

ETHICS IN PRACTICE

An Education and Apprenticeship in Civility: *Correspondent's Report from Canada*

Adam Dodek*

The title of this report would seem to be drawn from the pages of a Jane Austen novel. In actual fact, civility is a top issue for the legal profession in Canada. Contrary to popular stereotypes about Canadians being exceedingly polite and bland, Canada apparently has a civility problem. At least the legal profession thinks that lawyers in this country do. The last decade has witnessed the rise of a civility movement within the Canadian legal profession. It has parallels with the movement south of the border which seems to have run its course. In Canada, the civility movement stands at a crossroads with the high profile discipline hearing of a flamboyant lawyer seemingly putting civility itself on trial. The emphasis on civility risks overshadowing the more important issue of access to justice.

The focus on civility coincided with a renewed interest in professionalism within the legal profession around the turn of the millennium. The Chief Justice of Ontario and the head of Ontario's Law Society (still called the Law Society of Upper Canada despite the fact that no political entity of that name has existed since 1841) came together to form the Chief Justice of Ontario's Advisory Committee on Professionalism as a tripartite partnership between bench, bar and academe.¹ The Committee was created in part in response to a perceived growing lack of civility among lawyers. The Committee's first order of business was to create a document entitled *Defining Professionalism*, which articulated a broad-based conception of professionalism identifying 10 'building blocks'.² The Committee focused its energies on

* Associate Professor, Faculty of Law, University of Ottawa, Canada (Common Law Section). Thanks to Richard Devlin, Helena Lamed and Alice Woolley for their civility suggestions. All websites accessed 10 November 2011.

¹ See www.lsuc.on.ca/advisory-committee-professionalism.

² See Chief Justice of Ontario's Advisory Committee on Professionalism, Working Group on the Definition of Professionalism, 'Elements of Professionalism' (October 2001; revised December 2001 and June 2002), www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf. The elements of professionalism identified were scholarship; integrity; honour; leadership; independence; pride; spirit; collegiality; service; and balanced commercialism.

organising colloquia on professionalism with lawyers, judges and academics.³ At the same time, the Advocates' Society, a leading barristers' organisation in Ontario, published a booklet entitled *Principles of Civility for Advocates*,⁴ which was subsequently adopted by the Canadian Bar Association and incorporated as an appendix to its Code of Professional Conduct.⁵ Similar initiatives were undertaken in other Canadian jurisdictions.⁶

In the late 2000s, the Law Society of Upper Canada made civility a priority in continuing education and in enforcement. According to Law Society statistics, a significant proportion of complaints against lawyers in Ontario involve civility. The Law Society convened 'civility forums' across the province of Ontario to discuss civility problems and brainstorm responses thereto.⁷ The skeptic in me believes that those lawyers likely targeted as having 'civility problems' were unlikely to have been in attendance at these meetings. When the Federation of Law Societies of Canada decreed that all law schools in Canada must require their students to complete a course in ethics and professionalism, the first item on the list of subjects to be included in such a course was 'the duty to communicate with civility'.⁸ Surprisingly absent from this list was any mention of access to justice, a shocking oversight that was properly addressed by the Federation committee tasked with implementing the first report.⁹

Some within the legal profession in Canada are not comfortable with the profession's prioritisation of civility and professionalism. My colleague, legal historian and Law Society bencher Constance Backhouse, has written eloquently about the use of concepts like civility and professionalism to exclude outsider groups in Canada, especially women and minorities.¹⁰ In a paper written for the very first Colloquium on the Legal Profession convened by the Chief Justice of Ontario's Advisory Committee on Professionalism, Professor Backhouse documented some of this history and also described the more recent experience of some of the first women on Canada's highest courts. Writing about Bertha Wilson, the first woman to serve on the Supreme Court of Canada (1982–91), Backhouse asserts that

3 Since 2008, I have been a member of the Chief Justice of Ontario's Advisory Committee on Professionalism and have participated in several colloquia.

4 www.advocates.ca/new/advocacy-and-practice/institute-for-civility-and-professionalism.html.

5 Canadian Bar Association, *Code of Professional Conduct* (Canadian Bar Association, rev edn 2009), www.cba.org/CBA/activities/pdf/codeofconduct.pdf.

