Empresa (IE) Law School, Segovia*
Sarah Hutchinson *BARBRI International, London*

Speakers
Hermann Knott *Luther, Cologne*
Péter Köves *Lakatos Köves és Társai Ügyvédi Iroda, Budapest*
Sebastian Ramos *Ferrere, Montevideo*
Professor Erika Techera *The University of Western Australia, Crawley*
Carlos Valls Martinez *Fornesa Abogados, Barcelona*

This session focused on the topic of the legal, ethical and cultural issues of lawyers who work across civil and common law jurisdictions, and how to address these issues in law schools and lawyer training.

Sara Hutchinson, Session Co-Chair and a managing director at BARBRI International, introduced the panel and presented the information provided by the in-house legal team from Royal Shell concerning the need they had for lawyers who were capable of understanding different legal systems. This was followed by Session Co-Chair Soledad

Atienza, Vice Dean of IE Law School in Spain, who presented the results and conclusions of a survey conducted for IBA member law schools on their level of internationalisation in order to understand their situation regarding training graduates to work in jurisdictions from different legal systems. Erika Techera, Dean of Law at The University of Western Australia, then focused on the reasons for law graduates to understand different legal systems and ways for law schools to implement them. The survey to IBA member law firms was presented and commented on by Sebastian Ramos, a senior associate at Ferrere in Uruguay, and was followed by Péter Köves, a partner at Lakatos Köves in Hungary, who spoke from the point of view of the Bar Issues Commission. Hermann Knott, a partner at Luthe in Germany, presented the differences in civil and common law civil proceedings. Finally, Carlos Valls discussed the ethics issues concerning common law and civil law jurisdictions. The session was followed by a debate, in which Frederick Davis commented on the importance of training lawyers on international criminal law procedure.

Law firm global expansion: structure, governance, ethics and tax considerations for firms and their partners

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Presented by the Closely Held and Growing Business Enterprises Committee, the Individual Taxes and Private Client Committee, the Law Firm Management Committee, the Professional Ethics Committee and the Taxes Committee

Wednesday 21 September 2016

Session Co-chairs
Harvey Cohen *Dinsmore & Shohl, Cincinnati*
Philip van Hilten *AKD, Amsterdam*

Speakers
Antonio Barba *Cuatrecasas Goncalves Pereira, Madrid*
Peter Pantaleo *DLA Piper, New York*
Stephen Revell *Freshfields Bruckhaus Deringer,* Singapore
Carola van den Bruinhorst *Loyens & Loeff, Hong Kong SAR*

Introduction

This highly interactive session explored various real-world examples and potential new models on the perennially hot topic of great interest to law firms and their partners as they seek to compete globally. The meeting brought together approximately 95 lawyers from around the world. The five main topics of the session were: (1) Why go abroad? (2) structure/tax; (3) management/governance; (4) ethics; and (5) marketing/client base.

Why go abroad?

The panel discussed reasons and rationales for law firms going across borders. Some of the key observations can be summarised as follows:

- don't open abroad 'for the sake of it';
- moving abroad should always be client driven;
- there should be a clear vision, strategy and plan, debated in and bought in by the partnership;
- manage expectations and take a long-term view because opportunistic moves will not last; and
- in general, there seem to be two ways of starting abroad: either organically by sending some of the best qualified people from the headquarters or through a local merger.

Some further related questions were discussed:

- What is the timeline to admit defeat? The example of DLA Piper abandoning markets for political reasons was given. In relation to this, it was mentioned that it is easier to convince the partnership to go somewhere, then to leave again.
- What do you do when losing practice because of opening abroad? It seems to be part of the opportunity and as such, should be taken into account upfront.
- With regard to the format of opening abroad, is setting up a joint venture with a local partner a good idea? The panel stressed that the average joint venture or alliance lasts for a bit more than seven years without any guarantee for a full merger; as such, it seems that joint ventures are more of a distraction to a law firm's own strategy. Likewise non-exclusive cooperations seem to be less efficient because they require a lot of travel and time to make them work.
- The issue of referral fees was discussed, whereby the law firm abroad with whom there is an alliance could be incentivised by receiving a fee for referrals. The panel stressed that, on most occasions, the client in the end pays such a fee and this should always be kept in mind. Therefore, this should only be used if the law firms involved are fully transparent to the client.

Structure/tax

At the start of this topic, the speakers focused on 'knowledge', which is the only true asset of a law firm. The simplified idea is that the headquarter law firm gives away knowledge to the newly opened office abroad. How should this be dealt with from a tax perspective? It should be considered what the appropriate remuneration for such knowledge transfer should be because this may trigger a transfer pricing issue. Moreover, it should always be prevented to create any issues with local tax authorities; in particular, at the start of a new office abroad because this may distract the office from the real work to be done.

Secondly, the panel discussed what form the law firm should use in view of opening abroad: one integrated firm with one profit pool versus the Swiss verein model, which is more of an association with members who pay a membership fee and all keep their own profit pool. It was stated that taxes are always a result of the chosen structure. At DLA Piper, the Swiss verein model was chosen with the possibility of missing out on some tax benefits, but with the upside of having a simple model. The Swiss verein model also caters for differences in profitability and leverage among the offices in the different jurisdictions of the Swiss verein. Another argument is that the Swiss verein model ring fences risks within local jurisdictions.

Other tax-related issues discussed were the tax implications of sending lawyers abroad for a long period, which created the potential tax issue of permanent establishment. It appeared that there are no clear ways to resolve this issue yet. Additionally, how to deal with double taxation without getting into tax avoidance? There is no clear cut answer to this last question; there seem to be different relevant aspects such as: (1) the applicability of tax treaties that are intended to avoid double taxation; (2) how and where the profit is calculated; and (3) can the law firm operate in a jurisdiction abroad without having to set up a local entity.

Management/governance

This part of the session started with a focus on how to secure incentives for local partners to refer work to other firm offices abroad. It was stated that the Swiss verein model in that sense lacks such incentives because, pursuant to the applicable Swiss law, the different offices involved may only share expenses. Therefore, when using a Swiss verein model, a lot of energy should be invested in making the partners meet each other. And the best way to get referral work, whatever structure is chosen, remains to give a referral.

The issue of lateral hires in new offices abroad came up. Integrating these lateral hires costs a lot of energy. In relation to lateral hires, a few key issues were mentioned:

(1) prepare a detailed integration plan focussed on clients and sectors; (2) be aware of the restrictive covenants of local lateral hires; (3) check their local client base to verify any potential conflicts of interest; and (4) ensure there is a 'cultural' fit. Moreover it was stressed that reputation is key: will the law firm's reputation benefit from local lateral hires, or not? In view of this, solid due diligence on any local candidates is crucial to safeguard the law firm's reputation.

In general, culture is underestimated. People who are sent abroad to a newly opened office are often not well prepared for such secondment. Therefore, proper preparation of these lawyers and their families is crucial, in addition to ensuring the firm's return on investment.

Origination issues may also play a role in a law firm with offices abroad. In a lockstep system, this is no issue. In a Swiss verein model the engagement letter is the key issue in which it should be specified who has the lead; also with respect to insurance issues. In general, origination issues should be managed upfront in so far as possible.

Ethics

The topic of referral fees was revisited in this part of the session. There seem to be differences around the world. In general, it seems to be wise to ensure that: (1) clients do not pay the referral fee; and (2) any referral fee is not considered to be any form of bribery. Within United States firms referral fees are unacceptable because these are prohibited under applicable US regulations. Paying referral fees also makes compliance with anti-bribery legislation more difficult. Referring work to other lawyers abroad should be based on the quality of the lawyers involved and not on there being any referral fee involved.

It was mentioned that in the Middle East, middle men or agents play often a role when attracting work. Again, for US law firms, involvement with these people is prohibited.

Any expansion of a law firm abroad brings the firm into contact with ethical standards other than those applicable at the headquarters. These different ethical standards should be somehow streamlined and integrated into one global overall applicable system. This in particular becomes an issue when dealing with conflicts of interest. One single integrated conflict system obviously seems to be best practice. If allowed pursuant to the applicable local laws and regulations, parallel mandates can work.

Marketing/client base

The issue of conflicts of interest was already briefly discussed and was further elaborated on by posing the question of what to do in the case of two offices of one global law firm working for two competitors. This indeed may become an issue when opening abroad. Should the firm stop working for both of them? Or should only one go out? The audience also shared different views on this issue. It appeared that almost every jurisdiction has its own processes in place for full disclosure. The fact pattern will in the end determine what to do. Furthermore, the increasing role of regulators was mentioned.

Final remarks

The panel agreed that reputation should be a key driver when opening abroad. Indeed, culture, financial drivers, management consideration and ethical elements all play, and should play, a role when opening abroad. Having a long-term view seems crucial and when at hand, the firm and its partners should not be opportunistic nor impatient. Finally, Session Co-Chairs Philip Van Hilten and Harvey Cohen thanked the panellists for their input and the audience for being so actively involved.

Session Co-Chairs
Jeffrey Merk *Aird & Berlis, Toronto*
Steven Stevens *Stenas Legal, Melbourne*

Speakers
Keith Oliver *Peters & Peters, London*
Ryan Preston Dahl *Kirkland & Ellis, Chicago*
Gary Ulman *MinterEllison and the Law Society of New South Wales, Sydney*
Peter Rees QC *39 Essex Chambers, London*
Martin Daubney *Supreme Court of Queensland, Brisbane*

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Professional duties to clients and third parties. Managing conflicts: traditional versus multinational law firms – both private practitioners and company general counsel approach

Presented by the Professional Ethics Committee, the Judges' Forum and the Litigation Committee

Thursday 22 September 2016

This panel considered the duties that are owed to various parts of the firm and to clients of the various parts of the firm. The various conflicts regarding which professional rules apply were considered, as were how to manage acting for and against clients and/or their affiliates in various offices. The panel considered additions to the firm in various offices, the shifting duties of managing information and multinational processes for addressing and managing conflicts of interest, and the use of ethical walls.

The discussion touched on some of the most pressing ethical issues lawyers now face in their practice:

- the use of malicious reporting of lawyers to regulatory bodies as a litigation tactic;
- how lawyers placed in such situations may react;
- how to avoid conflicts of interest, in particular in global law firms;
- how to counter the practice of 'conflicting law firms out' with the aim of excluding them from advising an opponent; and
- what to advise clients who have conflicting legal obligations in different jurisdictions.

