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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

SEPTEMBER 2017



INTERNATIONAL CONVENTION CENTRE (ICC SYDNEY)

IBA 2017 Sydney

8-13 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



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- Acquire a greater knowledge of the role of law in society
- Be part of the debate on the future of the law



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Should you wish to advertise in the next issue, please contact the IBA Advertising Department: advertising@int-bar.org

Contributions to this newsletter are always welcome and should be sent to the Newsletter Officer:

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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.



FROM THE CO-CHAIRS

Looking forward to the Annual Conference

As Chairs of the Alternative and New Law Business Structures Committee and the Professional Ethics Committee, we are all delighted to present a continuation of the co-operative and mutual effort of these two IBA Committees in preparing and presenting the latest newsletter. The plan is to encourage other IBA Committees and Fora to join in this combined effort to be able to present to more IBA members.

All readers are encouraged to attend the 2017 IBA Annual Conference in October in Sydney, Australia. The Committees will be cooperating in the preparation of a number

of very interesting sessions. Full details of our Committees' sessions can be found on pages 10–11 of the newsletter.

Both Committees are seeking rapporteurs for their sessions at the Sydney Annual Conference. The reports shall be published in the next edition of the combined committee newsletter. If you wish to participate in either committee, this is a good way to get involved and to start to understand how IBA Committees operate.

We extend a warm welcome to those participating in our committees and hope to see you all in Sydney.

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The International Bar Association's Human Rights Institute



the global voice of the legal profession®

The International Bar Association's Human Rights Institute (IBAHRI), an autonomous and financially independent entity established in 1995, works to promote and protect human rights and the independence of the legal profession worldwide. The IBAHRI undertakes training for lawyers and judges, capacity building programmes with bar associations and law societies, and conducts high-level fact-finding missions and trial observations. The IBAHRI liaises closely with international and regional human rights organisations, producing news releases and publications to highlight issues of concern to worldwide media.

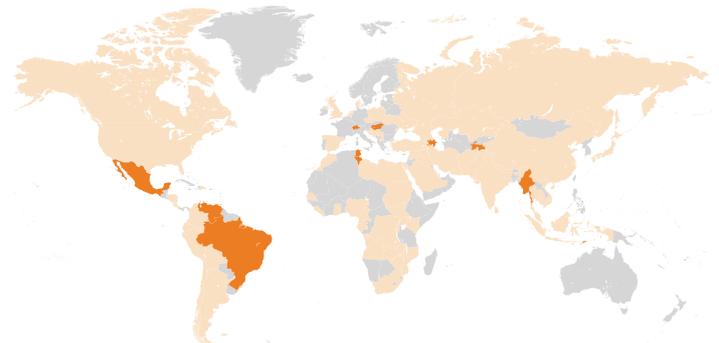


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Our work around the world

Work carried out in 2016 Work carried out prior to 2016



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From the Editor

Welcome to this edition of the combined newsletter of the Professional Ethics Committee (PEC) and the Alternative and New Law Business Structures Committee (ANLBS). This is the second edition of the combined newsletter within the last 12 months and my first edition in my new role as newsletter officer of the PEC.

I would like to thank my immediate predecessor, Jeff Merk, for both his support for me whilst I'm finding my feet and also to reflect on the tremendous work he has done whilst fulfilling the newsletter editor role. Big shoes to fill!

What strikes me is that professional ethics are as relevant today as they have ever been and these are topics that pervade everything we do as lawyers, regardless of jurisdiction. Being a good lawyer is so much more than knowing the technical materials. Understanding and displaying ethical behaviours and regulatory awareness is equally as relevant.

The articles in this newsletter cover a wide range of topics and I hope you will find them interesting. Thank you to all the contributors who have made my job easier by volunteering articles and meeting deadlines.

You will also see a schedule of the various sessions which we are running, or participating in, during the Sydney IBA Annual Conference. We hope to see as many of you as possible at the various sessions. A further newsletter will be published after the conference that will include the session reports. I look forward to working with the communications officers of the Alternative and New Law Business Structures Committee, Isobelle Watts and Stuart Fuller.

Please do let me know if you have any comments on the newsletter and any ideas for future editions.



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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

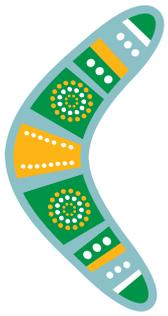
The Committee aims to bring together legal professionals and other interested individuals from many and various jurisdictions and backgrounds to monitor, discuss and shape the developments of new and modified structures, and the rules to which they are subject around the world.

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 2016 in Washington, DC and worked closely on other sessions with the Professional Ethics Committee and Law Firm Management Committee.



IBA 2017 Sydney

8–13 OCTOBER
ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



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

Monday 0930 – 1045

Is there any such thing as unauthorised practice of law in the global legal market?

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

Session Chair

Dalton Albrecht *EY Law, Toronto, Ontario, Canada; Co-Chair, Alternative and New Law Business Structures Committee*

As global firms continue to consolidate and merge, considerations of territoriality become more challenging. What is considered allowable transient practice in one jurisdiction may be unauthorised practise of law in other jurisdictions. The ability of law firms to maintain legally distinct affiliates while projecting a 'one-stop shop' is under challenge. At the same time, affiliations and the use of partners outside the home jurisdiction may trigger claims of unauthorised practice that can affect the ability to collect fees, as well as issues of attorney-client privilege. Have traditional concepts of what is and is not the practise of law been eroded? This session surveys the field of how alternative business structures and contemporary means of delivery of legal services and whether 20th century notions of unauthorised practise of law can survive the emergence of new and varied legal structures and mechanisms.

Speakers

Robert Heslett *The Law Society of England and Wales, London, England; IBA Council Member, The Law Society of England and Wales*

Shigenobu Itoh *Rutan & Tucker, Costa Mesa, California, USA; Membership Officer, Professional Ethics Committee*

Donald Johnston *Aird & Berlis, Toronto, Ontario, Canada; Secretary-Treasurer, Alternative and New Law Business Structures Committee*

Judith Lee *Gibson Dunn & Crutcher, Washington, DC, USA; Membership Officer, International Sales Committee*

Isobelle Watts *Clayton Utz, Sydney, New South Wales, Australia; Communications and Website Co-Officer, Alternative and New Law Business Structures Committee*

ROOM C3.5, CONVENTION CENTRE, LEVEL 3

Monday 1615 – 1730

When investors and founders collide: preventing, diffusing and resolving disagreements about corporate strategy, in good times and in times of financial crisis

Presented by the Closely Held and Growing Business Enterprises Committee, the Insolvency Section and the Professional Ethics Committee

Session Chair

Noreen Weiss *MacDonald Weiss, New York, USA; Women Lawyers' Interest Group Representative, Closely Held and Growing Business Enterprises Committee*

Moderator

Orla McCoy *Clayton Utz, Sydney, New South Wales, Australia*

Typically, many constituencies are involved in making managerial and strategic planning decisions for a growing company: founders, active strategic investors, directors and other shareholders. Sometimes, the goals and priorities of these constituencies do not align, which can lead to a crisis in decision-making. The process can be complicated further if the investor or director is also a supplier or customer and, as such, engages in related party transactions with the startup. Additionally, the misalignment of priorities and goals can become even more acute in times of trouble, when cash is tight and the company is in financial crisis. Through real-world case studies, this session will explore:

- governance best practices to avoid deadlock or prevent a veto situation that could paralyse the company;
- funding through revenue or investment: anticipating mechanisms for additional capital contributions that address anti-dilution concerns while realistically providing cash-flow support in times of financial crisis, or at times when the founder and other constituencies disagree on a growth strategy;
- consideration of how related party transactions affect the dynamic;
- the additional stress placed on the decision-making process if the company also faces a time of financial crisis when the consideration of insolvency or bankruptcy concepts comes into the equation, and planning for 'distressed funding' options; and
- lawyering in times and crisis, identifying 'who is the client' and the use of special committees.

Speakers

Joseph Addy *Pacific Hydro, Melbourne, Victoria, Australia*

Benedict F Christ *Vischer, Zurich, Switzerland*

Joanna Gumpelson *De Pardieu Brocas Maffei, Paris, France; Vice Chair, Insolvent Financial Institutions Subcommittee*

David Myers *Audinate, Sydney, New South Wales, Australia*

Alessandra Nascimento Mourão *Nascimento e Mourão Advogados, São Paulo, Brazil*

Hon Myron Steele *Potter Anderson & Corroon, Dover, Delaware, USA; Judges' Forum Liaison Officer, Professional Ethics Committee*

ROOM C3.4, CONVENTION CENTRE, LEVEL 3

Tuesday 0930 – 1230

Drivers of change: trade agreements, technology and the future of trading legal services cross border

Presented by the BIC International Trade in Legal Services Subcommittee, the Alternative and New Law Business Structures Committee and the BIC Regulation Subcommittee

Session Chair

Iain Sandford *Sidley Austin, Geneva, Switzerland; Secretary, BIC International Trade in Legal Services Subcommittee*

This session will look at the role that technology is playing in reshaping the potential for legal services to be traded across borders. The potential has long existed for legal services to be disaggregated and outsourced, but online tools are now increasingly targeting consumer markets for legal services. As with many other service sectors, lawyers are thus becoming dependent on relative freedom of data flows and vulnerable to costs associated with requirements to localise the storage of data. At the same time, data protection laws, e-commerce and distance-selling regulations are expanding unevenly, leaving some jurisdictions heavily regulated and some unregulated for non-resident lawyers. But in neither case has the interaction of trade and regulation of legal services been explicitly considered. So how, if at all, do trade agreements deal with these issues? What role should they play in the future?

Speakers

Chunghwan Choi *Lee & Ko, Seoul, South Korea; Bar Representative, IBA Management Board*

Hanim Hamzah *ZICO Law, Singapore; Vice Chair, Alternative and New Law Business Structures Committee*

Iain Miller *Kingsley Napley, London, England*

Wendy Peter *Australian Competition & Consumer Commission, Melbourne, Victoria, Australia*

ROOM C3.5, CONVENTION CENTRE, LEVEL 3

Tuesday 0930 – 1230

Offshore structures as a barrier to recovery of assets from criminals

Presented by the Anti-Corruption Committee, the Alternative and New Law Business Structures Committee, the Business Crime Committee, the Individual Tax and Private Client Committee and the Professional Ethics Committee

Session Chair

Yves Klein *Monfrini Bitton Klein, Geneva, Switzerland; Chair, Asset Recovery Subcommittee*

Co-Moderators

Stephen Baker *Baker & Partners, Jersey, Channel Islands; Senior Vice Chair, Asset Recovery Subcommittee*

David O'Mahony *7 Bedford Row Chambers, London, England*

The misuse of legal structures to conceal crime proceeds and assets of criminals has been in the news for the past few years, leading notably to the adoption of beneficial ownership registers by several countries. However, the adoption of such registers may have the unwanted effect of weakening some asset recovery tools. There have also been case law developments that may make trusts an obstacle to recovery of assets that are not crime proceeds.