6 eg Nova Scotia Barristers' Society, Task Force on Professional Civility, *2002 Report*, www.nsb.org/archives/reports/2002ReportOnTheTaskForceOfProfessionalCivility.pdf; Barreau du Québec, *Guide de courtoisie professionnelle* (2009). For a comprehensive review of Canadian civility initiatives see Alice Woolley, 'Does Civility Matter?' (2008) 46 *Osgoode Hall Law Journal* 175, 177–9.

7 Law Society of Upper Canada, *Treasurer's Report on the Civility Forum* (27 May 2010), www.lsuc.on.ca/media/convmay10_treasurers_report.pdf.

8 Federation of Law Societies Task Force on the Common Law Degree, *Final Report* (October 2009) (Hunter Report) 9, www.flsc.ca/_documents/Common-Law-Degree-Report-C.pdf.

9 Federation of Law Societies of Canada Common Law Degree Implementation Committee, *Final Report* (August 2011) (Conway Report) 19, www.flsc.ca/_documents/Implementation-Report-ECC-Aug-2011-R.pdf.

10 Constance Backhouse, 'Gender and Race in the Construction of "Legal Professionalism": Historical Perspectives', paper presented at the First Colloquium on the Legal Profession, London, Ontario, October 2003, www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf. Legal Historian Wes Pue has similarly described how the promulgation of ethical codes by the Canadian legal profession was motivated by a desire to exclude outsider groups from gaining a foothold in the profession. W Wesley Pue, 'Becoming "Ethical": Lawyers' Professional Ethics in Early Twentieth Century Canada' (1991) 20 *Manitoba Law Journal* 237, 255–8.

‘[p]rofessional norms of civility and collegiality were used here to demarcate, bolster and protect the masculine judicial circle. These ethical norms, so touted in professional rhetoric, were not used to extend collegial community to the first woman as an equal, but to isolate and exclude her.’¹¹ While Professor Backhouse is a legal historian, the events she depicts in her paper occurred in the recent past, only 10 to 30 years ago.

Alice Woolley opposes the civility movement on several grounds. Connecting to Backhouse’s concerns, Woolley objects to civility because it is too subjective. She finds this particularly problematic in a diverse bar ‘in which lawyers may simply have different senses of what constitutes “polite” behaviour’ and therefore we may require ‘greater tolerance of forms of expression than are countenanced by the civility movement. Otherwise civility would become shorthand for elitism.’¹² Next, Woolley asserts that civility may have a chilling effect on lawyers holding each other to account and thus undermine the ability of law societies to fulfil their obligation to regulate lawyers’ ethics.¹³ Finally, Woolley contends that lawyers should not have to be civil where it undermines their ability to advocate for their client.¹⁴ Many members of the bar share Woolley’s concerns that the focus on civility will run roughshod over counsel’s duty to be a fearless advocate for their client.¹⁵

One case has come to symbolise and perhaps threaten the civility movement in Canada: *Law Society of Upper Canada v Joseph Peter Paul Groia*, known generally as the ‘Joe Groia case’. Mr Groia stands accused of professional misconduct by the Law Society in connection with his actions as counsel in defending John Felderhof of charges of insider trading. Felderhof was the Vice President of the high-flying mineral company Bre-X, which crashed and burned in the late 1990s after exposure of a massive fraud, leaving investors with billions of dollars in losses. The Law Society alleges that Groia ‘failed to treat the Court with courtesy and respect’ because of his ‘consistent pattern of rude, improper and disruptive conduct’; ‘failed to act in good faith’ and failed to conduct himself ‘in a fair, courteous, respectful, and civil manner to the Court’; ‘undermined the integrity of the profession by communication with the [Ontario Securities Commission] in a manner that was abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer’; communicated with prosecutors in a manner that was ‘abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer’, etc.¹⁶

11 Backhouse, *ibid*. See also Constance Backhouse, *Petticoats and Prejudice* (Osgoode Society for Legal History, 1991); Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (University of Toronto Press, 1999).

12 Woolley (n 6) 183.

13 *Ibid*, 180.

14 *Ibid*, 81.