All the speakers were from common-law jurisdictions, but the discussion was enriched by civil law approaches raised by the audience.

Malicious reporting to regulatory bodies

It was agreed that malicious reporting is unfortunately a more and more common tactic (particularly in litigation matters) used across jurisdictions by combative lawyers to gain an inappropriate advantage in disputes. Malicious reporting causes much trouble for lawyers and their firms, and can irreparably damage the trust existing between lawyer and client. False accusations also destroy the collegial relationships with opposing lawyers, which are so essential for the effective administration of justice.

Keith Oliver shared his personal experience of having been reported to the Solicitors Regulation Authority (SRA) in what he considered to be a malicious fashion as a litigation tactic. He described the efforts, time and money required of him and his firm to defend him against the false accusation: establishing an in-house commission to investigate the accusation, notifying the insurer, providing explanations to regulatory bodies, and so on.

Oliver also commented that in his view, combative lawyers are less helpful to the courts. This view was shared by the audience.

Combative lawyers do not cooperate with each other in dispute resolution and, as Martin Daubney added, often trouble judges with their conflicts and even attempt to drag judges into their conflicts. Legal systems can no longer count on the old courtesy between lawyers and must provide effective tools to combat such unethical behaviour. Defamation laws or criminal laws seem ill-suited to handling such issues. This should rather be the task of disciplinary bodies. False accusation must itself be considered a form of professional misconduct, rigorously policed by disciplinary bodies.

External mechanisms aimed at avoiding conflicts of interest

Ryan Preston Dahl focused on the United States bankruptcy process. It has built-in mechanisms to prevent conflicts of interest and thus protect the integrity of the bankruptcy process. The need for a system of external conflict checks became apparent in the 1970s, when the bankruptcy process in Chicago was perceived as corrupt. The aim of the new process was to enhance public scrutiny of bankruptcy proceedings. It is not only intended to make the bankruptcy process substantively proper, but also to ensure it is perceived as fair by the public. Now, in order to represent the debtor in bankruptcy proceedings, a law firm must comply with the basic ethics rules and also a number of non-waivable additional standards. If the firm happens to be a creditor, or a client of the firm owes money to the debtor, the law firm is disqualified from representing the debtor. Lawyers are obliged to make disclosures on a regular basis. Compliance with these standards is rigorously enforced, and any failures lead to severe consequences. As a result of this strict system, law firms have had to adopt an equally rigorous approach to conflict checks. In the case of global law firms, conflict checks must cover all offices around the globe.

Cornering the legal market

Gary Ulman introduced the problem of 'cornering the legal market' by some institutional clients. Some corporations use their commercial relationships or legal services agreements with law firms to prevent these firms from acting against them. Ulman said he even once received a voicemail from one of his firm's regular clients who said that the law firm should not represent the client's opponent in a dispute with the client; although, the firm did not represent the client in that dispute or possess any confidential information related to the dispute.

Yet another way of cornering the market is to issue instructions to or share certain confidential materials with multiple lawyers. This effectively excludes all of them from acting against that client in the particular matter. The ethical standard is clear in most jurisdictions: counsel cannot take the case if they have confidential information. In some civil-law jurisdictions, as mentioned by the audience, lawyers owe a duty of loyalty to their former clients and are thus prevented from acting against them in new cases. In most jurisdictions, however, if a lawyer does not have any confidential information, he or she may take a new case.

The problem is seen in particular in niche industries and outside big cities. It is difficult to resist such pressure in practice. These practices used by businesses to exclude lawyers from acting against them are troubling, as they constitute a threat to the independence of the legal profession and may hinder access to justice. It was pointed out in the discussion that it is difficult to propose a mechanism that could insulate the profession against this threat. One way of approaching the problem is to introduce a 'cab rank' rule, prohibiting counsel from refusing to take a new matter if they are available and do not possess any confidential information about the other side. This applies in some common law jurisdictions. It is a safeguard for unimpaired access to justice. Another way of tackling the problem is to insulate from a case those lawyers who did have access to any confidential information of the opponent. This would not be possible in all circumstances; it all depends who was told what and when. Such 'Chinese walls' are nonetheless a costly procedure and are thus adopted only in high-profile cases. Certainly, these issues are likely to be resolved more often by the courts. Daubney confirmed that in his jurisdiction there is some case law on this issue. The best way of tackling this issue is to have a sound policy within the firm that the firm will not give in to such pressures and be cautious in accepting new matters.

Conflicting regulatory obligations

Peter Rees QC, former general counsel of

Shell, introduced the problem of advising a client that has two conflicting laws or regulatory duties with which that client has to comply. Rees recounted that Shell was obliged by US and European Union law to publish prices paid to foreign governments for each of its concessions, whereas such disclosures were prohibited by the respective domestic laws where Shell had existing operations. This is a serious dilemma for lawyers who advise companies such as Shell or any other client whose executives want to know which law it should comply with where it is clearly impossible to comply with both sets of laws. There is no perfect solution for this dilemma. However, it is more practical to follow local laws and try to challenge US and EU laws in the courts. In countries with a strong adherence to the rule of law, it is far more likely that you can explain the clash of conflicting rules and persuade the judge that your client had no reasonable alternative.

The panel discussion was scheduled to last 90 minutes. This was insufficient time to discuss all of these issues in depth, and others could hardly be touched on during the discussion. The Professional Ethics Committee is participating in a two-day conference in Buenos Aires in March 2017, which will be wholly devoted to issues of professional ethics and will allow the development of the issues raised in Washington, DC.

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Over the counter or underground: emerging and new models for legal services

Presented by the Alternative and New Law Business Structures Committee, the Law Firm Management Committee and the Professional Ethics Committee

Thursday 22 September 2016

Session Chair
Steven M Richman *Clark Hill, Princeton*

Speakers
Stuart Clark AM *Law Council of Australia, Sydney*
Catherine Dixon *The Law Society of England and Wales, London*
Shelley Dunstone *Legal Circles, Adelaide*
Donald Johnston *Aird & Berlis, Toronto*
Rachel McGuckian *Miles & Stockbridge, Rockville*
Karl Veldkamp *Karl J Veldkamp Professional Corporation, Toronto*

Steven M Richman introduced the session and panel, and noted that the session was aimed at being a conversation rather than a lecture. This format made for an engaging session and enhanced audience participation as various members of the audience contributed to the discussion. The panel was mixed,

with representatives from England, Canada, Australia and the United States, and each one offered a different perspective. The audience contained a number of civil law practitioners and provided a perspective from their respective jurisdictions.

Stuart Clark spoke first about alternative business structures (ABS) in Australia, which was the first place to allow a law firm to be publicly listed. He highlighted some issues with publicly listing law firms, such as reconciling legal professional obligations with discharging duties as a publicly listed corporation.

Catherine Dixon said that if you are looking at it from a 'business failure' perspective, both ABS and traditional models have failed. She highlighted that most of the organisations that have become an ABS were established law firms that transferred over to the ABS model, but thinks that we are likely to see emerging models in the future.

Richman asked what has changed and why has the ABS model emerged. The panel articulated a variety of reasons, including that the ABS model offers a more flexible equity structure than the traditional law firm model, where a lawyer works his or her way up to tap into equity. The ABS model also allows an organisation to expand services and diversify risk. There can be tax and liability advantages (eg, you can ring fence risk to a partner guilty of negligence) and non-lawyers can be brought into management levels of the organisation.

Shelley Dunstone explained that the original rationale for allowing law firms to list publicly was a 1993 report published by the Competition Commission, which said that restricting the model that law firms can use is anti-competitive, whereas permitting a law firm to raise money provides better scope for competition.

The discussion then turned to the different rules around sharing profits. Rachel McGuckian raised an interesting point that the District of Columbia is the only place in the United States that allows non-lawyers to share profits.

Donald Johnston gave some insight from the Canadian perspective. He said that they have not seen as much of an uptake in Canada as one would expect, and that multidisciplinary practices (MDP) have not been that popular.

A member of the audience offered some thoughts from the Danish perspective. She said that there are no ABS in Denmark, and that the ownership of firms is restricted to lawyers; however, there is an ongoing discussion, as some would like to see ownership by non-lawyers. She asked how non-lawyers are dealt with and what obligations they are subject to. Johnston responded by saying that non-lawyers in an MDP can be held accountable for the actions of lawyers. Richman said that US lawyers have supervisory responsibility over non-lawyers in the firm and noted that there are privilege issues. Dixon explained that strict rules govern ABS in England and Wales, including registration requirements and testing for individuals. When applying for a license, the ABS has to submit a detailed plan, and conditions or restrictions can be imposed on a license granted to an ABS.

Other members of the audience also offered some insight into their home jurisdictions. A participant from Russia said that it is not necessary to be a licensed attorney in order to practice law (except in the criminal law space) and it is possible to appear in many courts without a law degree. This triggered an interesting discussion around access to justice, the price of legal fees, the quality of legal service, whether the lack of regulation operates as a disincentive to embark on legal education, and the practicing requirements and consequences of unauthorised practice in other countries.

The conversation moved on to 'limited licensed legal technicians' in Washington state who practice some domestic law and do most things except appear in court but are controversial in many jurisdictions. Dixon spoke about 'legal executives' in England and Wales, which is an alternative route of entry to becoming a solicitor and involves on-the-job training to get qualified.

The panel and members of the audience also spoke about protected titles (eg, 'advocate' is a protected title in Belgium and Denmark) and the impact the 'Big Four' and services like LegalZoom will have – and have had – on the legal market. Richman cited cost as a driver for people to opt for online services in favour of a formal and tailored legal advice from lawyers at firms.

Dixon referred to political will and the belief that opening the market and enabling people to provide services in different ways leads to innovation. This is driving the will for the ABS model in England and Wales. McGuckian said that in the US, political will is likely to come from the people rather than from the top.

Richman wrapped up the session by recapping on the various discussion points including

the purpose of the ABS model and what it accomplishes, publicly listed firms, the growing digitalisation of law and the role of the internet.

Key takeaways:

- There are many drivers behind the emergence of the ABS model, but it is too early to tell whether the model will be successful in the long run. We are likely to see other models emerge in the future.
- There will be changes to the legal market, but at this stage we do not know exactly what the changes will look like.
- We should be open to the changes and part of the dialogue and innovation; otherwise we run the risk of being left behind in a changing market.
- Each country has its own legal landscape and approach to regulating the legal market. When making changes to the approach, a key consideration is what clients want and receive rather than what lawyers do.
- We need to make sure that we have access to the tools we need to deliver the best possible service to clients (eg, new technology and alternative structures and methods of providing service).