This session will be divided into two parts.

The first part will explore the question of whether beneficial ownership registers facilitate or hinder asset recovery.

The second part will discuss recent case law, according to which a discretionary trust may be a safe shield against the enforcement of criminal confiscation and civil asset recovery orders.

Speakers

Andrew Bodnar *Matrix Chambers, London, England*

Hon Justice Nicholas Davidson *Christchurch High Court, Christchurch, New Zealand*

Edward Davis Jr *Sequor Law, Miami, Florida, USA; North America Regional Officer, Anti-Corruption Committee*

Michael O'Meara *Sixth Floor Chambers, Sydney, New South Wales, Australia*

Duncan Osborne *Osborne Helman Knebel & Scott, Austin, Texas, USA*

Dominic O'Sullivan *Gerard Brennan Chambers, Brisbane, Queensland, Australia*

Eryn Schornick *Global Witness, Washington, DC, USA*

ROOM C4.10, CONVENTION CENTRE, LEVEL 4

Tuesday 1430 – 1730

The no longer brave new world: artificial intelligence and other new deliveries of legal services

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

Session Moderator

Steven Richman *Clark Hill, Princeton, New Jersey, USA; Co-Chair, Alternative and New Law Business Structures Committee*

Each day brings another news item about robots and artificial intelligence (AI) across disciplines, in law, medicine and elsewhere. We are facing a world of driverless cars, chips embedded in our bodies and robots performing analytical tasks as well as physical activity. What was imagined 50 years ago in science fiction is now part of the fact of legal practice. From document review to interactive response with clients, artificial intelligence is now permanently part of legal practice. Through its Global Employment Institute, the IBA issued a report on 1 April 2017 on the impact of AI and robotics in the workplace. How far will it go? Do the current rules of professional responsibility cover the responsibilities of lawyers? Will we now find judges relying on computer analysis to resolve cases, in the manner of computer chess programs resolving complex solutions? Beyond the technology and ethics, will the continued use of AI change the way society views law and dispute resolution? Will these alternative business structures relating to delivery of legal services solve the access to justice problem? A diverse panel of experts from around the world and in a variety of legal structures will seek to address these issues. Robots are also welcome and encouraged to attend.

Continued overleaf 

Speakers

Hilarie Bass *Atkin Chambers, London, England*
Geraldine Clarke *Gleeson McGrath Baldwin Solicitors, Dublin, Ireland; PPID/SPPI Representative, LPD Council*
Derya Durlu Gürzumar *Istanbul Bar Association, Istanbul, Turkey*
Kinley Gyeltshen *Office of the Attorney General, Thimpu, Bhutan*
Mickaël Laurans *The Law Society of England and Wales, London, England; Bar Executive Officer, The Law Society of England and Wales*
Fiona McLeod SC *Law Council of Australia, Canberra, Australian Capital Territory, Australia; IBA Council Member, Law Council of Australia*
Aku Sorainen *Sorainen, Tallinn, Estonia*
Vagn Thorup *Lundgrens, Copenhagen, Denmark*
Carlos Valls Martinez *Fornesa Abogados, Barcelona, Spain; Senior Vice Chair, International Sales Committee*

ROOM C4.10, CONVENTION CENTRE, LEVEL 4

Tuesday 1730 – 1830

Alternative and New Law Business Structures Committee open business meeting

Presented by the Alternative and New Law Business Structures Committee

An open meeting of the Alternative and New Law Business Structures Open Business Committee will be held to discuss matters of interest and future activities.

ROOM C4.10, CONVENTION CENTRE, LEVEL 4

Wednesday 0930 – 1230

Global anti-corruption update

Presented by the Anti-Corruption Committee, the Asia Pacific Regional Forum and the Professional Ethics Committee

This annual and very popular session will review the current trends and developments in anti-corruption policy, investigations and enforcement from around the world in an engaging roundtable dialogue with world experts. The session will review current and future trends in anti-corruption laws, enforcement and prosecutions.

Panel 1

Moderator

Bruno Cova *Paul Hastings (Europe), Milan, Italy; Co-Chair, Anti-Corruption Committee*

Speakers

Olumide Akpata *Templars, Lagos, Nigeria; Regional Representative Africa, Anti-Corruption Committee*
Hui Chen *US Department of Justice, Washington, DC, USA*
Satyajit Gupta *Advaita Legal, New Delhi, India; Committee Liaison Officer, Asia Pacific Regional Forum*
Paul Monaghan *The Law Society of New South Wales, Sydney, New South Wales, Australia*
Taek Oh *Lee & Ko, Seoul, South Korea; Regional Representative North Asia, Anti-Corruption Committee*
Leopoldo Pagotto *Trench Rossi e Watanabe, São Paulo, Brazil; Secretary, Anti-Corruption Committee*

Panel 2

Co-Moderators

Claire Daams *Monfrini Bitton Klein, Geneva, Switzerland*
Robert Wyld *Johnson Winter & Slattry, Sydney, New South Wales, Australia*

Speakers

Peter Crozier *Australian Federal Police, Canberra, Australian Capital Territory, Australia*
Kannan Gnanasighamani *Attorney General's Chambers, Singapore*
Sarah McNaughton SC *Commonwealth Director of Public Prosecutions, Canberra, Australian Capital Territory, Australia*
Laode Syarief *Corruption Eradication Commission, Jakarta, Indonesia*
Hock Chuan Tan *Messrs Tan Hock Chuan & Co, Petaling Jaya, Malaysia*
Jayasuriya Weliamuna *Colombo, Sri Lanka*
Jia Zhaoyang *Guangzhou R&F Properties Co, Beijing, China*

ROOM C4.9, CONVENTION CENTRE, LEVEL 4

Wednesday 1430 – 1730

Departures and lateral hires of partners

Presented by the Professional Ethics Committee, the Alternative and New Law Business Structures Committee and the Women Lawyers' Interest Group

Session Co-Chairs

Martin Kovnats *Aird & Berlis, Toronto, Ontario, Canada; Chair, Professional Ethics Committee*
Alberto Luis Navarro Castex *Navarro Castex Abogados, Buenos Aires, Argentina; IBA Council Member, Colegio Publico de Abogados de la Capital Federal*
Steven Richman *Clark Hill, Princeton, New Jersey, USA; Co-Chair, Alternative and New Law Business Structures Committee*

The legal world has been addressing the issues related to the mobility of lawyers for many years. The area has been expanding with many more lawyers changing firms due to wanting a broader platform; to the right-sizing of firms, the merger or other alignments of firms in many jurisdictions and the insolvency or other financial distress of law firms, to name just a few reasons. The expectations of lawyers and the bodies regulating lawyers have been changing over time, and the laws relating to the duties of lawyers and their new firms have also been changing. Further, there seem to be differing expectations and rules depending on the extent of the development of the Bar and the regulatory framework of the Bar. Law firms now have multijurisdictions to consider when trying to manage expectations and changing laws in many of these jurisdictions. The panel will explore the ethical considerations to clients, suppliers, creditors and employees of the departing firm, and the role and potential liability of the firms to whom the lawyer transitions. This panel will include practitioners and firm leaders who will explore these varied topics during the three-hour panel.

Speakers

Jennifer Bishop *Miller Thomson, Toronto, Ontario, Canada; Secretary, Women Lawyers' Interest Group*
Ellisa Habbart *The Delaware Counsel Group, Wilmington, Delaware, USA*
Jörg Menzer *Noerr, Bucharest, Romania; SPPI Council Member*

Roberto Augusto Nogueira de Pary *Souza Cescon Barrieu & Flesch Advogados, São Paulo, Brazil*
Clemens Schindler *Schindler Attorneys, Vienna, Austria*

ROOM C3.1, CONVENTION CENTRE, LEVEL 3

Thursday 0930 – 1230

Searching for solutions to gender diversity issues: bar associations jump into the fray

Presented by the Women Lawyers' Interest Group and the Professional Ethics Committee

Session Co-Chairs

Masako Banno *Okuno & Partners, Tokyo, Japan; Website Officer, Women Lawyers' Interest Group*

Rachel McGuckian *Miles & Stockbridge, Rockville, Maryland, USA; Co-Vice Chair, Professional Ethics Committee*

In this interactive session, we will discuss how bar associations can get involved to promote gender balance through education and create self-awareness in the legal industry about bias. Although lawyers' career development requires strenuous efforts regardless of gender, looking back on your career, consider that some highly skilled female colleagues might not have left your firm had they received just a little help, advice and support. There is more to be done, including involving bars in the furtherance of their mission of strengthening the legal profession.

In the first half of this session (0930 – 1045), we will have an interactive discussion with a panel of bar leaders who have been actively engaging in gender equality for each bar association and the international field. Women lawyers tend to face many more career challenges than men, including lack of role models or mentors, unconscious bias, lack of flexible work opportunities and career paths, sociocultural discrimination and the extra burden of family responsibilities. The panel will suggest practical solutions to these common but pressing issues.

The second half (1115 – 1230) has been set aside for roundtable discussions on the unique challenges experienced by women lawyers in each jurisdiction, potential solutions to the problems raised and the kind of support that their respective bar associations could offer. The audience will be divided into small groups, and is expected to actively participate in the discussion. In a wrap-up meeting at the end of this session, comments will be given from the bar leaders and active advocates for women lawyers' status. Should you want to contribute any of your experiences, or data about your own bar association, please contact Isabel Bueno and Masako Banno via email (isabel@mattosfilho.com.br, masako.banno@okunolaw.com). We want to collect as much data as we can to discuss it with the audience in this interactive session. If we could have all this information submitted by Monday 25 September, that would be most appreciated.

Men are encouraged to attend! We are looking forward to seeing both active male and female lawyers to discuss these important issues.

Speakers

Hilarie Bass *Greenberg Traurig, Miami, Florida, USA; IBA Council Member, American Bar Associations*

Fiona McLeod SC *Law Council of Australia, Canberra, Australian Capital Territory, Australia; IBA Council Member, Law Council of Australia*

Paul Mollerup *Association of Danish Law Firms, Copenhagen, Denmark; IBA Council Member, Association of Danish Law Firms*
Olufunmi Oluyede *TRLPLAW, Lagos, Nigeria; LPD Council Member*

ROOM C4.8, CONVENTION CENTRE, LEVEL 4

Thursday 1430 – 1730

Duties of confidentiality and the Panama Papers

Presented by the Professional Ethics Committee, the Alternative and New Law Business Structures Committee, the Anti-Corruption Committee, the Closely Held and Growing Business Enterprises Committee and the Bar Issues Commission

Session Co-Chairs

Jeffrey Merk *Aird & Berlis, Toronto, Ontario, Canada; Secretary-Treasurer, Professional Ethics Committee*

Steven Richman *Clark Hill, Princeton, New Jersey, USA; Co-Chair, Alternative and New Law Business Structures Committee*

Lawyers in virtually all jurisdictions have duties of confidentiality regarding their clients and their clients' affairs. In the past, there has been more 'hacking' of lawyers' data banks to disclose such information in unauthorised circumstances. One example is the unauthorised disclosure from an internal source of the information from a Panama-based law firm. In addition, many other leading international firms have been hacked externally and many firms have implemented additional security measures to restrain or limit hacking. This panel will consider some of the ethical considerations relating to these matters. The IBA and Organisation for Economic Co-operation and Development (OECD) are carefully considering similar issues. The discussion of the panellists is not to be construed as any indication of the current or future thoughts of the IBA and/or OECD with respect to these matters. The questions relating to privacy and security of data and information are important to law firms.