15 See eg Edward Greenspan and L David Roebuck, ‘The Horrible Crime of Incivility’ *The Globe and Mail*, 2 August 2011, www.theglobeandmail.com/news/opinions/opinion/the-horrible-crime-of-incivility/article2113385; Philip Slayton, ‘There Can be Too Much Civility’ *Canadian Lawyer*, May 2010, www.canadianlawyermag.com/There-can-be-too-much-civility.html. *Contra* Michael Code, ‘Counsel’s Duty of Civility: An Essential Duty of Fair Trials and an Effective Justice System’ (2007) 11 *Canadian Criminal Law Review* 97.

16 Notice of Application, Law Society Hearing Panel File No LCN 62/09 *Law Society of Upper Canada v Joseph Peter Paul Groia* (on file with author).

The case has been the subject of newspaper and magazine profiles in both legal trade publications and the popular press.¹⁷ There is much discussion about Groia in the blogosphere; there is even a blog called 'Free Joe Groia'.¹⁸ A lesser lawyer might simply have apologised, accepted penance from the Law Society and moved on. But Mr Groia is no stereotypically sheepish Canadian. He rejected a reported deal with the Law Society and has purportedly spent over \$1 million on his defence.¹⁹ It would not be surprising if the Law Society ends up spending a similar amount as it has retained the services of one of the premier barristers in the country to argue its case. This case is for all the marbles; for Groia, but also for the Law Society in terms of its civility agenda.²⁰ There have already been 10 hearing dates in 2011 and at least seven more are scheduled for the first two months of 2012. The case is not set to conclude until the end of April 2012. Meanwhile, Groia has not been content to simply plead his case before the Law Society. He has embarked on a nationwide speaking tour at Canadian law schools. Civility in Canada has become the Groia case.

The Groia case is emblematic of much that is wrong with our justice system and with the regulation of lawyers: too much time and money spent on cases that do not warrant it at the expense of addressing other issues. The Groia discipline hearing also raises questions of what forum is best suited to address particular conduct issues of lawyers. Much of the concerns regarding civility relate to litigation. Indeed, many of the organisations that have led on this issue are barristers' organisations. In Groia's case, the uncivil conduct of which he stands accused relates solely to his in-court activities. In vigorously defending Felderhof, Groia was not chastised let alone sanctioned by the trial judge for his alleged uncivil conduct. The prosecution complained about the trial judge's failure to control Groia and attempted to have the judge removed on grounds of reasonable apprehension of bias. This too was unsuccessful.²¹ As the court famously quipped about Groia's defence of Felderhof and about litigation generally, 'a hard fought trial is not a tea party'.²²

To the extent that civility is very much a litigation problem,²³ it is incumbent upon courts as supervisors of this process to control and if necessary sanction lawyers' behaviour, whether

17 See Bruce Livesey, 'The Trials of Joe Groia' *Report on Business Magazine*, 29 September 2011, www.theglobeandmail.com/report-on-business/rob-magazine/the-trials-of-joe-groia/article2185204; Jeff Gray, 'Bre-X Lawyer in his Own Words' *Globe and Mail*, 2 August 2011, www.theglobeandmail.com/report-on-business/industry-news/the-law-page/bre-x-lawyer-joe-groia-in-his-own-words/article2117472; Kevin Marron, 'Uncivil Law' *Canadian Lawyer*, May 2006, www.canadianlawyermag.com/Uncivil-law.html; Drew Hasselback, 'Civility Takes Centre Stage at ABA Meeting' *Financial Post*, 10 August 2011, <http://business.financialpost.com/2011/08/10/civility-takes-centre-stage-at-aba-meeting>.

18 <http://groia-case.blogspot.com>.

19 Livesey (n 17).

20 It is clear from the press coverage that many see the case as much bigger than an inquiry into the conduct of Mr Groia. See eg Betsy Powell, 'Civility Movement "Not Helpful" Ethicist Tells Discipline Hearing' *Toronto Star*, 12 August 2011, www.thestar.com/news/crime/article/1038852—civility-movement-not-helpful-ethicist-tells-discipline-hearing (reporting on the testimony of Professor Alice Woolley before the discipline hearing); Greenspan and Roebuck (n 15); Slayton (n 15).

21 See *R v Felderhof* [2002] OJ No 4103 (SCJ), aff'd (2003), 68 OR (3d) 481 (CA).

22 *R v Felderhof* [2002] OJ No 4103, para 275 (SCJ).