SCHOLARSHIP PROGRAMMES AND 2016 ESSAYS

Professional Ethics Committee

In 2016, both the Professional Ethics Committee and Alternative and New Law Business Structures Committee engaged in a scholarship programme to incentivise the participation of young lawyers in the IBA Annual Conference, especially the panels and activities of the two committees. To participate, young lawyers (up to the age of 35) had to register in the applicable committee scholarship section, according to the IBA requirements specified in the relevant conference programme. The candidate had to submit an essay on one of the specified subjects that are of interest to the applicable committee. A commission of the applicable committee qualified the essays and adjudicated the scholarship to the essay that received the most points. It is important to highlight that the essays were presented for qualification anonymously by IBA staff, so the committees' commissions had no background knowledge in respect of the candidates. The scholarship consisted of free registration to the IBA conference, travel and accommodation expenses.

The winner of the Professional Ethics Committee scholarship was Oksana Kotsovska of Lviv, Ukraine. Kotsovska obtained her Master of Law degree, with honours, at the law faculty of the National Ivan Franko University of Lviv, and obtained a PhD at the VM Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine. Kotsovska is a junior associate at Arzinger law firm in Lviv, and practices in the areas of commercial law, intellectual property and dispute resolution.

The winner of the Alternative and New Law Business Structures Committee (then known as the Alternative Business Structures Committee) scholarship was Isobelle Watts of Sydney, Australia. Watts is an associate at Clayton Utz in Sydney, and practices in the areas of corporate, real estate and commercial litigation.

With the permission of Kotsovska and Watts, we have included copies of the original winning submissions in this newsletter.

Professional Ethics Committee scholarship essay 2016

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Essay question

Professional duties to clients and third parties. Managing conflicts: traditional versus multinational law firms – both private practitioners and company general counsel approach. The candidate should address professional duties and conflicts of interest from the point of view of traditional and multinational law firms; also from the point of view of private practitioners and general counsels. Are duties the same or not? Should conflicts have different approaches according to the nature of the law firm?

The avoidance of conflicts of interest is one of the basic principles of advocacy both in Ukraine and in the whole world. Ukrainian legislation on advocacy includes some provisions regarding conflicts of interest, in particular, in the Law of Ukraine 'On advocacy and advocacy activities',[1] Rules of Lawyer Professional Ethics:[2]

- the Law of Ukraine 'On advocacy and advocacy activities', in Article 1, defines 'conflicts of interest' as a 'contradiction between the personal interests of the attorney-at-law and her/his professional rights and responsibilities which could affect the objectivity or impartiality during the performing by the attorney-at-law of her/his professional duties, as well as the committing or non-committing of some actions regarding the performing of advocacy activities';
- in Article 4 of the above-mentioned Law of Ukraine the 'avoidance of conflicts of interest' is listed among the principles and fundamentals of advocacy activities, along with other principles, such as the rule of law, legality, independence and confidentiality;
- if the performing of the contract on legal services by the attorney-at-law may be contrary to her/his interests; interests of her/his family or close relatives, office or bar association of which she/he is the founder (participant); or the professional obligations of the lawyer; and if there are other circumstances that may lead to conflict of interest, this according to Article 28 of the Law of Ukraine 'On advocacy and advocacy activities' is a ground for refusal to conclude the contract on legal services;
- one of the professional obligations of the attorney-at-law (Article 21 of the above-mentioned law) is to inform the client immediately about the conflict of interest;
- Article 9 'Inadmissibility of conflicts of interest' of the Rules of Lawyer Professional Ethics contains the same definition of 'conflicts of interest' as the Law of Ukraine 'On advocacy and advocacy activities'. In addition, the above-mentioned article defines the following aspects of avoidance of conflicts of interest in advocacy:
  - an attorney-at-law cannot represent or protect simultaneously two or more clients whose interests are mutually controversial, or with high probability could be controversial, and in such circumstances, provide them with legal assistance;
  - an attorney-at-law cannot represent, protect a client or provide her/him with legal assistance in the case in which she/he provided other client with legal assistance, protected or represented another client, from whom she/he obtained confidential information that is tangential to the interests of the new client;
  - an attorney-at-law cannot represent, protect a client or provide her/him with legal assistance, in the case in which client interests are contrary to the personal interests of the attorney-at-law; and
  - in case of conflicts of interest during the implementation of the contract by the attorney-of-law, she/he has to terminate this contract under the conditions of the Rules of Lawyer Professional Ethics.

Despite the importance of the avoidance of conflicts of interest, which is underlined in the above-mentioned provisions, the definition of 'conflicts of interest' contained in Ukrainian legislation is very outdated.

The main characteristic features of current legal definitions of 'conflicts of interest' are the following:

- it is a contradiction between the personal interests of the attorney-at-law and her/his professional rights and responsibilities;
- this contradiction can affect objectivity or impartiality during the performing by the attorney-at-law of her/his professional duties; and
- this contradiction can also affect the committing or non-committing of some actions regarding the performing of advocacy activities.

Therefore, a 'conflict of interest', according to Ukrainian legislation, is characterised only by subjective features, such as 'contradiction to personal interests', 'affecting of objectivity or impartiality', etc. Thus, we can conclude that the legal definition of 'conflicts of interest' concerns only the private practice of the independent attorneys and cannot be effectively applied to the practice of law firms, in particular, international law firms.

Nowadays, independent private attorneys-at-law usually only deal with relatively small cases, while most major cases are solved by large law firms, especially, international firms. This trend is seen in Ukraine and other countries of the world. The standards of lawyer activities are changing: the job of a lawyer in a large law firm differs a lot from the private practice of an independent attorney-at-law. While an independent attorney-at-law operates as a private adviser and her/his personal interests are very important, lawyers in a law firm are interchangeable, they can work together on the same project and often don't know the client personally.

Does conflict of interest arise when the interests of the client are contrary to those of one of such law firm employees? And when this employee doesn't work directly on a certain case but her/his colleagues do? And if it is a law firm that has offices in different cities in one country or an international law firm with many offices around the world? How does one avoid the conflict between client's interests and the interests of thousands of employees?

This means that the above-mentioned definition of 'conflicts of interest', taking into account its subjective nature, cannot be applied to the analogy of the activities of a large national or international law firm. The definition of 'conflicts of interest' must have a more 'objective' nature and concern the case essentially, not only the personal interests of a separate lawyer.

Thus, when we are talking about the provision of legal services by law firms, there is in Ukraine a lack of a legal definition of such an important principle as the 'avoidance of conflicts of interest'.

We can try to identify a few features that we believe should be taken into account in the provision of activities of law firms in order to avoid possible conflicts of interest.

Prohibition to represent several clients in the same case if their interests conflict with each other

This seemingly obvious and clear prohibition has many problematic aspects.

For example, there is in Ukraine a very common practice in which one law firm represents several creditors in bankruptcy proceedings. On the one hand, the demands of such creditors are addressed to the debtor and do not contradict each other. On the other hand, these creditors are still in competition because more money will be returned to one creditor and less to others.

In our opinion, in this case, a conflict of interest doesn't arise because the contradiction between the clients is indirect. It depends on many factors including the availability of funds of the debtor, nature of the debts and possible securement of these debts with a mortgage or pledge. Therefore, the law firm *can* represent a few creditors in the same bankruptcy proceedings.

A very similar situation may occur when one law firm is representing several heirs in the same succession case. We are deeply convinced that these relations do not generate conflicts of interest.

Instead, when one law firm is dealing with the legal support of several members of one tender, we think, *there is a conflict of interest.* The law firm has to do its best for the client to win the tender, and to provide this to several clients at once, in our view, is impossible.

There are also other examples in which one law firm represents different parties of the same case. In this situation, the most important thing is to determine either the interests of one client depend directly on those of the other clients.

Some problematic aspects also arise when several clients in the same case are represented by different offices of the same international law firm.

Such a situation *cannot be considered as a conflict of interest* when:

- each office of this international law firm can ensure the independence of its activities;
- there is no exchange of information within the international law firm; and
- the interests of the client indeed prevail over the relations between the employees of different offices.

In other cases, we believe, the international law firm could be blamed because of conflicts of interest. But, again, this is a very relative concept which, in each case, requires additional approval.

Disputes between the few 'permanent' clients of the same law firm seem to also be as problematic. In such a case, the question arises: which party does the law firm have to support? In our opinion, in this situation, a law firm should refuse to both participate in such a case and provide legal advices to any of these clients regarding this case.

There are also cases where two parties of the dispute at the same time request legal assistance from the offices of the same law firm in different cities of Ukraine. To avoid this situation, many law firms establish a unified database of clients and their cases. Thus, if one of the parties signed a contract on legal assistance and this contract was added to the database, all employees have access to this information and can check for conflicts of interest. Beside this, lawyers of one practice in a large law firm conduct periodic discussions of current and potential projects and cases.

But when we talk about international law firms, such a situation is quite hard to avoid.

Especial protection of confidential information from the client

In our opinion, this is the most important factor to avoid conflicts of interest in the activity of a law firm, especially an international law firm.

The corresponding provision on the protection of confidential information from the client should be included in the standard contract on legal services that is concluded between a law firm and the certain client. In addition, the contract on legal services should foresee the liability for breach of protection of the confidential information in order to guarantee the rights of the client.

Provision of the protection of confidential information from the client shall be valid not only during the contract validity but also after its termination.

In addition, the certain lawyer shall be bound by this provision of the contract, even if she/he terminates her/his professional activity and the liability for violation of this rule should be established.

Of course, the existence of provisions on the protection of confidential information from the client has become a standard of legal services in Ukraine and other countries.

Besides this, there must be additional guarantees for the protection of archive materials and data. Usually, law firms in Ukraine destroy documents and delete all data containing confidential information from the client after a certain period.

Effective protection of confidential information from the client by all the employees of the law firm is the key to avoiding conflicts of interest in the future.

Strong independence and impartiality of lawyers as the standard of law firm activity

These are purely personal, inner qualities that unfortunately cannot be regulated by anyone. But high consciousness and internal justice, though it may sound trite, must be the key characteristics of good lawyers.

A client that comes to a law firm must be sure that the professional lawyer will do her/his best to provide the most efficient legal services. Thus, the value of the interests of existing clients should always prevail over the interests of a new or potential client. Having concluded a contract for providing legal services once, a law firm becomes bound by this contract forever.