Speakers

Stig Bigaard *Copenhagen, Denmark; Vice Chair, Closely Held and Growing Business Enterprises Committee*

Martin Kenney *Martin Kenney & Co Solicitors, Tortola, British Virgin Islands*

Ricardo León-Santacruz *Sanchez DeVanny, Monterrey, Mexico; Membership Officer South America, Taxes Committee*

Laurent Nguyen *Zico Group, Ho Chi Minh City, Vietnam*

Aditi Rani *Advaya Legal, Mumbai, India*

Meg Strickler *Conaway & Strickler PC, Atlanta, Georgia, USA; Co-Chair, Cybercrime Subcommittee*

Pieter Tubbergen *Schaap Advocaten Notarissen, Rotterdam, The Netherlands; Website Vice Officer, International Sales Committee*

ROOM C3.5, CONVENTION CENTRE, LEVEL 3

Thursday 1730 – 1830

Professional Ethics Committee open business meeting

Presented by the Professional Ethics Committee

An open meeting of the Professional Ethics Committee will be held to discuss matters of interest and future activities.

ROOM C3.5, CONVENTION CENTRE, LEVEL 3

Continued overleaf 

Friday 0930 – 1230

Better safe than sorry

Presented by the Corporate and M&A Law Committee and the Professional Ethics Committee

Session Co-Chairs

André Dufour *Borden Ladner Gervais, Montreal, Québec, Canada; Senior Vice Chair, Corporate and M&A Law Committee*

Nicolas Piaggio *Guyer & Regules, Montevideo, Uruguay; Secretary, Corporate and M&A Law Committee*

Jean-Claude Rivalland *Allen & Overy, Paris, France; Vice Chair, Corporate Governance Subcommittee*

After the frenzied years of M&A in the mid-2000s, where due diligence was at best a cost and at worst a nuisance, a new economic and regulatory environment has led to a complete change of attitude by buyers towards due diligence. Moreover, given the constant evolution of this environment, the risk of something occurring during the interim phase between signing and closing has dramatically increased.

Part 1 of this session will focus on the new legal issues that have to be covered in due diligence when preparing for an acquisition as well as on the new tools that have become gradually available on the market to assist lawyers in their task. We will also investigate how legal

advisers can play a key role in preventing or preparing the new owner-to-be and the target to better face future legal constraints or risks that are coming their way. Part 2 of this session will review what process can be set up to maintain a close watch on possible issues occurring between signing and closing, and the solutions to address these risks.

Speakers

Valentina Cassata *American Express Co, New York, USA; Vice Secretary, Corporate Governance Subcommittee*

Michael Coates *Shell International, London, England; Vice Secretary, Corporate and M&A Law Committee*

Gabriella Covino *Gianni Origoni Grippo Cappelli & Partners, Rome, Italy; Secretary, Corporate Governance Subcommittee*

Hermann J Knott *Andersen Tax & Legal, Cologne, Germany; SPPI Council Member*

Paola Lozano *Skadden Arps Slate Meagher & Flom, New York, USA*

Javier Magnasco *Estudio Beccar Varela, Buenos Aires, Argentina*

Claudio Undurraga *Prieto Abogados, Santiago, Chile; Scholarships and Latin American Regional Forum Liaison Officer, Professional Ethics Committee*

Noah Waisberg *Kira Systems, Toronto, Ontario, Canada*

ROOM C4.1, CONVENTION CENTRE, LEVEL 4

All programme information is correct at time of print. For further information, visit www.ibanet.org/Conferences/Sydney2017.aspx



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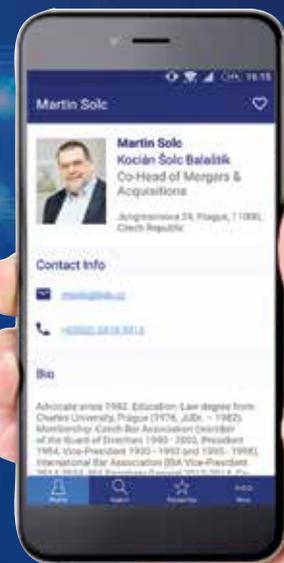
All new functionality is now available for the App in both the Apple Store and for the Android version in the Google Play Store.

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- Access to IBA Digital Content – with new articles, stories and items of interest available and updated daily
- The ability to download PDFs and podcasts from the IBA Digital Content library to your mobile device

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International Bar Association Conferences 2017–2018



2017

2–3 NOVEMBER 2017 MANDARIN ORIENTAL HOTEL, HONG KONG SAR

Asia Pacific Mergers and Acquisitions

4 NOVEMBER 2017 HANOI, VIETNAM

IBA-APAG International Arbitration Training Day: Introduction of the IBA Soft Laws

4–5 NOVEMBER 2017 QUEEN MARY UNIVERSITY OF LONDON, LONDON, ENGLAND

IBA-ELSA Law Students' Conference: International Human Rights Law

6–7 NOVEMBER 2017 HILTON SÃO PAULO MORUMBI, SÃO PAULO, BRAZIL

Latin American Anti-Corruption Enforcement and Compliance

10 NOVEMBER 2017 MOSCOW MARRIOTT ROYAL AURORA HOTEL, MOSCOW, RUSSIAN FEDERATION

9th Annual 'Mergers and Acquisitions in Russia and CIS' Conference

15 NOVEMBER 2017 LEVEL 39, 1 CANADA SQUARE, CANARY WHARF, LONDON, ENGLAND

European Start Up Conference

15–17 NOVEMBER 2017 THE GRANGE ST PAULS, LONDON, ENGLAND

8th Biennial Global Immigration Conference

15–17 NOVEMBER 2017 LABADI BEACH HOTEL, ACCRA, GHANA

Rising to the Challenge of Africa's Economic Development

16 NOVEMBER 2017 FOUR SEASONS HOTEL LONDON AT PARK LANE, LONDON, ENGLAND

Private Equity Transactions Symposium

17 NOVEMBER 2017 MONDRIAN LONDON, LONDON, ENGLAND

Building the Law Firm of the Future

30 NOVEMBER – 1 DECEMBER 2017 HILTON BUENOS AIRES HOTEL, BUENOS AIRES, ARGENTINA

The New Era of Taxation

1 DECEMBER 2017 MOSCOW MARRIOTT HOTEL NOVY ARBAT, MOSCOW, RUSSIAN FEDERATION

11th Annual Law Firm Management Conference

7–8 DECEMBER 2017 MILLENNIUM BROADWAY HOTEL, NEW YORK, USA

Investing in Asia

7–8 DECEMBER 2017 JUMEIRAH FRANKFURT, FRANKFURT, GERMANY

4th Annual Corporate Governance Conference

2018

18–19 JANUARY 2018 HONG KONG SAR

IBA Law Firm Management Conference: Growth Prospects for Law Firms in Asia

29–30 JANUARY 2018 etc. venues FENCHURCH STREET, LONDON, ENGLAND

7th Annual IBA Finance and Capital Markets Tax Conference

1–2 FEBRUARY 2018 THE WESTIN PARIS – VENDOME, PARIS, FRANCE

6th IBA European Corporate and Private M&A Conference

14–16 FEBRUARY 2018 PARIS INTERCONTINENTAL, PARIS, FRANCE

IBA/ABA International Cartel Workshop

23–24 FEBRUARY 2018 HOTEL EUROSTAR GRAND MARINA, BARCELONA, SPAIN

3rd Mergers and Acquisitions in the Technology Sector Conference

25–26 FEBRUARY 2018 HILTON PUERTO MADERO, BUENOS AIRES, ARGENTINA

21st Annual IBA Arbitration Day

5–6 MARCH 2018 CLARIDGE'S, LONDON, ENGLAND

23rd Annual International Wealth Transfer Practice Law Conference

8–9 MARCH 2018 HONG KONG SAR

3rd IBA Asia-based International Financial Law Conference

9–10 MARCH 2018 THE TAJ MAHAL PALACE, MUMBAI, INDIA

The Changing Landscape of M&A in India –

11–13 MARCH 2018 INTERCONTINENTAL LONDON PARK LANE, LONDON, ENGLAND

19th Annual International Conference on Private Investment Funds

14–16 MARCH 2018 HYATT REGENCY HOTEL AND INTERCONTINENTAL PRESIDENTE HOTEL, MEXICO CITY, MEXICO

Biennial IBA Latin American Regional Forum Conference

20 MARCH 2018 NEW DELHI, INDIA

Pre-International Competition Network Forum

22–23 MARCH 2018 LONDON, ENGLAND

Insurance – Into the Unknown: Challenges and Opportunities

9–11 APRIL 2018 INTERCONTINENTAL, LISBON, PORTUGAL

Biennial Conference of the Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL)

12–13 APRIL 2018 LONDON, ENGLAND

8th World Women Lawyers' Conference:

From Courtrooms to Boardrooms: The Impact of Women

19–20 APRIL 2018 RADISSON BLU HOTEL WATERFRONT, CAPE TOWN, SOUTH AFRICA

Africa: Opportunities and Challenges in M&A Transactions

21 APRIL 2018 THE PEACE PALACE, THE HAGUE, THE NETHERLANDS

War and Justice

2–4 MAY 2018 LE WESTIN MONTREAL, MONTREAL, CANADA

IBA Annual Employment and Discrimination Law Conference

6–8 MAY 2018 AMSTERDAM, THE NETHERLANDS

24th Annual IBA Global Insolvency and Restructuring Conference

ARTICLES

Mentoring in a law firm: why ethics should be taught

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Introduction

For some reason the perception of the law profession has been tarnished, with overbilling, the belief that unnecessary work is often created and the need for a lawyer exaggerated, and wrongful advice being just some of the many unethical practices, or allegations thereof, that have dogged the perception of lawyers worldwide. Especially say, for corporate and trial attorneys, it seems that legal professionals have gained the reputation of being a necessary evil, rather than a useful tool for clients in helping them to achieve a desired resolution of their legal problem.