23 See Wendy Matheson, 'Ten Litigators to Watch Out For' (2006) 25(1) *Advocates' Society Journal* 17; Megan Seto, 'The Importance of Being Civil' *Canadian Lawyer*, 3 October 2011, www.canadianlawyermag.com/3892/the-importance-of-being-civil.html?print=1&tmpl=component.

it occurs in or out of court.²⁴ Judges have been far too timid about policing and sanctioning bad behaviour by lawyers. Many Canadian judges are alive to this problem and judicial education programs are addressing it. As a former Chief Justice stated while conducting a review of civil justice in Ontario, ‘Judges should move to zero tolerance mode when confronted with uncivil behaviour in the courtroom’.²⁵ This is a matter of protecting the court’s process but it is also a matter of pragmatic regulation. The courts are best suited to observe, regulate and—if need be—immediately sanction the conduct of lawyers appearing before them.

However, many lawyers and lawyers’ organisations are not keen on judicial regulation of lawyers, despite the fact that all Canadian lawyers are ‘officers of the court’. As discussed in previous correspondent’s reports,²⁶ these organisations continue to oppose attempts by courts to regulate lawyers’ behaviour and assert the increasingly untenable position that only the relevant provincial Law Society can regulate lawyers. Law Societies simply cannot and should not regulate all aspects of lawyers’ conduct. Self-regulation does not necessarily equate with sole regulation. It is in the public interest for Law Societies in Canada to accept a system of complementary regulation of lawyers rather than competitive regulation. This is best demonstrated by one of the Law Society of Upper Canada’s responses to the civility problem. It has created a program whereby if a judge observes uncivil conduct in court, the judge may refer that lawyer to the Law Society for investigation or mentoring. The Law Society partners with defence counsel, the Crown and other lawyers’ organisations to provide mentoring to these lawyers who are deemed to be in need of guidance as to what is and what is not acceptable behaviour in court.²⁷ The mindset of competitive regulation needs to be supplanted by one of cooperative regulation whereby the Law Societies, courts and other bodies share the responsibilities for regulating lawyers depending on who is best suited to regulate the conduct with the public interest as the ultimate touchstone for such divisions of labour.

I am concerned about the priority given to civility in the regulation of lawyers in Canada. As Woolley notes, much of the behaviour for which law societies have sought to sanction lawyers in the name of civility is actually captured by the content of other underenforced rules.²⁸ And she is certainly correct in asserting that ‘[i]t is not obvious that the response to the law societies’ lack of rigorous enforcement of their existing rules should be the enactment of more rules ...’.²⁹ Having studied the history of the regulation of the profession in Canada, I share Backhouse’s concerns regarding the manner in which notions of civility and professionalism have been used by the legal elite to exclude dissenting and outsider groups. In many respects, civility in the legal profession in Canada parallels ideas of manners in Jane Austen’s

²⁴ See Code (n 15).

²⁵ The Hon Coulter A Osborne, QC, *Civil Justice Reform Project: Findings and Recommendations* (Ministry of the Attorney General, Toronto, 2007) 147, www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf; see also Code (n 15).

²⁶ See Alice Woolley, ‘Judicial Regulation of the Legal Profession: Correspondent’s Report from Canada’ (2010) 13(1) *Legal Ethics* 104; Adam Dodek, ‘Courthouse Cancellations and Challenges to Self-Regulation: Correspondent’s Report from Canada’ (2011) 14(1) *Legal Ethics* 125.

²⁷ See Law Society of Upper Canada, *Civility Complaints Protocol*, www.lsuc.on.ca/with.aspx?id=642.

²⁸ Woolley (n 6) 185–6.

²⁹ *Ibid*, 184.

nineteenth century England. The halls of legal offices in Canada are replete with tales of rudeness and incivility on the part of elite lawyers, but somehow these lawyers do not become the subject of law society discipline processes. In sum, I am troubled by the priority given by Law Societies to civility in terms of time, resources and money. There are other issues that are more pressing for the limited resources of legal regulators, as I discuss in more detail below.