Therefore, the definition of 'conflicts of interest' in the aspect of law firm activities could be formulated as follows:

Conflict of interest is a contradiction between the interests of a client directly related with the provision of legal services (representing) to this client by a law firm in one case with the interests of another client directly related with the provision of legal services (representing) to this other client by the same law firm in the same case, or the provision of legal services (representing) to a client by a law firm when such legal services or representation can't be provided without the disclosure of confidential information received before from another client.

This definition has a more objective character than the definition contained in Ukrainian legislation. Thus, we can assume that while in the activities of independent attorneys-at-law the main reason for conflicts

of interest is the personal interests of these attorneys, the main cause of conflicts of interest in the activities of law firms, especially, international law firms, is the connectedness of cases and information.

The question also arises regarding whether a law firm or independent attorney-at-law can provide legal services or represent a client despite a conflict of interest with another client, in the case in which these clients gave written consent on it.

In the case of a contradiction between the personal interests of the certain attorney-at-law and her/his professional rights and responsibilities that lead to a conflict of interest, we believe that it is very difficult to imagine the possibility of avoiding such a conflict by providing the written consent of the parties. The attorney in any case will be bound by her/his personal interests that will hinder her/him from carrying out the professional duties of the certain attorney properly. This means, in this situation, an unambiguous elimination of the corresponding attorney-at-law from providing such legal services or representation is required.

At the same time, when we talk about conflict of interest as it appears in the activities of law firms, if all the parties whose interests are contrary submit written consent on representing them/providing them with legal services by the same law firm, it can be considered that there is no conflict of interest at all.

Also, the disclosure of confidential information received from the client concerning the provision of legal services or representation of the other client will not be considered as a conflict of interest in the case in which the first mentioned client submitted the corresponding written consent to the law firm.

As a conclusion, the following can be noted:

- The standards of practice of an independent attorney-at-law and lawyers in a large law firm, especially an international law firm, differ a lot from each other. This is why conflicts of interest should have different approaches according to the nature of the law practice.
- Ukrainian legislation defines 'conflicts of interest' solely in the aspect of the private practice of the independent attorneys-at-law as a 'contradiction between the personal interests of the attorney-at-law and her/his professional rights and responsibilities which could affect the objectivity or impartiality during the performing by the attorney-at-law of her/his professional duties, as well as the committing or non-committing of some actions regarding the performing of advocacy activities'.
- Based on the analysis of the features of law firm activities, 'conflicts of interest' in this aspect could be defined as a 'contradiction between the interests of a client directly related with the provision of legal services (representing) to this client by a law firm in one case with the interests of another client directly related with the provision of legal services (representing) to this other client by the same law firm in the same case, or provision of legal services (representing) to a client by a law firm when such legal services or representation can't be provided without disclosure of confidential information received before from other client.

Law firms, in contrast to independent attorneys-at-law, can provide legal services or represent the client despite conflicts of interest with another client, in the case in which these clients gave written consent on it.

Notes

1 Law of Ukraine 'On advocacy and advocacy activities' of 5 July 2012, No 5076-VI with amendments.
2 Rules of Lawyer Professional Ethics approved by the Constituent Congress of Advocates of Ukraine on 17 November 2012.

Alternative and New Law Business Structures Committee scholarship essay 2016

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Essay question

McLaw firms: is the verein model of the global law firm effective?

Introduction

The legal profession has undergone remarkable change in recent times, which has triggered an evolution of the structure of law firms. Underlying macroeconomic trends, an expansion in the scope of international business engaged in by clients, and a shift in the nature of demand for legal services have pushed firms to critically evaluate their service delivery model. There has been a marked trend towards legal sector consolidation as law firms have sought to enhance their transnational capabilities, roll out their brand to new markets and follow clients around the globe. Firms have pursued different strategies to achieve two common overarching aims: to increase their reach and access new markets, and increase profits and revenues to combat downward financial pressures. Some firms have opted for a full or partial integration merger, others have remained independent but have tapped into international networks, some have formed an association and a handful[3] have adopted the controversial verein model.[4]

This paper will assess the effectiveness of the verein model of the global law firm against the above two aims. While there are other legitimate considerations for the decision-making echelon of law firms when deciding what expansionist strategy to pursue, these aims are of particular interest. They directly correlate with the impetus of the emergence of alternative business structures, are fundamental to the success of an international business operation construct and are often driving forces in strategic decision-making. This paper will also contemplate ethical considerations of the verein model because, even though such considerations may not be at the forefront of decision-making in law firms, they are fundamental to the fabric of the legal profession and we cannot afford for them to be compromised.

There is little doubt that the verein model has provided a vehicle that has enabled law firms to adapt to and survive in the contemporary environment. Nevertheless, vereins, in practice, have serious impediments, including operational and ethical drawbacks that undermine the overall effectiveness of the model.

This paper will first set the scene by exploring factors that generated an appetite for law firm consolidation and outline what a verein is. It will then assess whether the verein is effective in extending global reach and increasing profits. While some comparisons are threaded through the paper, it does not purport to provide a relative analysis of the verein against other consolidation strategies. Lastly, this paper will consider some potential ethical issues that vereins face.

Appetite for law firm consolidation

To inform the analysis of whether the verein model is effective, it is helpful to understand the conditions that led to its emergence. The trend towards consolidation[5] is largely attributable to structural weaknesses that developed in the traditional law firm model as the legal market changed.[6] Two key drivers of the change were threats to profitability and the globalisation of the legal market.[7]

Threats to profitability

The market for legal services generally contracted with the slump in business activity.[8] The squeeze on profit margins prompted clients to scrutinise expenses with a view to reducing expenditure on legal services.[9] For example, billing pressures eroded fees and incentivised clients to engage fewer law firms globally in the pursuit of greater value.[10] Additionally, new entrants in the legal market increased competition; the outsourcing of

repetitive and commoditised work by clients, in the absence of substantive legal work to fill the gap, imposed profitability pressure on firms.[11]

Globalisation of the legal market

Underlying macroeconomic conditions have also significantly contributed to the globalisation of the legal services market.[12] Corporate and institutional clients have been expanding to new markets over the past two decades, which has launched a phase of globalisation of legal services.[13] Notably, prominent United Kingdom and United States firms have followed clients to Europe and Asia to position themselves to service the increasing levels of international business.[14] Given the dependence law firms have on their client base, movement with clients is paramount to maintain a flow of work.

How have law firms dealt with these changes?

Between the mid-1970s and mid-1990s, some law firms opened new local offices to service the international business of existing clients.[15] Others firms turned internally to examine and restructure their organisation, especially as the high costs associated with establishing offices in new jurisdictions became apparent.[16]

Since the mid-1990s there has been a surge in the number of companies expanding for 'market-seeking' and 'cost-cutting' reasons.[17] The complexity of market-seeking international expansion fundamentally changed the nature of demand for legal services in many new markets.[18] It required engagement with local expertise and involved ongoing transactions and asset purchases, which shifted the focus towards organic growth strategies and law firm combinations to achieve a sustained presence in emerging markets.[19]

The verein

A verein is a Swiss corporate holding structure.[20] The verein model is governed by the Swiss Civil Code.[21] The structure is used to maintain separation between independent entities that form a group of member firms tied together under a common brand.[22] A verein is formed through articles of association[23] and once established, it may adopt regulations that supplement the governing of its operations.[24] The verein itself is a holding entity or central managing vehicle and does not practice law in any jurisdiction or have any legal responsibility.[25] The member law firms falling under the verein independently deliver legal services but severally accept the benefits and liabilities that flow from these services.[26] The constituent firms do not share a common profit pool across the group – they maintain separate national or regional finances under the one umbrella brand.[27]

Is the verein effective in increasing global reach?

The verein model provides a large amount of flexibility, which can be leveraged to establish a global footprint. The effectiveness of the verein as a vehicle for global expansion, however, is undermined by factors that tighten the client base and reach, including a loss of referrals and conflict of interest issues.

Flexibility

The interest in using the verein model to expand globally is thought to be primarily attributable to the flexibility that the verein provides.[28] Observers have described the verein structure as 'the embodiment of simplicity, yet with infinite variability'.[29] A verein is able to promote itself as a unified brand across borders, yet allow each member firm to maintain a separate revenue pool and distinct corporate and partnership status with limited liability.[30] This enables vereins to sidestep complex financial hurdles encountered with a single profit pool merger deal as constituent firms hold on to their financial independence, compensation schemes, tax regimes and accounting practices.[31] The liability flow is also cleaner because, unlike traditional mergers where the successor corporation assumes the liabilities of its constituent firms, verein member firms maintain discrete legal liability.[32]

Integration issues

Although this level of flexibility may provide for a smoother transition from a financial and liability aspect, the verein model does not escape the full suite of integration problems. The different information technology (IT) systems, policies, organisational structures and cultures of the member firms need to be somewhat aligned, which can be a lengthy and costly process, and involve serious

compromises. Such complications do not exist for firms who join an international network or association instead.

There is a real risk that the substantial costs of establishing and functioning as a verein (discussed in the section 'Is the verein effective in increasing profits and revenues?') will outweigh the benefits of the model and it will lose the support of some partners. Partners departing from the member firms can be severely detrimental to the foundation of the verein structure.[33] Portions of practice groups dropping off will lead to a contraction in the legal services the verein is able to provide. It will also lead to a redistribution of the financial contributions to the central management body, and the remaining firms may not be equipped to handle the additional burden.[34]

Separate profit pools

A potential benefit of becoming part of a verein is access to a wider client base and the opportunity to tap into a global referral network, which is expected to enhance profit and revenue streams.[35] However, this can be undermined by partners hoarding work instead of spreading it through the verein web. Separate profit pools undermine the financial incentive to share work – if a partner retains work in its own member firm or jurisdiction then it is better positioned to reap the financial benefits. This risk is much lower in a fully integrated merger scenario where the shared economic interest can foster cooperation and collaboration instead of silos and competition.[36]

Loss of referrals

There is also the additional reality that once a firm becomes part of a verein, it will lose referral opportunities from other sources competing with the verein brand.[37] This negates some of the benefits enjoyed by entering the verein referral system.

Conflicts of interest

Conflicts of interest are a further impediment to the anticipated benefits of becoming part of a verein. First, conflicts can impact on the client base as member firms may be conflicted out of representing certain clients. Secondly, conflicts can raise ethical issues for vereins. As discussed in the section '"Ethical landmines" affecting vereins', some recent cases cast doubt on whether a verein member firm subject to the American Bar Association Model Rules of Professional Conduct (the 'ABA Model Rules') is able to 'represent a client adverse to another verein member firm's client'.[38]

Is the verein effective in increasing profits and revenues?