The difficulty is, is that such perception is not entirely wrong, and the more a lawyer develops professionally, the greater the potential to become aware of just how much personal benefit they can achieve by 'overearning'. In particular, personal benefit is translated not only in economic terms, but also in terms of time (or lack thereof) when convincing the client to take a course of action and/or decisions that primarily seek to benefit the lawyers' business and not the clients' needs.

The role of the lawyer

When considering the relevance of the legal profession within a multicultural society, it is important to remember that lawyers have a role not only in conflict situations, but also in creating and negotiating cross-border businesses and in preventing future disputes. Working in an old profession but within a volatile culture triggers a constant demand to stay up to date and prepared in terms of having the necessary skills at an inter-company level, combined with the typically unceasing study that the profession requires.

The individuals in any law firm are the most important asset, and the failure to provide focused, up-to-date and effective training to

such an asset within any law firm will most likely result in internal and external ruptures. To that end, ethics was, is, and will continue to be, one of the most relevant and important aspects of practice (though there are many) that any law firm must consider when rendering a professional service.

Mentoring and being mentored ethically is also part of the job. It is vital to involve less experienced lawyers in cases to engender both the passion and compromise that the profession involves, but it is more important to lead a team, either as the responsible lawyer before the client or as the responsible lawyer within the firm, under a transparent and ethical practice. In other words, in investing time on young lawyers, the most relevant aspect is teaching them that acting as an ethical professional is not a choice, it is an obligation.

Undertaking an ethical practice not only helps promote a culture of excellence in terms of work practice, but also requires an understanding of both the client and their needs and expectations. When training young lawyers to achieve an understanding of the client's exact needs and expectations, this helps promote efficiency and precision in their work as a consequence, such that complies with the core foundations of the profession. On the other hand, the lack of training of young lawyers and the ensuing lack of their understanding in cases will directly result in unnecessary requests and work that will lead to a loss of valuable time for any case.

By extension, understanding the client takes a professional commitment from the lawyer to 'keep up to speed' on the client's language. Getting involved in the client's personal and/or professional world will immediately lower the barriers that sometimes blur the lines of communication and leads to differences between what the client wants and what the lawyer understands.

Internal and external clients

Except for lawyers in sole practice, each practitioner has two clients: an external client, who is the one seeking legal advice; and, an internal client, who is any other lawyer in the firm regardless of their role in that firm.

In relation to external clients, professional obligations in terms of confidentiality extend beyond not sharing the clients' information, to keeping the clients' experiences confidential, as well as abstaining from commenting or discussing with any other person, whether colleague or relative, any cases of that client (past, current, or future). It is the legal and moral obligation of the lawyer not to 'expose' their client, in any way; and an understanding of the sensitivity of matters handled by the lawyer is a constant requirement and outlook that should be reinforced throughout a lawyer's career.

Regarding internal clients, it is crucial for leading lawyers to explain the responsibilities of each member of the team. Creating achievable targets and indicating the team's expectations for each lawyer allows for substantial professional development. Working with respect and teaching excellence among co-workers are vital elements that will

give added value not only to the lawyer as an individual, but to the entire firm, which, in turn, will reflect positive results both internally and externally.

Conclusion

The added value of using a legal professional may easily change from delivering professional quality in the rendering of a service to 'over-lawyering' the real needs of the clients, resulting in a disservice both to the client and to the profession. A lack of involvement in the client's business and/or needs, and any difficulties in achieving clear communication between lawyer and client, may adversely affect the provision of an effective legal service and so impede the needs of the client rather than drive them forward.

Mentoring and training of lawyers on ethical practice is part of the job of a lawyer which cannot be ignored and must take its place among the other priorities involved in providing an effective and ethical legal service. A lawyer is required to fulfil their professional obligations and in so doing become a strategic partner who will at all times avoid engaging in friendly fire with a client.

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'Failure to prevent' – a panacea for regulators

An important issue in combatting bribery, 'Failure to prevent' a tool that forces the management of companies to take anti-bribery regulations and rules seriously. In simple terms, it compels management to ensure that the company becomes compliant and that all rules and regulations are observed. As a result, many companies today are introducing, following up, updating, training and re-training their employees on their internal codes of conduct, as well as on international and local rules on bribery and anti-corruption. In addition, companies have introduced due diligence methods regarding their business partners – customers as well as suppliers – and current and new contracts are analysed and registered in various types

of data systems. As a consequence, it is impossible to approach a (new) customer without having performed proper due diligence.

The multinational companies, and in particular those which have been subject to a breach of the US legislation, the Foreign Corrupt Practices Act (FCPA), have realised that a breach is extremely expensive and poses a real threat to management who do not properly ensure compliance. Consequently, the recognition of this type of risk management is forcing companies to apply all types of actions to ensure compliance. Under the FCPA the concept of failure to prevent has been applied in practice while other countries have included the concept in anti-bribery legislation, for



example, in the UK Bribery Act. In Sweden, a form of the concept was introduced in the modifications and updates made in 2012 to Swedish anti-bribery legislation, with the creation of a new crime – the Gross Negligent Financing of Bribery – which in reality means that management must secure a due diligence system for the control of the parties the company is dealing with. However, the Swedish legislator appears to live under the impression that Swedish companies are particularly ‘clean’ in this regard – Sweden is ranked high on the Transparency International’s (TI) so-called ‘perception index’, and as a result, the Swedish rules have been designed as being relatively weak. It seems to be the classic mistake of not realising that the TI perception index represents only the view or perception that citizens have of public officials and is nothing to do with the actual behaviour of the private sector – in Sweden or elsewhere.

Regardless of this apparent lack in Sweden, the rules of other countries, and especially the UK Bribery Act and those of the United States and the FCPA, are highly effective and require most companies, including Swedish companies, to implement control and training programmes to show that the management of the company takes compliance issues seriously. From the perspective of the authorities, this is of course also a relief – the regulations put a substantial burden of proof (in most instances) on the companies to demonstrate

they are compliant. The companies not living up to the prescribed standards also have an upward battle to defend themselves. Rightly or wrongly, the principle of failure to prevent and the system it has entailed has proven to be very effective and rewarding – in particular for the US Department of Justice and also, gradually, for the Serious Fraud Office in the United Kingdom.

Compliance and the requirement to abide by the rules have spread to a number of areas – finance, antitrust and tax to mention a few. New areas of the law are being added – the most recent within the European Union is the Data Privacy Regulation (DPR) which shall be implemented at a corporate level by May 2018. They all include demands on companies to live up to the same idea and, in the case of the DPR, those companies which have not implemented the new rules will be held responsible regardless of a data breach or not. The failure to prevent principle may not be clearly stated but in my opinion it is there. And increasingly, management will be held responsible in these areas if the company proves not to be compliant. It is my personal opinion that we will see more of the principle introduced in other areas of compliance. As a (small) indicator I recently learned, for example, that Iceland has introduced legislation where the company/employer must be able to show the reason for paying different rates of pay to its employees for the same work.

All about Brexit

On 29 March 2017 the United Kingdom served notice under Article 50 of the Lisbon Treaty that it wished to withdraw from the European Union, thereby commencing the Brexit process.

Brexit is in reality potentially three processes. The first is the negotiation of the terms by which the UK will leave the EU. This is what is governed by Article 50. The second is determining the future relationship between the UK and the EU. The third is negotiating the future trading relationship between the UK and non-EU states.

Article 50 requires the terms of the UK’s departure to be resolved within two years, which is by 28 March 2019. There is no time limit on the other processes. While all the relevant parties have an interest in maintaining existing markets, the Brexit process is complex and like any essentially political process is fraught with difficulty. This was made clear by the outcome of the UK General Election in June where the Conservative Government lost its majority, having based its campaign on the need for a strong majority in order to effectively negotiate Brexit. The election has thrown

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into doubt the second and third processes above. Prior to the election the government had favoured a complete severing of all the current trading ties with the EU. There is now a greater possibility of some form of close-trading relationship with the EU that would preclude independent trading relationships with the rest of the world. Whatever the outcome, Brexit will in due course have consequences for the UK legal services market.

The current strength of the UK legal services market is built on a series of interdependent factors: (1) the strength of the judicial system; (2) the use of the English language; (3) English common law; (4) critical mass in the infrastructure to support a large legal services market in terms of lawyers and support businesses; (5) the ability to enforce UK judgments relatively easily worldwide; (6) free movement of lawyers within the EU; and (7) a large financial services industry that needs substantial legal services.

Brexit does not directly impact the first four of these factors. It does impact on the others, including the regulatory framework that allows UK-based lawyers to move freely across EU borders. By way of background, the EU-wide regulation of law firms is primarily to be found in two European directives: the Lawyers' Services Directive 77/249/EC permits EU lawyers to provide temporary cross-border services within the EU, without prior notification or registration with the host Member State's bar; and The Establishment of Lawyers Directive 98/5/EC, which enables lawyers to practise on a permanent basis in a Member State other than that in which their qualifications were obtained and to obtain qualification in the host state after three years.

Before the election the government published the Great Repeal Bill white paper which provided that the existing EU directives will become part of UK law post-Brexit. It must therefore follow that the government's intention is that EU lawyers will continue to enjoy the right to practise in the UK under the Directives.

This is clearly good news for EU law firms who currently have London offices or those that wish to establish offices in the future. Of course, this position may change depending upon the negotiations between the UK and the EU. If, for example, the ultimate Brexit agreement imposes restrictions on UK law firms practising in the EU beyond the current directives, then it may be that the UK will then impose similar regulatory restrictions.

However, even if this scenario arises, EU law firms are unlikely to face significant regulatory restrictions in operating in England and Wales (Scotland and Northern Ireland are separate legal jurisdictions) because of the current statutory framework and the proposed Solicitors Regulation Authority (SRA) reforms.

The Legal Services Act 2007 generally only regulates six reserved legal activities (advocacy, litigation, probate, reserved instruments, notaries, and oaths) along with immigration advice. Legal advice, including advice on commercial transactions, is not regulated and this is more likely to be the area in which overseas law firms operate.

In addition, the SRA's proposed reforms to its regulatory framework will allow solicitors to work in unregulated firms and hold themselves out as solicitors provided they do not undertake any of the reserved legal activities. These reforms are likely to come into effect in late 2018. When this happens it would be perfectly possible for an EU-based firm to operate in England and Wales without any need to engage with the domestic regulatory framework, unless it wished to undertake the reserved legal activities. This would still be the case if the EU firm employed domestically qualified solicitors who held themselves out as such. Of course, immigration issues may still affect this.

However, we do not have any clarity as to what might happen to UK-based law firms who wish to practise in the EU. That will form part of the Brexit negotiations. As matters presently stand, many international law firms use London as their European base. Most of these firms should be making contingency plans as to whether they need to restructure to preserve free access to the EU.

Of course, legal services are just one aspect of a hugely complex negotiation. The UK legal services market is also dependent on the financial services market and, if parts of this move to stay within the EU, this will also have an adverse impact. In addition, London's position as a centre for dispute resolution could be affected if the UK loses the benefit of the Brussels Regulation on the mutual recognition of judgements with the EU and this is also an issue in the Brexit negotiations.