If self-regulation is ever restricted in Canada, it is unlikely to be the result of a perceived civility crisis; it will more likely be due to anger at the legal profession's failure to address access to justice issues. I fear that attempts by Law Societies and lawyers' organisations to address the perceived civility deficit drain desperately needed resources from the real challenge to the justice system and ultimately to self-regulation in Canada: access to justice. There are signs that we may be moving to a critical juncture in Canada.

In August 2011, the Governor General, the Queen's representative in Canada and the holder of an office that is supposed to be non-partisan and non-political and which usually studiously steers away from controversy, appeared before the national conference of the Canadian Bar Association and effectively chastised the members of the Canadian bar. His Excellency, himself a member of the legal profession and a former law dean, stated:

We enjoy a monopoly to practise law. In return, we are duty bound to serve our clients competently, to improve justice and to continuously create the good. That's the deal.

What happens if we fail to meet our obligations under the social contract? Society will change the social contract, and redefine professionalism for us. Regulation and change will be forced upon us—quite possibly in forms which diminish or remove our self-regulatory privilege. ...

For many today, the law is not accessible, save for large corporations and desperate people at the low end of the income scale charged with serious criminal offences. We must engage our most innovative thinking to redefine professionalism and regain our focus on serving the public.³⁰

When Canadian legal history is written, it may show that the profession was distracted by civility and failed to devote sufficient interest to access to justice. In short, the Canadian legal profession is addressing the wrong crisis.

With the Access to Justice crisis increasingly in the foreground, the legal profession in Ontario is more concerned with supply-side issues, specifically the apprenticeship period known as 'articling' required for all qualifying lawyers in Canada. Due to a relative equilibrium between the number of available articling positions and the number of graduating law students in Canada, most aspiring lawyers have always been able to find articles and thus qualify to be called to the bar (as bar exams are not significant barriers to entry in Canada). There have always been students who have struggled to find articles and concerns have focused on the challenges that minorities and other 'outsider groups' have faced in securing articles, but over 90 per cent of those seeking articles were able to secure them. Over the past few years, Canada's largest province has seen over a 15 per cent increase in the number of students seek-

³⁰ His Excellency the Right Honourable David Johnston, Governor General of Canada, 'Canadian Bar Association's Canadian Legal Conference—The Legal Profession in a Smart and Caring Nation: A Vision for 2017', Halifax, 14 August 2011, www.gg.ca/document.aspx?id=14195.

ing articling placements, with the number of articling positions remaining stagnant.³¹ The increase in demand for articles is largely a result of Canadians studying law abroad and internationally trained lawyers immigrating to Canada. But it is also due to expansion in the number of Canadian law students.

For 30 years, the number of law faculties in Canada remained stable at 21. All law schools in Canada are part of publicly-funded universities and require authorisation and funding in order to be established. In September 2011, Canada added a 22nd law school: Thompson Rivers University's Faculty of Law (TRU Law) opened for business in Kamloops, British Columbia. TRU Law intends to offer an academic program 'that pays particular attention to legal issues facing energy, natural resources, and the socio-economic challenges confronting Canada's First Nation and Aboriginal communities'.³² Another new law school is slated to open in September 2013 in Lakehead University in Thunder Bay, Ontario. In addition, in 2009, the Common Law Faculty at the University of Ottawa expanded its entering class by 75 students and the Université de Montréal has similar plans to expand its common law program. Student demand for more law schools certainly exists in Canada as roughly eight applicants compete for every one law school spot.

The articling crisis represents a real challenge for the legal profession in Ontario and, by extension, for the rest of Canada because of increasing reciprocity in recognising legal credentials between provincial regulators. The profession strongly supports articling but not enough individual lawyers seem willing to step onto the field and call for the ball. There is very little supervision by the Law Society of the articling process and even less accountability. It is thus frequently acknowledged that there are wide discrepancies in individual students' articling training and experience. Articling seems to have continued because it has always existed, and while that might be a historical explanation for its persistence, it is an unsatisfactory reason for its continued existence. There is conceptual agreement on the need for lifelong learning in the legal profession but there is very little coordination between those involved in this endeavour: law schools, Law Societies and lawyers. Law Societies need to confront the question of what is the purpose of articling and ascertain whether they are meeting that purpose. Law Societies need to ask what my fellow Canadian Jordan Furlong has called the 'moneyball question in law—if we weren't doing things the way we are, how would we be doing them?'³³ Tradition explains why things are the way they are but it is not a good enough reason to justify why it should continue to be so. As the Dean of the Faculty of Law at the University of Calgary recently quipped: 'Civility is Canada's charm. Complacency is its curse.'³⁴

31 See Law Society of Upper Canada, Professional Development and Competence Department, *Resource and Program Report*, May 2011, 4–5, www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485117 (noting 1,473 articling applications in 2006 and 1,837 in 2010, an increase of 17.9%).