Substantial costs associated with operating a verein and issues with the multiple profit pool structure undermine potential financial benefits.

Costs of operating a verein

There are significant financial costs associated with establishing a global alliance through the device of a verein. A substantial investment needs to be made to integrate the member firms and support the organisation. There needs to be a sufficient level of staffing to perform the various marketing, advertising, IT, insurance and referral activities required by a verein.[39] There are also a large number of issues that need to be discussed and agreed upon, including, with respect to verein bylaws, contributions to the centralised administrative vehicle, funding of the integration, implications for withdrawals and where decision-making powers will fall.[40] The financial burden of operating a verein is likely to be significant – one observer commented that for a law firm with over 1,500 lawyers, the cost may be more than $100m.[41]

The significant costs of running the verein machine may have hurt vereins. The 2014 American Lawyer's ('AmLaw 100') annual rankings highlighted the lagging performance of vereins.[42] In 2013, the combined revenue per lawyer of each verein fell more than four per cent.[43] This drop was mirrored by a decline in the combined profits per partner of each of the vereins, which fell by 8.2 per cent.[44] The combined profits per partner for the remaining 94 firms, however, moved in the opposite direction, increasing 2.7 per cent.[45]

Vereins and non-vereins cast doubt on the effectiveness of the AmLaw 100 rankings when there are single law firms and vereins in the mix.[46] Nevertheless, the AmLaw 100 figures do suggest that the purported advantages of the verein structure are not as great as had been hoped, or at least they are yet to be realised.[47]

Operational issues

Further operational and cost issues can arise from a multiple profit pool structure. If the separate pools are not managed correctly, there may be 'poor cross-selling levels internationally due to the lack of any economic benefit accruing; no pricing consistency, which can be unattractive to new and existing clients; sluggish revenue growth as a result of partners not being incentivized to work in a collegiate way; weak firm-wide management; and, no consistency of quality among the network'.[48] These factors can have a considerable impact on the reputation of the firm and its ability to attract and retain clients.

While there is scope to be innovative with the verein structure,[49] there are limits to the level of departure from the multiple profit pool structure firms can take. If member firms share profits, they risk losing their status as individual entities for some liability purposes including tax liabilities.[50]

'Ethical landmines'[51] affecting vereins

This section considers potential ethical issues encountered by vereins in the context of the ABA Model Rules, which are relevant for consideration given how many vereins practice in the US.[52] While the issues outlined below may be overcome, vereins that are subject to the ABA Model Rules need to be careful to ensure that they are not involved with a business structure that may be in contravention of fundamental ethical obligations embraced by almost every state bar association in the US.[53]

Conflicts of interest

Rule 1.10(a) of the ABA Model Rules provides that conflicts of interest are imputed on lawyers while they are 'associated in a firm'. Thus the conflicts of interest of one member firm may be imputed to all other member firms, which could make an entire global verein vulnerable to disqualification.[54] Two recent cases,[55] which consider conflicts of interest in the context of vereins, signal that there is a real possibility that member firms operating within a verein will be regarded as one firm for conflict of interest purposes, despite their separate legal entity status.[56]

Fee splitting

Some vereins reportedly share costs by each member firm contributing to a common pool of monies, while retaining their separate profit pools to avoid compromising their independent legal and financial status.[57] Using the common cost pool to compensate one another for client referrals may give rise to a breach of ABA Model Rules.[58] Rule 1.5(e) provides that a division of a fee between lawyers who are not in the same firm may only be made if certain conditions are satisfied, including that the client agrees to the arrangement and that the share each lawyer will receive, and the agreement is confirmed in writing. If a verein is considered to be a single firm for professional responsibility purposes, and shares fees for work generated in the US but not performed in the US without satisfying the requisite client disclosure conditions, the verein may be in violation of the rule.[59] Courts have tended to require strict compliance with Rule 1.5(e),[60] and lawyers who breach this rule risk disciplinary action irrespective of whether the client has been negatively impacted.[61]

Sharing profits with non-lawyer partners

Vereins that include member firms who share profits with non-lawyers may also be at risk of violating the ABA Model Rules. Rule 5.4(a) provides that a lawyer shall not share legal fees with a non-lawyer except in specified circumstances. Issues arise, for example, where a US member firm collaborates with a foreign member firm that permits non-lawyer ownership of law firms. The US lawyers may be considered to share legal fees because the foreign lawyer's share of the fees will ultimately be distributed to non-lawyers with an ownership interest in the foreign firm.[62]

Conclusion

The verein, which emerged off the back of structural weaknesses that developed in the traditional law firm model, offers an alternative business structure for the global law firm. In many ways, the verein is a crude indicator of the shift in the legal field from a profession towards a business. The perceived advantages of the verein model play into commercial objectives such as to increase profits and global reach, rather than values that are fundamental to the legal profession, such as to honour ethical standards and

deliver high-quality client services. In other ways, the emergence of the verein reflects the innovation that has taken place in the legal profession to keep up with client demands, as well as broader economic and business trends.

Either way, the verein does not truly solve many issues encountered with law firm combinations; it merely facilitates avoiding dealing with them at the global management level.[63] On the surface, there are notable strengths with the verein structure: presenting as a unified brand and having access to wide referral network, while maintaining independence in key areas such as finances, and liability, appears to be a powerful combination. However when one digs deeper, it becomes clear that there are serious limitations and issues with the model, which undermine its effectiveness and indicate the benefits may not be as great as anticipated.

The successful avoidance of these risks and the effectiveness of the verein model will largely depend on the adeptness of key decision makers and how well member firms integrate. It is arguably premature to make a determination as to whether the verein model is, or will be, effective at this stage especially given the lack of quantitative data comparing vereins to other models. The verein may turn out to be the latest legal fad, or the world may be witnessing the establishment of the platform for the next phase of law firm expansion and consolidation.[64] Ultimately, the answer as to whether the verein model of the global law firm is effective rests with the clients – that will be the real test.[65]

Notes

1 Law of Ukraine 'On advocacy and advocacy activities' of 5 July 2012, No 5076-VI with amendments.
2 Rules of Lawyer Professional Ethics approved by the Constituent Congress of Advocates of Ukraine on 17 November 2012.
3 For example: Dentons, Hogan Lovells, Baker McKenzie, DLA Piper, Squire Patton Boggs and Norton Rose Fulbright.
4 A snapshot of the Australian legal market illustrates various expansionary strategies. Out of the top tier firms, there has been two full mergers (Ashurst and Herbert Smith Freehills), one association (Allens Arthur Robinson changed its name and entered a joint venture with Linklaters, but remained financially independent), one verein (King & Wood Mallesons), and two firms that have remained Australian, but expanded their reach through international networks, eg, Lex Mundi (Clayton Utz and Minter Ellison). See AAL, 'Linklaters chief opens door for fuller merger with Allens' (*Australasian Lawyer*, 19 May 2014) www.australasianlawyer.com.au/news/linklaters-chief-opens-door-for-full-merger-with-allens-187677.aspx accessed 9 April 2016.
5 Altman Weil MergerLine, a legal consulting firm, reported that 2015 witnessed the highest annual number of law firm combinations announced in the US (totalling 91) and the largest law firm merger in history between Dentons (2,500 lawyers) and Dacheng (3,600 lawyers). See Ward Bower, 'A Record Year for US Law Firm Combinations' (*Altman Weil, Inc*, 2016) www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/4e21b3a3-edcd-4dc3-8325-030e4066dcaf/resource/A_Record_Year_for_US_Law_Firm_Combinations.cfm accessed 9 April 2016.
6 James Tsolakis, 'The tables have turned' (2013) 32 International Financial Law Review 52, 52.
7 *Ibid.*
8 *Ibid.*
9 *Ibid.*
10 *Ibid.*
11 *Ibid.*
12 Nicholas Bruch and John Cussons, 'The Strategy-led Law Firm: Business Models that Work' (*Ark Group*, 2012) www.ark-group.com/sites/default/files/product-pdf-download/ARK2137%20-%20The%20Strategy-led%20Law%20Firm%20Business%20Models%20that%20Work_Sample%20chapter.pdf accessed 4 April 2016.
13 *Ibid.*
14 *Ibid.*
15 *Ibid.*
16 See n 4 above 52.
17 See n 10 above.
18 *Ibid.*
19 *Ibid.*
20 Douglas Richmond and Matthew Corbin, 'Professional Responsibility and Liability Aspects of Vereins, The Swiss Army Knife of Global Law Firm Combinations' (2014) 88 St John's Law Review 917, 917–918.
21 Megan Vetula, 'From the Big Four to Big Law: The Swiss Verein and the Global Law Firm' (2009) 22 Georgetown Journal of Legal Ethics 1177, 1181.
22 Peter Kalis, 'Grand Illusion' (*The American Lawyer,* May 2011) www.klgates.com/files/tempFiles/4ee9900d-b476-42b5-9253-2b24a1615834/Am_Law_Swiss_verein.pdf accessed 5 April 2016.
23 Richmond and Corbin (n 18) 921.
24 *Ibid*, 922.
25 *Ibid*, 923.
26 Kalis (n 20); Edwin Reeser and Martin Foley, 'Are verein-style law firms ignoring fee-splitting ethics rules?' (*Legal Rebels*, 1 October 2013) www.abajournal.com/legalrebels/article/are_verein-style_law_firms_ignoring_fee-splitting_ethics_rules/ accessed 8 April 2016.
27 *Ibid*; The Economist, 'When it vereins, it pours' (*The Economist*, 3 May 2014) www.economist.com/news/business/21601555-recent-wave-giant-legal-mergers-has-yet-produce-financial-rewards-when-it-vereins-it accessed 9 April 2016.
28 See n 18 above 918.
29 Edwin Reeser, 'Swiss verein – the cassoulet pot for global law practice' *San Francisco Daily Journal* (San Francisco, 18 August 2011) 7.
30 See n 18 above 918.
31 *Ibid*; see n 4 above 52.
32 See n 18 above 923.
33 See n 27 above.
34 *Ibid.*
35 See n 24 above.
36 Anthony Lin, 'The Rise of the Megafirm' (*ABA Journal*, 1 September 2015) www.abajournal.com/magazine/article/the_rise_of_the_megafirm accessed 8 April 2016.
37 See n 24 above.
38 See n 18 above 936.
39 See n 27 above.
40 *Ibid.*
41 *Ibid.* It is unclear whether this refers to an annual cost or a one-off establishment investment.
42 See n 25 above.