The fundamental strengths of the UK legal market described above remain and it is difficult to see any European capital replacing it any time soon. For example, Ireland, a likely alternative, does not currently allow limited liability for law firms. However there are some bumps coming down the road.

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Brexit and the UK's negotiating position: proposals made by the Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 11,500 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and UK Governments, Parliaments, the European Institutions, wider stakeholders and our membership.

Both prior and subsequent to the referendum on the UK's membership of the European Union we conducted polls of our members and we developed the following points in the light of our statutory function to act in both public and membership interests.

The current situation

On 29 March 2017 following the case of *Miller and Dos Santos v The Secretary of State for Leaving the European Union*¹ and the European Union (Notification of Withdrawal) Act 2017, the UK Prime Minister, Theresa May notified the EU Council of the UK's intention to leave the EU under Article 50 of the Treaty on the Functioning of the European Union (TFEU).

The UK's exit from the EU is arguably the most significant constitutional development to affect the UK since 1945. Other changes including accession to the European Economic Community in 1972,

the development of devolution to Scotland, Northern Ireland and Wales in the 1990s, the adoption of the Human Rights Act in 1998 and the creation of the UK Supreme Court in 2005 were important changes but exit from the EU has so many aspects including economic, financial, legal, social, and cultural, which will affect every person living in the British Isles and has as much potential to affect many people living in the EU in some ways which are known and understood and in other ways which are currently unpredictable. The impact of the change will also have deep, broad and far-reaching effects for the immediate future and for several years to come.

The negotiations will begin in earnest in summer 2017 against a backdrop of frenetic activity in both the British Isles and in the EU Institutions and the EU 27. In the UK, the British Parliament and Government, the devolved Parliament in Scotland and the Assemblies in Northern Ireland and Wales and the respective devolved administrations have been working hard to engage with stakeholders, to mount inquiries and to hold debates. The UK Government has published two white Papers setting out proposals on the *UK's Exit from and new relationship with the European Union* and on *Legislating for the UK's withdrawal from the EU*. These will result, subject to the general election, in a Great Repeal Bill which will repeal the European Communities Act 1972 (ECA) and other legislation and provide for the domestication of EU law into the law of the UK. The Scottish Government has put forward proposals for recognition of a special status for Scotland (*Scotland's Place in Europe*) and similar ideas are being put forward by other parties in Northern Ireland. The Prime Minister called a UK general election which took place on 8 June 2017. At the time of writing, discussions are taking place between the Conservative Party and Democratic Unionist Party to create a stable government. There have been

elections in the Netherlands and France and they will take place soon in Germany. The EU Council and Commission have published guidelines for the negotiations.

Taking all of these various elements into account, the Society has submitted a proposal document to the UK Government to inform it about the legal issues we consider to be most pressing for the negotiation process.

Ensuring stability in the law

We support the UK Government's decision to maintain consistency and stability in the law which it has made clear in the Exit White Paper and which reflects one of our priorities for the negotiations.

The need to maintain stability in the law, repeal legislation and prepare new legislation to fill in gaps arising from leaving the EU will comprise a significant part of domestic legislation which is passed at or following withdrawal for some years to come.

The proposals in the Great Repeal Bill which will repeal the ECA and preserve and continue existing EU law (whether derived from direct or indirect effect provisions) will achieve the government's objectives. However it would be inappropriate to include in any new law the wholesale repeal of direct effect provisions without providing for alternative arrangements. These arrangements would ensure clarity and prevent legal uncertainty.

EU law with indirect effect (directives) has already been transposed into domestic legislation through either primary or secondary legislation by the UK Parliament or by the devolved legislatures. That law will continue to be part of the UK and Scots law until and unless it is specifically repealed. Many statutory instruments deriving from EU directives have been enacted under Section 2 of the ECA and so would be repealed along with it, unless explicitly retained. The time constraints and the significant amount of material in the Acts of Parliament and statutory instruments which implement the nearly 19,000 EU laws (House of Commons Library Paper Number 7867, 16 January 2017) will make this target exacting, especially taking into account pre-legislative consultation, drafting, debate and the preparation of ancillary documents. The Great Repeal Bill White Paper estimates that the necessary changes 'will require between 800 and 1000 statutory instruments (para 3.19)'. These changes to UK law could be very substantial, if, for example the

negotiations result in a Free Trade Agreement in various sectors, or changes made to correct deficiencies in EU derived law.

Many of the recommendations made by the House of Lords Constitution Committee in the report *The Great Repeal bill and delegated powers* (HL Paper 123), particularly the special scrutiny regime referred to in paragraph 102(4), are worthwhile considering. The Great Repeal bill White Paper identifies the need to strike the balance between the need for scrutiny and the need for speed. The need for scrutiny should not be sacrificed to the need for speed. International trade law creates the basis for UK import and export activity which has a direct impact on economic and commercial growth and development. This affects everyone and therefore it is important that new trade agreements are constructed in line with existing standards of trade law and put in place as soon as is possible to minimise disruption to the economy. In order to reassure and create stability for businesses, consumers and citizens, it is vitally important that effective transitional arrangements are in place to ensure that disruption to existing commercial and personal legal arrangements are minimised.

Maintaining freedom, security and justice

We agree that the UK should continue to work with the EU to preserve UK and European security and to fight terrorism and uphold justice across Europe. We proposed that the UK should seek as part of the Withdrawal Agreement to maintain the existing EU Freedom, Security and Justice Legislation, including the European Arrest Warrant (EAW), access to EU databases, information exchange systems, agencies and cross-border cooperation framework. The Lisbon Treaty created the Area of Freedom, Security and Justice (AFSJ), which covers policy areas that range from the management of the EU's external borders to judicial cooperation in civil and criminal matters and police cooperation. It also includes asylum and immigration policies and the fight against crime (terrorism, organised crime, cybercrime, sexual exploitation of children, trafficking in human beings, illegal drugs, etc).

The UK retained an opt-in facility granted to the UK and Ireland under the Amsterdam Treaty in 1997 and has opted into (or in the case of Schengen-related measures has



not opted out of) a number of measures, including the EU arrest warrant.

EU measures have been developed to deal with cross-border situations, for example where it is suspected that a criminal organisation is operating in several EU countries, or a suspected criminal is hiding in an EU country. EU law and policy in this area is intended to strengthen dialogue and facilitate action between the criminal justice authorities of EU countries.

Access to agencies

As an EU Member State, the UK enjoys access to all of the agencies such as Eurojust, the European Police Office (EUROPOL), the European Police College (CEPOL), the European Union Agency for Fundamental Rights (FRA) and the European Network and Information Security Agency (ENISA). These agencies participate in the EU-wide investigation of crime and subsequent prosecution by way of data-sharing measures, identifying the whereabouts of a suspect and the obtaining of an EAW.

The UK Government should, as part of the withdrawal agreement negotiations, give priority to maintaining access to all agencies. It would also be desirable for the UK to retain the ability to influence the policies and operational activities of those organisations but after withdrawal from the EU this would be a challenge.

Schengen information system (SIS)

The SIS facilitates the real-time sharing of information and alerts between the relevant authorities in participating countries. It is in operation in all EU Member States and associated countries that are part of the Schengen Area. Special conditions exist for EU Member States that are not part of the Schengen Area, of which the UK is one. The SIS enables the UK to exchange information with Schengen countries for the purposes of cooperating on law enforcement.

This provides UK police forces with the following specific alerts for persons wanted for arrest for extradition: missing persons; witnesses or absconders or subjects of criminal judgments. The UK Government should follow other non-EU countries and continue access to the SIS, particularly if an EAW-style framework for extradition to and from EU Member States is agreed as part of the Withdrawal Agreement or the post-leaving UK/EU relationship.

The European Arrest Warrant

The EAW is applied throughout the EU and has replaced extradition procedures within the EU's territorial jurisdiction. Judicial procedures have been designed to surrender people for the purposes of criminal prosecution or executing a custodial sentence.

Unless the EAW is retained following withdrawal, the process for the extradition of individuals will be more expensive, complex and time-consuming and will require a new treaty or treaties to underpin any alternative arrangements.

In 2012, the UK Government made a positive decision to opt into the EAW framework. The then Home Secretary Theresa May MP outlined some of the reasons in support of the decision to opt into the framework, for example it being a streamlined process making it easier to bring serious criminals back to the UK to face trial or serve sentences.

Those reasons for opting into the EAW are still sound and the UK Government should take an approach which avoids disengagement from the EAW. There should be no change to the law which would prejudice the safety and security of the individual.

The European Investigation Order (EIO)

The UK Government should prioritise the implementation of the Directive regarding the EIO. The UK Government opted into this measure. The directive allows Member States to carry out investigative measures at the request of another Member State on the basis of mutual recognition. These investigative measures include interviewing witnesses, obtaining of information or evidence already in the possession of the executing authority, and (with additional safeguards) interception of telecommunications.

Criminal procedure

The EU published a 'roadmap' on procedural rights in 2009 to ensure the basic rights of suspects and accused persons are protected. A number of measures followed with proposals to further strengthen procedural safeguards for citizens in criminal proceedings. Of those measures, the UK opted into and transposed the directives on the Right to Interpretation and Translation

in Criminal Proceedings and the Right to information in Criminal Proceedings.

We believe that the rationale for opting into these Criminal Procedure Directives remains, and the government should avoid any proposal which results in a reversal or erosion of the opt in and, which diminishes the right of the individual.

Civil procedure

We proposed, notwithstanding that the Exit White Paper made limited reference to civil judicial cooperation, that the UK Government include in the negotiations maintaining recognition and enforcement of citizens' rights, including the rights of parties with pending cases before the Court of Justice of the EU. The UK Government is alive to this issue and recognises that an effective system of civil judicial cooperation will provide certainty and protection for citizens and businesses, families and consumers.

Maintaining the structure of the Brussels Regulations, the EU Enforcement Order and Order for Payment, the Maintenance Regulation and Rome I & II on Applicable Law are essential to litigants in both the UK and the EU. They assist in the resolution of disputes and are valuable to litigants in their personal and commercial capacities. Other rights including European trademark unitary patents and design rights and pending applications should be included in the Withdrawal Agreement.

Article 81 of the TFEU is backed up by civil justice instruments into which the UK has opted, including the Brussels I Regulation on the mutual recognition and enforcement of civil and commercial judgments. The principal rule is that the court where a defender is domiciled has jurisdiction. Other EU instruments with significant domestic impact include the EU Enforcement Order 2004 and Order for Payment 2006, and Rome I and II on applicable law.