32 www.tru.ca/law.html.

33 Jordan Furlong, 'Ask Yourself the Moneyball Question', 19 September 2011, www.attorneyatwork.com/articles/the-moneyball-question.

34 Ian Holloway QC, 'The Canadian Lawyer in the Twenty-First Century' (2011) 69(5) *The (Vancouver) Advocate* 691, 691.

Germany: Any White Elephants in the House?

Correspondent's Report from Europe

Matthias Kilian*

Contemplating, discussing and implementing ever new reforms of the legal framework governing the work of lawyers keeps policy makers, bar officials and academics increasingly busy around the world. However, little is known about the views and experiences of the professionals who are faced with those reforms in everyday practice. With lawyers being creatures of habit as much as anyone else, probably not much would have changed over the past decades if reforms had been based on a majority vote of those affected by them. Nevertheless, it is useful to consider the views and experiences of those on the frontline on reforms that are looming or have already been implemented. It at least keeps the population of white elephants under control. Since 2007, German 'Rechtsanwälte'—from solo practitioners to mega firm partners—are asked every other year about their assessment of ongoing reform debates, particularly whether they welcome proposed changes of the law and whether the changes, if implemented, would have an impact on their practice. This survey, carried out by the Saldan Institute, an independent institute researching the legal profession and the legal services market (the author of this report happens to be the institute's director), was carried out for the third time this year. It has shown again that some much debated reforms indeed hit the nerve of the profession, while others are seen by many lawyers in practice as an exercise detached from their needs and wishes. In 2011, the survey, known in Germany as the 'Berufsrechtsbarometer', covered 18 subjects, ranging from the possible introduction of a new concept of accredited specialisation or ethical rules to complement the existing black letter law of lawyering to additional CLE requirements for specialist lawyers. The study, in which 1,200 members of the profession participated, also evaluated the impact of recent changes to the law. These included the introduction of speculative funding agreements (2008), the permissibility of waivers to avoid imputed disqualification because of a conflict of interest (2006), the relaxation of rules on factoring fees (2007), the restructuring of the practical training syllabus for trainee lawyers (2003), and the inroads commercial litigation funding companies have made on the market.

A strong focus of the 2011 survey was on the relevance of reforms elsewhere as a driver for reform in Germany. With quite a few German law firms deserting German partnership law by organising themselves as UK LLPs (limited liability partnerships) and with external ownership of UK law firms on the horizon, Germany is forced to catch up with reforms that common law jurisdictions such as England and Wales, Scotland and Australia have already

* Senior Lecturer, Faculty of Law, University of Cologne, Germany.