43 *Ibid*.
44 *Ibid*.
45 *Ibid*.
46 See n 20 and n25 above.
47 See n 25 above.
48 See n 4 above 53.
49 Eg, DLA Piper. See DLA Piper, 'Legal Notices' (2016) www.dlapiper.com/en/australia/legalnoticespage/ accessed 1 May 2016.
50 See n 18 above 924.
51 Jake Simpson, '3 Ethical Landmines Confronting Vereins' (*Law 360*, 9 December 2014) www.law360.com/articles/591293/3-ethical-landmines-confronting-vereins accessed 9 April 2016.
52 See n 24 above.
53 *Ibid*.
54 See n 18 above 931.
55 In *In re Project Orange Associates* 431 BR 363 (Bankr SDNY 2010), an application by Project Orange Associates('PO') for authorisation to engage DLA Piper (US) ('DLA Piper') as counsel was denied. DLA Piper's representation of particular General Electric (GE) entities in other matters, including General Electric International Inc (GEII), which was PO's largest unsecured creditor, was an issue. DLA Piper maintained that GEII was a client of DLA Piper International and not of DLA Piper and that it received no financial benefit from the work DLA Piper International did for GEII. DLA Piper and DLA Piper International are the two components of DLA Piper Global, a verein. In making its finding, the bankruptcy court referred to the firm's website observing 'DLA Piper holds itself out to the world as one firm, although it now tries to separate itself into separate firms for conflicts purposes.' See n 18 933–935.
In the Matter of Certain Laser Abraded Denim Garments, 2015 ITC LEXIS 359 involved Dentons bringing a lawsuit on behalf of their client (RevoLaze) against Gap Inc ('Gap'). Gap, a longtime client of Dentons Canada, filed a motion to disqualify Dentons US as counsel arguing that Dentons US was a 'portal' of Dentons and that Dentons and its predecessor firm had represented Gap for over two decades in multiple matters around the world. Dentons argued that there was no conflict of interest as Dentons US and Dentons Canada were effectively separate firms – they did not share confidential information, client files or profits and losses and are financially and operationally separate. The US International Trade Commission (USITC) rejected this argument; the judge held that a verein is a 'law firm' as defined by the ABA Model Rules because the firm 'holds itself out to the public as a unified global firm in order to attract business' and 'a single law firm with a "seamless delivery of services"'. The USITC disqualified Dentons US from representing RevoLaze in the matter against Gap, while Dentons Canada was simultaneously representing Gap in other separate matters. Interestingly, this occurred despite the judge finding that RevoLaze would be prejudiced by losing counsel that had represented it for the prior 15 months. Matthew O'Hara, 'Conflicts in Law Firm Vereins: The Novel Conflicts Issue of the Moment' (*Hinshaw & Culbertson*, 23 December 2015) www.lawyersfortheprofession.com/conflicts-in-law-firm-vereins accessed 17 April 2016.
56 See n 18 above 936.
57 *Ibid*, 938.
58 See n 24 above.
59 See n 49 above.
60 See n 18 above 945, which cites *In re Law Offices of James Sokolove, LLC*, 986 A 2d 997, 1004–1005 (RI 2010).
61 *Ibid*, which cites *In re Hart*, 605 SE2d 532, 534 (SC 2004).
62 *Ibid*, 949.
63 See n 27 above.
64 Nick Jarrett-Kerr and Ed Wesemann, 'Enter the Swiss Verein: 21st-century global platform or just the latest fad?' (Edge International Review) www.edge.ai/wp-content/uploads/2014/05/enterswissverein_2012.pdf accessed 23 April 2016, 26.
65 See n 4 above 53, which argues that 'the true test of success in consolidation, irrespective of which structure is adopted, is whether existing clients feel comfortable with the combined entity, and new clients feel it is giving them something more than what's provided by their existing advisers'.

ARTICLES

Professional Ethics Committee

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Against the trivialisation of our profession: thoughts on the particular nature of legal services and the ethical risks of its denaturalisation by the application of exclusively market criteria

Any service or profession has its own characteristics, so stating that the legal profession does so too would seem redundant. However, the point of view we take on the nature of our activity gives rise to regulatory, management and organisational consequences for our firms and the way our profession fits into society. If we consider the legal profession to be equivalent to other services and accept that progress in our services would be to prioritise the improvement of processes by the parameterisation of our management, we open up a field of experiments in solutions that have already been applied to other sectors, such as mass production, economy of scale, and computer and internet optimisation and, ultimately, the possibility of making our activity capital intensive, allowing investors and generating commercial speculation in our work and firms, such as real estate, or financial or industrial companies; in the United Kingdom and Australia, some law firms are listed on the stock exchange.

In recent years, Spanish legislation seems to have given a seal of approval to the trend of equating our profession with other services and has, remarkably, allowed non-lawyer partners into organisations set up to develop our activity (up to 49 per cent; according to Article 4.2 of Spanish Law 2/2007 of 15 March, further to the amendment by Law 2/2009, as in the original Law 2/2007, only 25 per cent of non-lawyer partners was permitted).

Recently, the Spanish Government has also been studying the possibility of eliminating compulsory membership of a bar association in its draft bill on Professional Associations (promoted by the European Union Bolkestein Directive), which has been shelved for the time being.

These liberalising measures of our professional activity arise with the aim of liberalising services on a global level, which might certainly make sense in other industries, but is not the subject of this article. We at the Socio-Professional Prospectives Commission of the Barcelona Bar Association wish to reflect on the nature of our activity and the consequences that these changes in legislation, in the view of the legal profession, might entail for the future of our profession. To do so, we assume that the ultimate aim of our activity is the protection of our clients.

With this aim in mind, we maintain that the legal profession has a number of characteristics and covers a number of functions that oblige us to permanently examine the limits of its commoditisation. Specifically, its particularity is a result of two precise aspects: its social function and the very nature of the service.

Defending legal protection for the rights of citizens

Our clear function is that of serving citizens, in its broadest meaning, including legal persons, in the defence of their rights before public authorities or other citizens in the institutionalised resolution of conflict or the prevention of conflict.

For such a function, fundamental to our social harmony in a democracy, lawyers must maintain their independence, while ensuring loyalty and the obligation to secrecy for their clients.

Independence, loyalty and the obligation to secrecy represent, in themselves, key distinctive characteristics of our services, but are, however, not exclusive to our services (eg, banking shares them).

However, our profession does have an additional feature (eg, shared with doctors), which does prove to be a crucially differentiating element.

Invisible dichotomy of our professional decisions

The result of legal advice is not easily compared or cross-checked. Take a knee operation: a patient does not know if the surgeon has ruled out less aggressive alternatives; in the case of a lawsuit, the client does not know whether the lawsuit has grounds, or whether enough, or excessive, means have been dedicated to studying it.

If we compare the above situations with an architect designing a home, the client is also not aware, initially, whether the materials are adequate with regard to price and durability. However, this can be evaluated afterwards – with a market study, ascertaining the performance of the materials over time – while in the case of a doctor or lawyer, his or her advice may be arguable, but not necessarily wrong (ie, cannot be put down to malpractice). In the case of the knee operation, even when the patient is totally recovered, another professional could suggest that the operation had not been necessary. In the case of the lawyer, the lawsuit may be deemed not necessary, or could have been cheaper. In both cases, alternatives may have existed that were cheaper for the patient or client, but also less profitable for the professional.

The above dichotomy we face when advising our clients has been described, from outside our profession, as being a real 'conflict of interest' inherent in our profession: 'Even as professionals pledge primacy of client interests on their behavior, they are also influenced by self-interest. Herein lies the conflict of interest that professionals face: personal interest subverts their commitment to place client interest foremost… Managing this conflict of interest to ensure that self-interest does not detract from responsibility to client interest is central to being a professional'.[2]

In addition, most of our clients will, in all likelihood, have but very rarely (if at all?) the need to recur to our services. Our advice may, therefore, be at the same time as infrequent as it is life changing, yet again, as is the case with doctors.

We can thus conclude that the nature of our profession has certain traits that confer a specific character with regard to other types of services – an invisible dichotomy faced all the time by legal professionals in their role as advisers – which must, of course, be dealt with in a specific way.

Commitment to ethical conduct and how to control it

The immediate question, once we have analysed the nature of our professional practice, is how to control and boost correct behaviour by legal professionals.

The object of this article is not to dwell on this point, but it seems logical that, in order to ensure that our practices favour citizens, we must implement criteria of control and internal and individual incentives, as well as other external means.

If an exclusively external control system is implemented, the task is a daunting one, unless it is complemented with a committed professional culture that will give rise to a feeling of approval and professional pride in acting in a consistently ethical way. This commitment is symbolised when donning the robes, along with the oath to act according to law and deontological regulation. Traditionally, this was also expressed orally when insisting on the vocational aspect of the profession ('I act correctly because of my calling').

The external control is, in Spain, provided by our bar associations, by way of the Deontological Commission, which has full disciplinary powers as delegated by the state (further to the Constitution).

The solution chosen in Spain by which control is exerted by peers may seem a paradox in as far as it appears to be self-serving; however, many jurisdictions have adopted this system by finding it preferable over the alternatives, control by the government – where professional independence may be put at risk – or mainly jurisdictional – also chosen by many other jurisdictions, but where

there can be the risk of manoeuvring, delays and complex procedure.[3]

There is an additional advantage to control by the members of the same collective – other than that they are specialised in the matter – and that is the reputation among colleagues (peer pressure),[4] which can serve as an added incentive if there really is a collective professional culture. It is this that makes, in our jurisdiction, compulsory membership of the Bar so important.[5]

Conclusion

The legal profession entails an ethical mandate to resolve the dichotomy between the client's interests and those of the professional; not as apparent in other services.

Any regulatory innovation (eg, tending towards liberalisation) or the organisation of the provision of advice (in collective firms, multidisciplinary teams, the entry of non-lawyers or financial investors, and online platforms) must, therefore, be analysed and executed, not so much in view of its element of novelty per se, but in view of how it may affect professional conduct with regard to choosing the best option for the client – including preservation of independence of the professional – and of the professional tradition that will ensure such ethical conduct by the professional from within him or herself, or autonomously, ex ante – not imposed from without or heteronymously, ex post.