The EU has also made law in a number of areas concerning civil judicial cooperation in cross-border family cases. The law includes the Brussels IIa Regulation on the jurisdiction of matrimonial proceedings, principally divorce. This regulation also allows for the mutual recognition and enforceability of judgments concerning parental responsibility. It supplements the Hague Convention and provides a mechanism for the return of abducted children. The Maintenance Regulation provides rules for assessing

jurisdiction in maintenance disputes and for identifying the law which will be applied as well as for the recognition and enforcement of maintenance decisions from other EU Member States' Courts.

When the UK leaves the EU this law will be subject to the Great Repeal Bill and the terms of the Withdrawal Agreement cease to apply in the UK as Article 81 and the regulations and directives flowing from it will not operate outside the EU. Prior to the TFEU and the EU regulations, arrangements were made for cross-border litigation by way of bilateral treaties and other conventions. When the UK exits, unless there is provision in the Withdrawal Agreement, this solution will need to be adopted. This will take time, incur cost and delay and will leave citizens with civil or family law issues in limbo.

In family cases, although there have been some practical problems with the implementation of Brussels IIa, family practitioners generally agree that the regulation makes the law in this area clearer.

In terms of intellectual property, the European Patent Office and the European Patent and the EU Intellectual Property Office and EU trademarks and the registered Community design are important processes for UK business and the Withdrawal Agreement must contain provision preserving EU patents, trademarks and registered Community designs and adequate transitional provisions. The EU Council *Guidelines following the UK notification under Article 50 TEU* note the need for arrangements dealing with administrative issues.

Creating arrangements to secure the rights of parties with pending cases before the Court of Justice of the European Union (ECJ)

We believe the UK Government should adopt the option for dealing with pending cases at the ECJ which will cause least disruption to litigants. The UK's exit will have an impact on litigants before the ECJ and their lawyers and on the relationship between the ECJ and the domestic courts in the constitutive jurisdictions of the UK. Whatever the outcome, the objective should be to uphold the rule of law and the proper administration of justice.

The EU Council *Guidelines following the United Kingdom's notification under Article 50 TEU* highlight the need for arrangements ensuring legal certainty and equal treatment



for all court procedures pending before the ECJ on the date of withdrawal which involved the UK or natural or legal persons in the UK (para 15).

Promoting immigration, residence, citizenship and employment rights of EU Nationals in the UK

We believe clarity is needed as a matter of urgency about the residence, housing and work rights of such individuals and their families and how these can be regularised with the minimum of bureaucracy. The Exit White Paper makes it clear that securing the rights of EU nationals in the UK and UK nationals in the EU and protecting workers rights are priority negotiation issues. We welcome this approach.

Although the UK is bound by treaty obligations to respect the free movement of persons, it has opted out of most EU Law on immigration, the best example of which is the Schengen Agreements which creates the common European area and framework for visas and border control.

UK immigration law is within the province of the UK Parliament and although the UK is bound by treaty to the principle of free movement, it has retained control over some aspects of border and visa policy. The UK Government has stated an objective of withdrawal from the EU's control of immigration law and policy, borders and visas. There is a debate about the accrued rights of EU citizens and their families. Both the EU and the UK Government recognise the desirability of early certainty about the rights of citizens of EU 27 and their families resident in the UK and vice versa.

An EU citizen can apply for a permanent residence card after five years' residence in the UK. This document proves the right to live in the UK permanently. Eligibility arises if the applicant has lived with a European Economic Area (EEA) family member for five years and the EEA family member is a qualified person throughout five years or has a permanent right of residence.

The UK Government has stated that when the UK leaves the EU they fully expect that the legal status of EU nationals living in the UK and that of UK nationals in EU Member States will be properly protected. The UK Government has also stated that EU nationals who have lived continuously and lawfully in the UK for at least five years automatically have a permanent right to

reside. This means that they have a right to live in the UK permanently in accordance with EU law. There is no requirement to register for documentation to confirm this status. Furthermore a person can apply for a permanent residence card after that person has lived in the UK for five years. The card will prove that person's right to live in the UK permanently. Similarly, UK citizens living in other Member States would have to comply with the immigration, residence and visa requirements imposed by those Member States.

Promoting continued professional recognition and continued rights of audience in the EU

We believe that the UK Government should negotiate the continuity of EU law concerning the transnational practice of law and legal professional privilege in the Withdrawal Agreement. The regime to regulate the cross-border supply of legal services and the rules designed to facilitate the establishment of a lawyer in another Member State have been in force for a number of years. There are three key pieces of legislation that affect the legal profession: (1) Lawyers' Services Directive of 1977 (77/249); (2) Lawyers' Establishment Directive of 1998 (98/5); and (3) Recognition of Professional Qualifications Directive (2005/36).

In addition, Directive 2006/123/EC on Services in the Internal Market which regulates the provision of services in the EU also touches on the legal profession.

The Lawyers' Services Directive (temporary provision of legal services)

The Lawyers' Services Directive 1977 governs the provision of services by an EU/EEA/Swiss lawyer in a Member State other than the one in which he or she gained his or her title – known as the 'host state'. Its purpose is to facilitate the free movement of lawyers, but it does not deal with establishment or the recognition of qualifications. The Directive provides that a lawyer offering services in another Member State – a 'migrant' lawyer – must do so under his or her home title. Migrating lawyers may undertake representational activities under the same conditions as local lawyers, save for any residency requirement or requirement to be a member of the host Bar.

However, they may be required to work in conjunction with a lawyer who practises before the judicial authority in question. For other activities the rules of professional conduct of the home state apply without prejudice to respect the rules of the host state, notably confidentiality, advertising, conflicts of interest, relations with other lawyers and activities incompatible with the profession of law.

Permanent establishment under home title

The Establishment Directive 1998 entitles lawyers who are qualified in and a citizen of a Member State to practise on a permanent basis.

However, this entitlement requires that a lawyer wishing to practise on a permanent basis registers with the relevant Bar or Law Society in that state and is subject to the same rules regarding discipline, insurance and professional conduct as domestic lawyers.

Once registered, the European lawyer can apply to be admitted to the host state profession after three years without being required to pass the usual exams, provided that he or she can provide evidence of effective and regular practice of the host state law over that period.

Recognition of professional qualifications

Re-qualification as a full member of the host State legal profession is governed by the Recognition of Professional Qualifications Directive. Article 10 of the 1998 Lawyers' Establishment Directive is essentially an exemption from the regime foreseen by the Recognition of Professional Qualifications Directive.

The basic rules are that a lawyer seeking to re-qualify in another EU/EEA Member State or Switzerland must show that he or she has the professional qualifications required for the taking up or pursuit of the profession of lawyer in one Member State and is in good standing with his or her home bar.

The Member State where the lawyer is seeking to re-qualify may require the lawyer to either: (1) complete an adaptation period (a period of supervised practice) not exceeding three years; or (2) take an aptitude test to assess the ability of the applicant to practise as a lawyer of the host Member State (the test only covers the essential knowledge needed to exercise the profession in the host Member

State and it must take account of the fact that the applicant is a qualified professional in the Member State of origin).

Legal professional privilege

The ECJ decided the case of *AKZO NOBEL Ltd and AKCROS Chemicals Ltd v The European Commission (C-550/07)* in September 2010. The judgment concerned the application of legal professional privileged communications between a client and in-house counsel. The Court also decided to exclude all lawyers qualified outside the EU from the application of legal professional privilege.

The case proceeded on the precedent of the ECJ in *AM&S Europe v the Commission*² which also excluded non-EU lawyers from the application of legal professional privilege. The Court acknowledged that legal professional privilege applies to communications between a client and his independent lawyer but limited the definition of lawyer to 'a lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which that client lives... but not beyond'. The apparent basis of the exclusion of third countries from the benefit of legal professional privilege within the EU is the difficulty of the Court being able 'to ensure that the third country in question has a sufficiently established rule of law tradition which would enable lawyers to exercise the profession in the independent manner required and they to perform their role as collaborators in the administration of justice' (Opinion of Advocate General Kokott).³

Legal professional privilege and confidentiality of communications are key aspects of the rule of law in the UK and are acknowledged by the Courts and Parliament as central to the administration of justice. Recently legislation such as the Investigatory Powers Bill and the Policing and Crime Bill specifically acknowledge the requirement to protect legal professional privilege and confidentiality. The doctrine is upheld under human rights law in *Campbell v UK*.⁴

The loss of legal professional privilege and confidentiality will have a negative impact on the rights of clients and on the ability of lawyers in the UK to provide a full service to their clients when acting in EU legal issues or on matters which relate to EU law or business in the EU. The UK legal systems clearly meet the test which Advocate General Kokott identified in respect of the Rule of



Law and the independence of the lawyers in those systems and should therefore have legal professional privilege accorded to the lawyer/client relationship when EU law is an issue.

This should be a priority for the UK Government in the negotiations in order to ensure that UK lawyers can function fully

when acting for British, EU and third country clients who wish to access their legal services and advice.

Notes

- 1 UKSC [2017] UKSC 5.
- 2 [1982] ECR 1575 paras 25-26.
- 3 29 April 2010 paras 60-61.
- 4 (1992)15 EHRR 137.

The case for an elected comptroller

Government in the US

The United States has long been known for its bicameral government and checks and balances established by its Constitution, but what happens at the local level?

History: the scandal

In the late 1800s, the City of Grand Rapids, Michigan operated under a mayor and board of aldermen. These ‘were the days of the Robber Barons when official integrity was in eclipse, and all government was considered to be an “adjunct to business and industry.”’¹

‘[The] occasion for the scandal was a projected franchise to bring Lake Michigan water to the city. The range of corruption was stupendous. It reached out to New York, Chicago, Milwaukee, Indianapolis, and even Omaha. It ensnared the mayor, fourteen aldermen, the city attorney, the city clerk, a state senator, an ex-prosecutor, leaders in society, church and business, and all three newspapers then existing... The plot was simple: Authorize bonds far in excess of the cash needed to pay the cost of a water system which would connect Grand Rapids with Lake Michigan.’²

Of 24 aldermen 16 were named by the chief witness in the scheme by which they were on the take.³

Office of city comptroller

In 1903 Council authorised a charter revision, which eventually became the commission-

manager charter of 1916, giving more strength to the office of the city manager and weakening the political office of the mayor. The city comptroller was deliberately changed from an appointed position to an elected one,⁴ taking the subordination of the office out from under the elected commission. The city comptroller is elected at large by a city-wide vote.⁵

Other cities that elect their comptroller include: Houston, Milwaukee, Philadelphia, and New York City. Counties also elect comptrollers, including: Orange County, Florida; and several counties in New York State; and the following nine states elect comptrollers: California, Connecticut, Idaho, Illinois, Maryland, Nevada, New York, South Carolina and Texas.

Nevada Controller Ron Knecht says: ‘When I ran, I promised much more transparency, accountability and disclosure of facts and data the... political establishment would rather avoid. The Popular Annual Financial Report is a key example... the on-line checkbook we’re currently developing, my current efforts to inject some realism into Nevada Public Employee Retirement Systems assumptions, planning and Actuarial Required Contribution determination, etc. All things... which are vital to the public interest.’