implemented or are about to implement. The German Federal Bar (BRAK) and the German Bar Association (DAV) are pressing the Ministry of Justice hard to introduce changes to German partnership law to create a partnership model akin to the UK LLP. Although lawyers have been able to make use of a specific type of partnership available to members of the free professions—the so-called ‘Partnerschaftsgesellschaft’—uptake has been somewhat disappointing, with less than 30% of all lawyers who are not solo practitioners switching from the general partnership.¹ Compared to the UK LLP, liability in a ‘Partnerschaftsgesellschaft’ is only limited to the extent that partners are not liable for professional negligence in cases they have not worked on. They remain liable for all other obligations of the partnership not resulting from the practice of law (eg for salaries, rents, leases, and fees for other professionals) and for professional negligence in cases in which they have been involved. Although this is a considerable improvement compared to the general partnership, the limitation of liability is not as comprehensive as in a UK LLP. Because of this disadvantage, it has been proposed to introduce a ‘German-style LLP’ (the working title currently is ‘haftungsbeschränkte Freiberuflergesellschaft’, which can be loosely translated as ‘limited liability partnership for members of the liberal professions’). Policy-makers currently favour a concept in which the German LLP would be required to maintain indemnity insurance for professional negligence with cover of at least €2.5 million for each single case—an amount 10 times higher than that currently required for lawyers practising in a structure with unlimited personal liability. Unsurprisingly, members of the profession support these proposals as they would offer a relatively cost-effective opportunity to limit liability without being forced to set up a limited company: 71% of all participants in the survey would welcome the introduction of a ‘German LLP’. However, 29% share the view of some prominent academics that a ‘German LLP’ would be a further departure from common principles of German partnership law as the German LLP, like the already existing Partnerschaftsgesellschaft (and unlike the UK LLP), is not open to everyone, but requires partners to be a member of a liberal profession. Interestingly, most of those opposed to the German LLP are solo practitioners. However, as conceptual or dogmatic questions have little to do with how a respondent practises law, the critical view of solo practitioners is most likely a thinly veiled disappointment that policy makers have focused almost exclusively on risk management concepts for other types of lawyers. The silent majority of solo practitioners have no other choice when it comes to limiting their liability than to set up a limited lawyers’ company, an organisational model based on the German limited liability company (GmbH). As it is a corporation and comes with various strings attached when used by lawyers, it has proved to be rather unpopular since its introduction in 1998.

Another interesting finding of the study is that the majority of lawyers who are in favour of a German LLP support the proposal that it should be required to have insurance coverage of at least €2.5m. As most lawyers are known to keep a tight hold on the purse strings when running their firm, it could be expected that they would resist any requirement that

¹ Not necessarily because of a conscious decision; 54% of all lawyers admitted that they simply had never thought about alternatives to the general partnership.

could be seen as an economic disincentive to make use of the German LLP. The findings suggest, however, that there is widespread acceptance that there is no such thing as a free lunch: Almost two thirds of those who support the proposal agree that a German LLP should have higher insurance coverage to safeguard the interests of clients. Surprising as this may be, there is a rather trivial explanation: The survey also found out that the average insurance coverage of most lawyers who are not working as solo practitioners is already today between €1.76m and €4.14m (depending on the size of the firm—the figures do not include multinational firms).

External ownership of law firms, however, is a different story: 69% of German lawyers do not think that external ownership of law firms would be a good idea. The minority of 16% who support the idea² fall into three subgroups: 6% prefer limited external ownership up to a maximum of 49% of shares and/or voting rights, 4% would limit external ownership to children or spouses for maintenance purposes, and 6% would not place any restrictions on external ownership. In almost all cases those opinions were expressed without any knowledge of the details of Australian ILPs or English ABSs or of safeguards such as the requirements relating to ‘appropriate management systems’ and ‘legal practice directors’—let alone an understanding of the principles-based approach to regulation that has become popular in the common law jurisdictions: All these developments have gone more or less unnoticed in Germany and the discussion about external ownership in Germany at this stage takes a much more simplistic (not to say naive) approach. Lawyers from large and particularly international law firms are more open to the idea of external ownership than lawyers from small firms, proving that external ownership in Germany is very much seen as a ‘big firm’ issue. In addition, young lawyers take a much less critical view than older lawyers—it will be interesting to see over the coming years whether the attitude towards external ownership is indeed influenced by age *per se* or whether the driving force is the duration of membership in the profession.

Some other findings from the survey: Speculative fees, now in their fourth year of existence as a lawful funding mechanism, are still rarely used by lawyers: Only 4% use ‘no win, no fee’ agreements and 2% use ‘no win, less fee’ agreements on a regular basis. 75% of all lawyers have never made use of any type of speculative fee. Two other findings of the survey will be rather frustrating for businesses that have identified lawyers as a lucrative market in the past decade and have spent lots of money on marketing for their products—commercial litigation funding companies and commercial fee collectors. Litigation funding companies have been active in Germany since 1998 and offer after-the-event litigation funding against a share in any potential proceeds. Most German legal expenses insurers have set up subsidiaries offering such litigation funding. Despite a lot of marketing, 82% of the respondent lawyers had not submitted a single case to a commercial litigation funding company over a two year period, and 14% had done so only once or twice. On average, a lawyer will contact a litigation funding company on behalf of a client every four years. While this already indicates a rather small market, three out of four lawyers who had given litigation funding a try

2 The remaining 15% do not care.

had no case accepted for funding. Even fewer lawyers have made use of the services of companies that offer factoring of fees. Selling a fee owed to the lawyer by the client to a third party (which will then claim the fee from the client) is a relatively new concept for lawyers—and apparently something lawyers do not easily warm to: 98% of the respondents had never sold a fee to a claims collector since the concept became lawful. So yes, apparently there have been some additions to the German white elephant sanctuary recently.