This is the importance of our genuine pride in being lawyers.

An exclusive business outlook on our profession might run the risk of adulterating it, if our specific characteristics are not taken into account.

We should therefore not trivialise the legal profession: if we do, our coexistence and democratic quality might be significantly damaged in the long run.

Notes

1 This article is a translation, with very few adaptations, of the article published by the author in Món Jurídic (the official magazine of the Barcelona Bar Association), No 300, September 2015, 36–38. The article was written on behalf of the 'Laboratori d'Idees' (Laboratory of Ideas) of the Socio-Professional Prospectives Commission within the Barcelona Bar Association. This article is being published with express permission from Món Jurídic.

2 Ashish Nanda, 'The Essence of Professionalism: Managing Conflict of Interest' Harvard Business School, No 9-903–120, Rev 29 December 2003.

3 This was the basis of a very interesting session last year at the IBA Annual Conference in Vienna: 'Martial arts ethics: the offensive and defensive use of the rules of professional conduct', organised by the Professional Ethics Committee, the Arbitration Committee, the Judges' Forum and the Litigation Committee, which took place on 8 October 2015.

4 See n 3 above.

5 It may be interesting to analyse whether this factor may be equally important in other jurisdictions.

Alternative and New Law Business Structures Committee

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Changing legal terrain in the United States

Introduction

An alternative business structure (ABS) is a term that means different things to different people. At its heart, it involves delivery of legal services. Increasingly, traditional models of that provision do not hold. This article touches on some of the changes underway in the United States, one of the, if not the, largest national legal market in the world.

Access to justice rationales

Traditional law firm models still persist, with most lawyers still in the range of solo practitioners to small firms. As reported as recently as 2012, according to the American Bar Association (ABA) reports in The Lawyer Statistical Report, American Bar Foundation, 1985, 1994, 2004 and 2012 editions, the following was the case:

- solo: 49 per cent;
- two to five lawyers: 14 per cent;
- six to ten lawyers: six per cent;
- 11–20 lawyers: six per cent;
- 21–50 lawyers: six per cent;
- 51–100 lawyers: four per cent; and
- 101+ lawyers: 16 per cent.

Most (75 per cent) American lawyers are in private practice. They continue to utilise billable rates, even as more companies are looking for fixed fee or other arrangements. As reported in the 15 July 2013 ABA Journal, 'The average billing rate for partners ranged from about $343 at firms of 50 or fewer lawyers to $727 at firms of more than 1,000 lawyers. The analysis takes information from $9.5 billion worth of invoices submitted by 4,800 U.S. law firms to 83 corporate clients from 2008 to 2012'. Various studies have shown that these models have resulted in a dichotomy, where many people and businesses that need legal advice are not getting it from traditional sources, or are engaged in do-it-yourself activity. It is not limited to the impoverished, but includes middle-class persons and businesses as well. The Washington Supreme Court noted, regarding a need for alternatives, that moderate as well as low income people find the current legal system unaffordable. The Legal Services Corporation, in a 2009 report on the justice gap, noted there was one private lawyer for every 429 people in the general population, but only one legal aid lawyer for every 6,415 people in poverty.

The Canada Futures Report issued in 2014 also noted that 'it has been estimated that Canadians seek legal advice for only 11.7% of justiciable events'. Non-lawyers offering guidance and advice about 'rights and entitlements' include accountants, financial planners and human resource consultants, among others. In 2016, the ABA's Commission on the Future of Legal Services issued its own report, and estimated 80 per cent of the 'poor and those of moderate means', lack 'meaningful access to our justice system', and recommended innovate approaches to address the issue. The Law Society of England and Wales issued its own report on the future of legal services in January 2016, and also noted '[t]here is a large group of potential clients who cannot afford to pay for legal services'.

In other words, while some two-thirds of American lawyers are either solo practitioners or in small firms, and therefore assumed not to charge the rates of 'Big Law', there is still an identifiable 'justice gap', where whatever the supply of lawyers, they are not meeting demand.

Limited license legal technician

One solution is to broaden the class of those who can give legal advice, even if limited in terms of the ability to function as a 'lawyer' in all respects. In New York, for example, a Court Navigator Program was launched in 2014, pursuant to which, according to the New York Courts website:

> 'Specially trained and supervised non-lawyers, called Court Navigators, provide general information, written materials, and one-on-one assistance to eligible unrepresented litigants. In addition, Court Navigators provide moral support to litigants, help them access and complete court forms, assist them with keeping paperwork in order, in accessing interpreters and other services, explain what to expect and what the roles of each person is in the courtroom. Court Navigators are also permitted to accompany unrepresented litigants into the courtroom in Kings County Housing Court and Bronx Civil Court. While these Court Navigators cannot address the court on their own, they are able to respond to factual questions asked by the judge'.[6]

The Washington Supreme Court has gone one or more steps beyond, in establishing limited licensed legal technicians. On 15 June 2012, the Washington Supreme Court adopted a new rule: APR 28-Limited Practice Rule for Limited License Legal Technicians (LLLT). The purpose of the rule was to address the critical need to provide access to justice, and at the same time, establish an appropriate regulatory regime. As noted by the Washington Supreme Court, the underlying rationale was:

> 'Every day across this state, thousands of unrepresented (pro se) individuals seek to resolve important legal matters in our courts. Many of these are low income people who seek but cannot obtain help from an overtaxed, underfunded civil legal aid system. Many others are moderate income people for whom existing market rates for legal services are cost-prohibitive and who, unfortunately, must search for alternative sin the unregulated marketplace'.

In the case of family law practice, well over 50 per cent of participants in family law cases were unrepresented.[7] Some other states have

working groups and otherwise are studying the concept.

Non-lawyer ownership: alternative business structures

The concept of alternative business structures remains controversial in the US. Apart from Washington state's new rule permitting ownership of a law firm by LLLTs (to a limited extent), only Washington, DC permits such ownership, in DC Bar RPC 5.4(b):

> 'A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
> (1) The partnership or organization has as its sole purpose providing legal services to clients;
> (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
> (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1'.

That rule continues to have limitations. The DC rule remains practically limited by the prohibitive rules in other states. For example, New York State Bar Association has ruled that a New York lawyer with a New York-based practice could not be a partner in a Washington, DC law firm that has a non-lawyer partner, nor could his or her New York law firm be a 'subsidiary' of that Washington firm.

In England and Wales, the Legal Services Act 2007 permits non-lawyers to own and invest in law firms. As explained by the Law Society of England and Wales:

> 'An ABS is a firm where a non-lawyer:
> • is a manager of the firm, or
> • has an ownership-type interest in the firm.
> A firm may also be an ABS where another body:
> • is a manager of the firm, or
> • has an ownership-type interest in the firm and at least 10 per cent of that body is controlled by non-lawyers.
> A non-lawyer is a person who is not authorised under the Legal Services Act 2007 to carry out reserved legal activities'.[8]

US firms have started to take advantage of this. In American Lawyer (13 April 2015), it was reported that 'Under ABS Structure, Cahill Makes London Litigation Debut'. The rationale: 'We don't intend to do any type of nontraditional legal work', says Cahill capital markets partner Daniel Zubkoff in New York, where he's a member of the 327-lawyer firm's executive committee. '[The ABS structure] was a little more convenient administratively in that it allowed us to avoid creating a two-partnership trust. Our legal advisers thought we could use it effectively, and [the SRA] processed our application promptly'.

To date, there continues to be resistance to ABS and non-lawyer ownership in the US, despite the movement towards them in the other major common law jurisdictions.

In-house counsel

The ABA Model Rules have been amended to permit a more liberal approach to the registration of in-house counsel and accommodate the peculiarities of bar registration and licensing in other countries. Their activity must be permitted per Rule 5.5(d); they can only provide services to an employer entity and affiliates on matters directly related to work for the entity and consistent with 1.7 (conflicts of interest); they cannot appear before a court or tribunal unless otherwise permitted; and they cannot provide advice to other than the above. As safe harbour for the unauthorised practice of law, they can provide:

1. services to the lawyer's employer or its organisational affiliates; these are not services for which the forum requires *pro hac vice* admission; and, when performed by a foreign lawyer and requiring advice on the law of this or another jurisdiction or of the US, such advice shall be based upon the advice of a lawyer who is duly licensed and authorised by the jurisdiction to provide such advice; or
2. services that the lawyer is authorised by federal or other law or rule to provide in this jurisdiction.

Accounting firms

Lawyers employed by accounting firms cannot split legal fees and be in partnership with

non-lawyers in these firms per ABA Rule 5.4 as adopted in the states. The scope of advice is also limited by the rules. According to James M McCauley, Ethics Counsel, Virginia State Bar: 'Generally speaking, tax advice or planning is not considered to be the unauthorized practice of law'. A recent article in *The Economist* (22 March 2015) noted the 'Big Four accounting networks (Deloitte, EY, KPMG and PwC), whose combined annual revenues of $120 billion exceed the $89 billion generated by the 100 largest law firms combined'. *The Economist* further noted that accountants may own and control law firms in Australia, Britain and Mexico. They cannot own and control law firms in China, France, Germany, Ontario (Canada), Italy, Japan and Spain, but may collaborate and share costs. They cannot own law firms in Brazil, the US, India and other Canadian provinces.

Regarding privilege issues, Internal Revenue Code (IRC) section 7525 extends attorney-client privilege to communications between a taxpayer and 'federally authorized tax practitioner' in civil tax matters. *Valero Energy Corporation v US*, 2009 US App Lexis 13050 (7th Circuit 2009) held that only legal advice, not accounting advice, was covered.

Online legal services

A plethora of companies now offer certain legal 'services' online. LegalZoom, for example, describes its vision to provide 'an easy-to-use, online service that helped people create their own legal documents. We brought together some of the best minds in the legal and technological fields to make this vision a reality'. There are other companies that provide online legal documents: Nolo and Rocket Lawyer are two. The issues implicated include primarily whether this constitutes the unauthorised practice of law. Other issues may relate to advertising and testimonial restrictions.