Recently, a former City Attorney for Flint, Michigan claimed she was fired after she spoke out about illegal activities committed by the City and its Mayor:

‘The lawsuit [filed in Detroit U.S. District Court], although scant on details, claims (the City Attorney) reported multiple

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suspected and actual violations of law, including: (The City Attorney's) refusal to sign "fraudulent legal documents".

Objections from (the City Attorney) to approve a retroactive contract for the director of the Flint Action and Sustainability Team, which city press releases claim coordinates pipe replacement "activities between the City of Flint, state and federal departments and agencies, and other stakeholders", in violation of Internal Revenue Service rulings.

And the objection to the "illegal access" of an unnamed advisor of (the Mayor).⁶ In 2012 the city tried to change the charter to eliminate the elected city comptroller which was rejected by the voters. 'On the charter proposal to replace the city's 100-year tradition of electing its comptroller, nearly 64 percent of the voters rejected the proposal, which would have created an appointed financial watchdog. The final unofficial tally was 46,017 against and 26,241 in favor.'⁷

An appointed official is fired by an elected official for honouring her ethics; an elected official is on equal footing with other elected officials. The City of Grand Rapids in 1916 had not only hindsight, but foresight in creating an elected position that serves as a check and balance for its people; and in 2012 the voters were smarter than the politicians.

Notes

- * Sara Vander Werff, JD, is the City Comptroller for the City of Grand Rapids, Michigan, elected in November 2013 for a four-year term, having taken office in April 2013 to complete the term that expired that year.
- 1 Z.Z. Lydens, *The Story of Grand Rapids* (Kregel Publishers, 1966) at 56.
- 2 *Ibid* at 57-58.
- 3 *Ibid* at 59.
- 4 The language in one of the original drafts reads: 'The City Commission shall appoint a City Comptroller who shall hold office at the pleasure of the Commission' after which the words 'Commission', 'appoint', and 'who shall hold office at the pleasure of the Commission', were stricken. Grand Rapids, Mich, 32d Session Reports of Charter Commission (31 August 1915).
- 5 Grand Rapids, Mich, Code Of Ordinances, Part 1 – Charter, Title II, Sec 2 (1916).
- 6 Gary Ridley, 'Former city attorney alleges illegal acts by Flint mayor in new lawsuit' (*Mlive.com*, 3 April 2017) www.mlive.com/news/flint/index.ssf/2017/04/former_flint_city_attorney_all.html.
- 7 Jim Harger, 'Final votes tallied on city proposals to decriminalize marijuana, end elected comptroller' (*Mlive.com*, 7 November 2012) www.mlive.com/news/grand-rapids/index.ssf/2012/11/final_votes_tallied_on_city_pr.html.

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Legal ethics and professional responsibility concerns related to alternative litigation financing

Introduction

Alternative litigation financing (ALF) is a term that refers to the funding of litigation or arbitration activities by third parties, such as indemnitors or liability insurers, who have a contractual relationship with one of the parties¹ to litigation. Third-party funders pay the plaintiff's legal costs on a non-recourse basis in return for a fee payable from the amounts recovered. Such a tripartite contractual relationship between the funder, litigant and litigant's lawyer involves an

assignment of an interest in the proceeds from a cause of action. As the funder's objective and efforts in ALF are to maximise the return on their investment, the funder's involvement may create incentives for and effects on the client and the lawyer, differing from the ones that would be expected in a similar case without ALF. This may raise ethical questions.

Beginning in the late nineties, commercial litigation finance has gradually grown into a multi-billion-dollar industry.² Currently, ALF is available and legally permitted to



clients in various jurisdictions including the United Kingdom, Australia, and other Asian and European countries. Many states in the United States have also permitted some form of ALF. Among the dominant actors in the industry are banks and hedge funds, which tend to finance class actions, medical malpractice and personal injury lawsuits that will likely end in a monetary award.

As the ALF business is booming, state bar ethics committees have also developed interest and scrutiny thereof. Regardless, lawyers seem rather less familiar with the potential issues ALF presents. This article intends to fill that void and touches on some of the major issues³ and ethical concerns presented by ALF. By shedding light on the client-lawyer relationship and the professional responsibilities of lawyers in these emerging transactional structures, this article aims to raise awareness among practitioners and calls for greater certainty and transparency in the litigation finance industry.

Ethical concerns regarding third-party funding relationships

Among the major ethical issues are conflicts of interest, exercise of independent judgement, attorney-client confidence and privilege, and fees. It also raises questions for lawyers to refer clients to funders.

Conflicts of interest

Many of the jurisdictions worldwide if not all, have conflict of interest provisions in professional responsibility regulations and codes of conduct for lawyers. Conflict rules prohibit lawyers from representing clients when subject to a conflict of interest, without obtaining the informed consent of the client. The protected interests of clients by such rules include the confidentiality of information the client shares with the lawyer, the client's reasonable expectation of loyalty from the lawyer, and the client's interest in receiving the lawyer's independent professional judgement with candid and unbiased advice. Such rules protect clients from having to assume the risk that their interests will be harmed because of the lawyer's relationship with another client, a former client, or a third party, or the lawyer's own financial or other interests.

With regards to ALF, the major concern is whether the existence of litigation funding undermines performance of the lawyer's

fiduciary and professional obligations towards the client, who is a litigant funded by the third party. Although many ALF transactions are negotiated and contracted between the funder and funded litigant with no involvement of the litigant's lawyer, the terms of such contracts affect the rights, role and financial gain of the lawyer anyway. In such circumstances, one might be worried that the lawyer's primary loyalty might rest with the funder because the funder pays the lawyer, in one particular case; or as retainer; or when the funder offers the prospect of repeat business for the lawyer.

Such concerns are not however sufficient to assume a breach of professional conduct per se. It might eliminate or mitigate the concerns, if the lawyer at all times clearly explains to the client the terms and consequences of any interaction, communication and arrangement with the funder, which might in any way affect the client's interests, and obtain the client's informed consent in writing.

Lawyers should also comply with the professional rules on acquisition of an interest in the client's cause of action and business transactions with the client, as the financing of lawsuits is considered 'an asset purchase, and not a loan',⁴ where the legal claim by the funded litigant is the asset. In many jurisdictions, provided that the terms and consequences of such transaction are clearly explained and disclosed to the client, and the lawyer has obtained the client's informed consent, the lawyer may acquire pecuniary interest adverse to the client.

Professional independence of the lawyer

The rationale underlying the conflict of interest rules in many jurisdictions if not all is to protect the professional independence of the lawyer. Interference with the professional judgement of the lawyer is not a risk unique to ALF; however, the presence of ALF creates the complex tripartite relationship between the lawyer, client and funder (who is a non-client) and certainly raises questions.

ALF and the presence of a third-party funder have the potential to interfere with the lawyer's exercise of candid, objective, independent judgement on behalf of the client, as the funders may seek the right to comment or advise on, or even veto, decisions⁵ made by lawyers during the course of litigation, 'to approve the filing of the lawsuit; control(led) the selection of the

plaintiffs' attorneys; recruit(ed) fact and expert witnesses; receive(d), review(ed) and approve(d) counsel's bills; and have (*sic*) the ability to veto any settlement agreements.⁶ It raises concerns when the contract between the funder and client includes clauses permitting the funder to inspect pleadings, waiving confidentiality, and giving the funder a say in the hiring and firing⁷ of counsel. There may as well be clauses allowing the funder to refuse further funding if the lawyer, in representing the client, makes decisions that the funder has a fundamental disagreement with. Presence of such clauses may lead to it being impossible for a reasonable lawyer to provide competent representation of the client.

Interestingly enough, the practice shows⁸ that some of the funders claim no control over the lawyers' decision-making process and representation of the client. There are however counter examples,⁹ and possibilities.

Regardless of the case, the lawyer has an obligation to act with reasonable competence and diligence in representing the client, as well as independently advise the funded litigant although the funder's interests may be harmed. The lawyer must feel no pressure to favour the interests of the funder who is a non-client, and must at all times ensure that the client-funder contract does not compromise the lawyer's independent professional judgement.

Duty of confidentiality and attorney-client privilege

In the contracts between the funder and client, funders may have the right to inspect all documents, including those covered by the attorney-client privilege.¹⁰ Such right may seem reasonable, as the funder may need confidential information to make decisions regarding the financing of the lawsuit. Funders, as part of their internal process, often ask the lawyer to disclose information or provide a litigation assessment referencing such information. Such information, albeit relevant to the funder's decisions, raises concerns regarding the lawyer's duty of confidentiality. Disclosing confidential information, or any information on the client learned because of the attorney-client relationship, may require waivers of confidentiality and privilege and the client's consent.

In many jurisdictions, if not all, professional responsibility rules and codes of conduct,

as well as agency laws, require the lawyer not to disclose information relating to the representation of a client without the client's informed consent. The scope of the duty of confidentiality is significantly broader than attorney-client privilege, which also exists in many countries. In legal practice, the communications made in confidence between attorney and client, for the purpose of obtaining legal assistance, are protected by the attorney-client privilege. What the lawyer must do in any and all cases that may involve disclosing a client's information – albeit to the funder who the client is in a contractual relationship with, where the client agreed to such a disclosure – is to exercise reasonable care to preserve the confidentiality of information and to safeguard against inadvertently waiving the protection of the attorney-client privilege.

Fees

In many jurisdictions, financial assistance by lawyers to clients are either prohibited or partially permitted. The underlying policy is to not encourage clients to pursue lawsuits just because there is great financial stake in the particular litigation for the lawyer. The funder is however independent of the lawyer; therefore ALF should be distinguished from the financial assistance by lawyer to client. Nevertheless, ALF business upsets opponents, such as the President of the US Chamber of Commerce, who argued that litigation finance, by encouraging more lawsuits, turns the courts into 'profit centers'.¹¹ On the other hand, Professor Anthony Sebok, who also advises a leading funder in the ALF business, argues 'the fact that the money for a lawyer comes from someone other than the person named on a caption of a legal document does not change the facts of the lawsuit or the law itself.'¹²

In fact, ALF may serve the promotion of justice by enabling the funded litigant to present the facts in the courtroom, which could have not been possible otherwise due to the lack of finances to fight the legal battle. Regardless of the role of funders, lawyers must at all times abide by the law and comply with the relevant jurisdiction's rules on material limitation conflicts and financial assistance to clients.