In late 2013, a specially appointed referee in South Carolina concluded that LegalZoom practices, as apparently memorialised in a settlement agreement, did not constitute the unauthorised practice of law. That opinion was approved by the South Carolina Supreme Court on 11 March 2014. One notable portion of the referee opinion notes:

> 'As the Settlement Agreement and the Affidavit of Mr. Hartman demonstrate, LegalZoom records verbatim the original input that a customer provides and transfers that information verbatim into pre-existing forms. Any later edits to the information to address spelling or other similar typographical issues are to be approved by the customer. Accordingly, based on the business practices described in the Settlement Agreement and the Affidavit of Mr. Hartman, I recommend that the Supreme Court find that LegalZoom acts as nothing more than a scrivener in the practices to be implemented or maintained per Section 2.1 of the Settlement Agreement and described in the Hartman Affidavit'.

While certain bar associations had concluded that LegalZoom's activities constituted unauthorised practice of law, the company seems to be prevailing more once litigation ensues. North Carolina has joined South Carolina in November 2015 in sustaining the practices. Joan Rogers notes in Bloomberg BNA that in the past 15 years since LegalZoom's founding, over 3,400,000 customers have purchased through the company, and that it has plans in 48 states as of 1 January 2016.[9] The plans include certain access to attorneys for certain services and certain other conditions.

Other sites, such as Avvo Lawyers, are facing statutory changes in states such as North Carolina that seek to condition their provision of online legal services or otherwise be deemed to engage in the unauthorised practice of law, and cautionary ethics opinions from these certain quarters.

Fee sharing

The phrases 'fee sharing', 'fee splitting', 'division of a fee' and 'referral fees' are often used interchangeably and incorrectly. The following discussion distinguishes three basic 'fee splitting' issues and addresses the rules of ethics that apply to each:

- sharing legal fees with non-attorneys;
- the division of a fee between lawyers who are not in the same firm; and
- referral fees paid by attorneys to other attorneys and non-attorneys.

Subject to certain exceptions, ABA Model Rule 5.4(a) provides: 'A lawyer or law firm shall not share legal fees with a nonlawyer'. For example, there can be no payments to a non-attorney 'runner' who solicits legal business for the attorney. Exceptions include payment to deceased lawyer's estate, for example, or sharing a court ordered fee with a non-profit that retained the lawyer.

ABA Model Rule 5.4 states:

> '(b) A lawyer shall not form a partnership

with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer'.

The impact of this on multinational firms was addressed in an ABA Formal Opinion 464, 19 August 2013: Division of Legal Fees With Other Lawyers Who May Lawfully Share Fees With Nonlawyers:

> 'Lawyers subject to the Model Rules may work with other lawyers or law firms practicing in jurisdictions with rules that permit sharing legal fees with nonlawyers. Where there is a single billing to a client in such situations, a lawyer subject to the Model Rules may divide a legal fee with a lawyer or law firm in the other jurisdiction, even if the other lawyer or law firm might eventually distribute some portion of the fee to a nonlawyer, provided that there is no interference with the lawyer's independent professional judgment.'
>
> 'This situation is different from that considered in Formal Opinion 91-360, noted above, which dealt with the prohibition of partnerships with nonlawyers expressed in Model Rule 5.4(b) rather than the fee-sharing provision of Model Rule 5.4(a).'

The verein

A verein is a group of separate and independent legal entities, generally involving non-US components, which join together for marketing, branding and promotional purposes, but intend to be recognised and treated as separate legally separate entities. Law firms operate across international borders through other structures, from the least formal law firm networks to more integrated structures, but generally premised on the notion that each one is protected against liability for the acts of the others. Whether by verein or other affiliation, they seek to maintain separate legal existence while nonetheless marketing as one entity for 'one-stop shopping' purposes.

A proper verein operating in the US will respect the rules regarding financial separation.

Under ABA Model Rule 1.5(e), a division of a fee between lawyers who are not in the same firm may be made only if:

1. the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
2. the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
3. the total fee is reasonable.

At least one set of commentators has noted that different vereins may employ different models, and may not be compliant:

> 'It should be no surprise that, based on conversations with partners in four different vereins, the standard form client engagements do not contemplate fee-splitting or referral fees, and therefore they do not include any of the elements of full client disclosure and written consent, or satisfaction of reasonableness, or proportional sharing/joint responsibility, let alone all three. Most clients do not concern themselves with law firm structures and are unaware of the applicability of the ethical rules. In such circumstances, the only way a referral can be in compliance with the US-based ethics rules is if there is no fee-sharing between verein member firms'.[10]

Recently, that belief may have been challenged in a recent decision.

The case involves one law firm member of a verein in New Jersey, Dentons US. On 25 September 2016, a federal court ruled in the District of Columbia that the Dentons verein is a separate legal entity through which its member components provide legal services, and therefore other members of the verein may be liable for breach of contract.[11]

In brief, Dentons US sued Guinea to collect its fees and costs. Guinea filed a counterclaim against Dentons US, and a third party complaint against Dentons Verein (Swiss), Dentons Europe and Dentons UKMEA. Regarding the count in the third-party complaint for breach of contract, the issue was whether only Denton US was retained, or whether the third-party defendants were also retained such as to be liable on the contract claim. The court likened the verein to an incorporated membership association, with separate revenue pools, and noted that while other courts had declined to treat them as one entity notwithstanding the associational name and collaborations among them, that was not dispositive of the issue. At least at the pleading stage, which was the procedural context, the court found the allegations of direct intervention of the verein sufficiently pleaded to sustain a claim on Guinea's breach of contract claim against the third-party defendants.

The decision reflects the tension between marketing the one-stop global shop on the one hand, and the need to respect traditional concepts of separateness of legal entities on the other.

Summary of models

A few years ago, the ABA 2020 Commission, in reviewing the then current rules, considered three types of approaches:

1. Limited lawyer/non-lawyer partnerships with a cap on whether non-lawyer ownership lawyers could be permitted to become partners with (and share fees with) non-lawyers, such as economists, social workers, architects, consultants and financial advisers, under narrowly defined circumstances. The most modest such approach would require that: (i) the firm engage only in the practice of law; (ii) non-lawyers own no more than a certain percentage (eg, 25 per cent) of the firm; and (iii) non-lawyers pass a 'fit to own' test, such as the test that exists in the United Kingdom for all ABSs, including legal disciplinary practices (LDPs).
2. Lawyer/non-lawyer partnerships with no cap on non-lawyers' ownership (the DC approach): the District of Columbia currently permits lawyers to engage in partnerships of the sort described in option 1, but without a cap on the non-lawyer ownership percentage. It also does not require non-lawyers to pass a 'fit to own' test.
3. Multidisciplinary practices (MDPs) that offer non-legal services.

Another option would be to permit firms of the type described in option 2 and to allow those firms to offer both legal and non-legal services. In other words, this option would essentially be the DC rule, but without the restriction contained in DC Rule 5.4(b)(1) ('The partnership or organization has as its sole purpose providing legal services to clients').

As noted, there remains considerable resistance to change of the traditional models. The issuance of the ABA Report on the Future of Legal Services in 2016 notes, essentially, that the alternative delivery of legal services is necessary to provide access to justice and, like it or not, is ongoing.[12] The choice is whether to continue to ignore the present day reality or seek, as appropriate, to regulate.

Notes

1 See www.courts.state.ny.us/COURTS/nyc/housing/rap.shtml accessed 23 January 2017.
2 See www.lsc.gov/sites/default/files/LSC /pdfs/documenting_the_justice_gap_in_america_2009.pdf at p 25 accessed 12 July 2015. For further information on the LLLT rule, see the article in Professional Ethics and Multidisciplinary Practices joint committee newsletter – newsletter of the IBA Public and Professional Interest Division, October 2015.
3 See generally www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures/ accessed 25 January 2017.
4 See www.bna.com/settlement-allows-legalzoom-n57982063694/ accessed 25 January 2017.
5 Edwin B Reeser and Martin J Foley, 'Are verein-style firms ignoring fee-splitting ethics rules? ABA Journal (Chicago, 1 October 2013) see http://www.abajournal.com/legalrebels/article/are_verein-style_law_firms_ignoring_fee-splitting_ethics_rules/ accessed 25 January 2017.
6 Dentons US LLP v The Republic of Guinea, No 14-1312, 2016 US Dist Lexis 130866 (25 September 2016).
7 See www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf accessed 25 January 2017.

Looking ahead

Professional Ethics Committee activities

The Professional Ethics Committee distributed a message to its members in June, 2016 following the IBA Mid-Year Officers' Meetings Barcelona, Spain. This message highlighted various achievements realised as part of the revitalisation efforts for enhancing the role, reputation and impact of the Committee. A complete copy of the Professional Ethics Committee Message to Members – June 2016, is available on the IBA website.

This message included a synopsis of an outreach programme to be led by the Committee. There were three principal types of future activities in the Professional Ethics Committee outreach programme outlined in the message to Committee members, including:

1. The Committee continues to participate in IBA programmes in which it has participated previously, to provide a strong ethics focus.
2. The Committee participating primarily in programmes organised by other IBA Committees or Forums, such as the Latin American Regional Forum conference in Rio de Janeiro held in March 2016 (the Committee participated in one panel in this programme through the leadership of Claudio Undurraga, a current Committee officer who is also former chair of Latin American Regional Forum). The Committee is now working with a number of IBA committees to be invited to various other IBA sponsored conferences in the next 24 months.
3. The Committee is also participating in programmes by law societies or regulators.

Committee member involvement

The Alternative and New Law Business Structures Committee expects to expand its officer pool beyond those officers mentioned above. For those members of the Committee who are interested in becoming more involved with your committee in the form of an officer role, please contact Steven Richman (srichman@clarkhill.com).

The two IBA committees are seeking ideas for topics and volunteers, including rapporteurs, for the 2017 IBA Annual Conference to be held in Sydney, Australia on 8–13 October 2017.

If you wish to become active in the Professional Ethics Committee or the Alternative and New Law Business Structures Committee, a good place to start is by providing ideas for topics for upcoming conferences and volunteering, including as a rapporteur, at an IBA event. If any of these are of interest to you, please contact Martin Kovnats (mkovnats@airdberlis.com) or Rachel McGuckian (rmcguckian@milesstockbridge.com), in respect of the Professional Ethics Committee, and Steven Richman (srichman@clarkhill.com), in respect of the Alternative and New Law Business Structures Committee.

In addition, the Committees are always seeking content (eg, articles or other materials that meet the publishing standards of the IBA) for publication. If this is of interest to you, please contact Carlos Valls Martinez (c.valls@fornesaabogados.com) or Jeffrey Merk (jmerk@airdberlis.com), in respect of the Professional Ethics Committee, and Dalton Albrecht (dalton.albrecht@ca.ey.com), in respect of the Alternative and New Law Business Structures Committee.