Another issue with fees is that in many jurisdictions, codes of conduct prevent lawyers from charging an unreasonable fee or amounts for expenses arising out



of representing the client. The metes and bounds of reasonable or unreasonable fees are determined in many jurisdictions by two criteria: (1) whether the client made a free, independent and informed decision to enter into the contract with the lawyer; and (2) whether the attorney-client contract provides for a fee within the range commonly charged by other lawyers in the legal profession of the particular jurisdiction in similar circumstances. What seems to be the concern regarding the ALF arrangements is that, although the lawyer charges the client a reasonable fee, at the end of the litigation, the lawyer may end up gaining an unreasonable amount, due to the lawyer's arrangement with the funder, beyond the client's intention. Although the tripartite structure between the funder, lawyer and client is in compliance with the codes of conduct, the lawyer's total compensation for providing legal services would still need to meet the reasonableness requirement. Therefore, receiving money beyond the reasonable attorney's fee seems an interesting and complex issue for lawyers, to be solved by the courts and bar association ethics committee decisions.

Referring clients to funders

The issue of whether lawyers can tell their clients about the availability of ALF and refer the clients to the funders is highly problematic. In many jurisdictions, there is no clear provision prohibiting such referral. Unless prohibited, lawyers seem to inform their clients of the availability of ALF, on condition they follow the professional responsibility rules and ethical obligations to clients. These include, first and foremost, warning clients about the risk of waiver of the attorney-client privilege, by obtaining informed consent to disclose confidential information, due to the involvement of a funder. Also lawyers must in general terms and at all times avoid any interference with their professional judgement as a result of involvement in the ALF transaction. Further, lawyers may not have an ownership interest in the funder to which the client is referred. Nor may lawyers receive referral fees or otherwise benefit financially as a result of such referral.

Recent developments and outlook

There have been significant developments in the ALF business in many countries especially in recent years. In parallel, bar associations

in many jurisdictions have developed interest and scrutiny with regards to professional responsibility of lawyers in litigations funded by a third party. Courts have also started to focus on ethical concerns in litigations where the parties utilise ALF. Acknowledging all the attempts worldwide to provide clarity to the issues in the ALF business, this section presents selective examples instead of looking into developments in all countries.

Australia

Australia, widely considered the birthplace of third-party litigation financing, seems to experience increasing scrutiny in the ALF business. A judge of the Federal Court of Australia recently drew attention to the unregulated nature of ALF, and encouraged judges to take a more active role in regulating the amount a third-party funder can take from a settlement and questioned why judges have not cracked down on excessive payouts¹³ to third parties from the beginning. Further, the Attorney General for the State of Victoria, asked the Victorian Law Reform Commission to review the rules covering litigation funders to prevent unfair conduct in civil proceedings, including class actions, earlier this year. Australian government and legal officials have also considered the possible improvements to be made to the class action system, which is attractive to funders, in order to ensure its objective, which is to compensate victims and not the third-party funders.

The United Kingdom

As in Australia, class actions are attractive for the ALF business in the UK. Becoming a major global hub for ALF, the UK has introduced opt-out class actions for the first time. With the Consumer Rights Act, effective 1 October 2015, the UK permitted consumers to sue collectively for damages resulting from competition law violations. It is estimated that such development will fuel the ALF business in class actions to be brought by consumers due antitrust and unfair competition violations.

On the ethical side, some of the ALF providers in the UK launched a code of conduct¹⁴ in 2011. It seems a good start, although the code fails to provide sufficient safeguards against the risks associated with ALF because: (1) it is voluntary; (2) it applies only to the funders who are members of the Association of Litigation Funders of England

and Wales; and (3) the only sanction for breaching the code is potential expulsion from that association. This means that the funder who breaches the code of conduct remains free to continue ALF activities, which seems to leave the code absent of an aversive sanction. It is certainly good to see civil societies taking such optimistic steps, however it would be more effective if the official authorities such as the government and bar associations took actions to regulate the ALF business and the rules of ethics thereof.

The United States

The informational report on ALF issued in late 2011 by the American Bar Association's Commission on Ethics¹⁵ appears to be the most comprehensive guide presenting and tackling ethical concerns raised by the ALF business and involvement of lawyers in such third-party funding arrangements. Further to the report, a major development in the field is a new rule announced by the US District Court for the Northern District of California requiring the automatic disclosure of third-party funding agreements in proposed class-action lawsuits. The Court issued a proposed revision to Civil Local Rule 3-15 for public comment regarding the disclosure of non-party interested entities or persons that are 'funding the prosecution of any claim or counterclaim' 'in any proposed class, collective, or representative action'.¹⁶

It remains to be seen if any other court follows the California court's initiative. Nevertheless, it would certainly be more effective to see such disclosure requirement on federal level rather than state level – that is, a revision on the Federal Rules of Civil Procedure. One step towards this end at the federal level is the Fairness in Class Action Litigation Act of 2017. The Act includes a provision that implements mandatory disclosure of ALF in all class actions passed by the US House of Representatives in March 2017. In any event, the developments will be interesting to monitor.

Conclusion

Having become more prominent and rampant over the last two decades in many jurisdictions, ALF has both proponents and opponents. While proponents argue ALF business promotes justice and deters wrongdoing, opponents are of the opinion that ALF encourages more lawsuits and

turns the courts into profit centres. Regardless of which side one takes, there are ethical concerns for lawyers and emerging professional responsibility issues. Despite the variables in particular cases, what seems to be in common in many hypotheticals is that the lawyer must ensure the client's informed consent as well as act with reasonable competence and diligence in representing the client. At all times, the client should be adequately advised and informed of the material risks, and reasonable available alternatives explained to them. Similarly, the client should be adequately advised and it explained to them in what ways the contracts between the funder and client could adversely affect the client's interests, or favour the lawyer's or funder's interests over the client's.

Finally, it would certainly be ethical for all stakeholders to require transparency regarding funding arrangements, so that both the court and litigants are aware of a funder's role in a particular case. To ensure such clarity, governments, judges and bar associations as well as key persons and actors in the ALF business must take action.

Notes

- 1 This article acknowledges but leaves out of its scope that ALF arrangements may also come as third-party funders financing a law firm's portfolio of cases in return for profit.
- 2 See eg, Joshua Hunt, 'What Litigation Finance is Really About' (*The New Yorker*, 1 September 2016) (stating that litigation finance 'has gradually grown into a three-billion-dollar industry') available at www.newyorker.com/business/currency/what-litigation-finance-is-really-about accessed 10 June 2017. See also Alison Frankel, 'Burford, Gerchen Keller to merge: turning point for litigation funding?' (*Reuters*, 14 December 2016) (noting that 'litigation funders such as Harbour Litigation Funding, Calunius Capital and Therium have invested hundreds of millions of dollars in British, European and Asian cases.') available at www.reuters.com/article/us-otc-burford-idUSKBN1432S4 accessed 10 June 2017.
- 3 This article acknowledges common law doctrines historically affecting ALF such as maintenance, champerty and barratry, however does not focus thereon. Neither does it consider the social policy nor normative issues nor legislative responses to identified problems. This article limits its scope to the duties of lawyers in representing clients funded by third-party financial suppliers, and leaves out of consideration the case where the lawyer also has a professional relationship with funder. It also acknowledges the difficulties in generalising the ethical issues for lawyers engaged in or associated with ALF across and in light of a wide range of transaction terms, market conditions, type of litigation or arbitration, and the bargaining power of parties among other variables.
- 4 Thomas Brom, 'How Litigation Funding Upsets the Justice Marketplace' (*California Lawyer*, June 2015) available at www.callawyer.com/2015/06/how-litigation-funding-upsets-the-justice-marketplace/ accessed 10 June 2017.



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- 5 This also includes the decision whether to settle a civil lawsuit, which is in many jurisdictions one of the non-delegable professional duties owed by the lawyer to the client, and where the client retains the authority to decide whether or not to settle a case. Due to the fiduciary nature of the client-lawyer relationship, client-lawyer contract clauses interfering with non-delegable client rights, such as the right to decide whether or not to settle a civil lawsuit, are unenforceable. Similar clauses in a client-funder contract however seem enforceable, from a contract law standpoint, unless defences such as duress or unconscionability are established.
- 6 *Abu-Ghazaleh v Chaul*, 36 So 3d 691, 693 (Florida District Court of Appeals 2009).
- 7 As per withdrawal and substitution of counsel, in many jurisdictions, clients have the absolute right to discharge their lawyers, and lawyers are not permitted to restrict such right of clients. A client's contract with the funder, however, may include clauses restricting the client's right to terminate a lawyer or to retain substitute counsel, or tying it to the written approval of the funder. Such clauses may be deemed valid or void as a matter of public policy and law in the respective state or country.
- 8 See eg, *Anglo-Dutch Petroleum Int'l, Inc. v Haskell*, 193 SW3d 87, 104 (Tex. Ct App. 2006) (stating that 'there is no evidence that [the funders] maintained any control over the Halliburton lawsuit. The agreements do not contain provisions permitting [the ALF suppliers] to select counsel, direct trial strategy, or participate in settlement discussions, nor do they permit [the funders] to look to Anglo-Dutch's trial counsel directly for payment.').
- 9 See above at n 5.
- 10 See eg, Michigan State Bar Standing Committee on Professional Ethics, Advisory Opinion, RI-321, 29 June 2000 (discussing a contract between a civil tort plaintiff and a funder where the funder is 'entitled to inspect all records, including all privileged attorney-client records, relating to the collateral.');
- 11 Lisa A Rickard, 'This Is Casino Litigation, Where We All Lose' (*New York Times*, 27 May 2016) available at www.nytimes.com/roomfordebate/2016/05/27/the-ethics-of-investing-in-anothers-lawsuit/this-is-casino-litigation-where-we-all-lose accessed 10 June 2017.
- 12 Anthony Sebok, 'Third-Party Litigation Finance Promotes Justice and Deters Wrongdoing' (*New York Times*, 27 May 2016) available at www.nytimes.com/roomfordebate/2016/05/27/the-ethics-of-investing-in-anothers-lawsuit/third-party-litigation-finance-promotes-justice-and-deters-wrongdoing accessed 10 June 2017.
- 13 The limit of what amount is 'excessive' is unclear, however to illustrate the payouts, see eg, *Kirby v Centro Properties Limited (No 6)* [2012] FCA 650 (19 June 2012), where the initial lawsuit alleged AU\$1bn in economic damages. The case was settled for AU\$200m; \$62m, amounting to more than 30 per cent, of which was paid to Bentham IMF Australia, the funder that financed and managed the lawsuit. In the end, after the additional fees, the class members were left with \$106m, which was 10 per cent of the initial claim, and 50 per cent of the settled amount.
- 14 The Association of Litigation Funders of England and Wales, 'Code of Conduct' (ALF, 2017) available at <http://associationoflitigationfunders.com/code-of-conduct/> accessed 10 June 2017.
- 15 American Bar Association Commission on Ethics 20/20 'Informational Report to the House of Delegates' (*American Bar*, 12 December 2011) available at www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_finalhod_informational_report.authcheckdam.pdf accessed 10 June 2017.
- 16 US District Court, Northern District of California, 'Notice Regarding Civil LR 3-15' available at www.cand.uscourts.gov/news/210 accessed 10 June 2017.