**Law Students as Peer Mentors:
Developing the Reflective Practitioner
and/or Embedding Legal Learning:
*Correspondent's Report from the United Kingdom***

Lisa Webley*

With a major review of legal education and training underway in England and Wales, post the introduction of the Legal Services Act 2007 and the prospect of alternative business structures, and a gearing up for the new higher education fees regime as of September 2012, it is perhaps no surprise that many law schools are considering new ways of distinguishing themselves from their competitors through curriculum design and student support structures. The recent Society of Legal Scholars Legal Education stream was packed full of papers on learning and teaching innovation in the undergraduate law curriculum.¹ Elements of good practice were brought out in the Learning in Law Annual Conference in January.² The Association of Law Teachers³ continues to be a testing ground for much legal education innovation and the annual OUP Law Teacher of the Year award is a testament to the importance of learning and teaching and also students' perceptions of learning and teaching (they get to nominate staff for consideration).⁴ The National Student Survey, undertaken yearly and nationwide, has underlined the importance of students' views on their learning and teaching experience.⁵ Results for each law school are scrutinised with alacrity as deans, heads of department, course leaders and directors of learning and teaching try to glean best practice and poor practice examples which they can use to shape the way in which the law degree should be augmented and enhanced with the minimum extra resource allocation. Higher education funding is tight, and getting tighter, so many law schools need to do more with less while competing with private providers with strong track records in vocational training who have recently entered the undergraduate market. They also need to meet the changing needs

* Professor of Empirical Legal Studies, School of Law, University of Westminster, UK. All websites accessed 9 November 2011.

1 For paper details see <http://conference.legalscholars.ac.uk/cambridge>.

2 For paper details and podcasts see www.ukcle.ac.uk/learning-in-law-annual-conference/2011.

3 See www.lawteacher.ac.uk/events/cambridge-conference-papers.

4 For details see www.oup.co.uk/academic/highereducation/law/prizes/lawteacher.

5 Details of the survey method and questions may be found at www.thestudentsurvey.com; results by institution are viewable at <http://unistats.direct.gov.uk>.

of an increasingly diverse undergraduate law student population, which bring challenges⁶ as well as real benefits to law schools.

Having said that, financial pressures, alongside the pressures to meet students' and parents' expectations and the expectations of the professions, have led to some worthwhile developments in learning and teaching. Many of them have led to a stronger partnership model between academics and students, whether that be through the medium of clinic, such as the LLB programme at York University taught exclusively through clinic, or through the use of extra curricula partnerships working through Innocence projects or pro bono centres. A different form of partnership model is also developing as between law students. Peer mentoring by law students, for law students, has become a relatively mainstream practice as opposed to a 'buddying' add-on used to help new first years settle in to their new life as law students. And interestingly, it has brought ethical issues to the fore for some student mentors.⁷ Should they provide information that may help students to do better than they otherwise would in their assessments? Should they blow the whistle if a student mentee makes it known that they are planning to use the services of a paid essay writer to complete an assessment for them? Should they pass on student complaints when they hear of academic behaviour that appears to be unethical or unprofessional? What are the confidentiality constraints when a student reveals a mental health problem to them in confidence? These are just the sorts of issues that, in a slightly different context, they may have to face as nascent professionals. Academics also have the opportunity to confront these issues head on with the peer mentors to assist them in developing their roles as reflective practitioners as well as ethical ones. All of this means, however, that peer mentoring schemes need to address the potential for ethical issues as part of their mentor training, as well as provide ongoing support for mentors who experience ethical conflict. It requires us to have thought through the ethical issues ourselves and developed some guidance that we may give to students upfront and when prompted. It also requires us to professionalise our approach to personal tutoring, so that we are clear on our own ethical responses and our reasoning, so that we may help students with theirs. Peer mentoring may act as a vehicle for students to develop their ethical reasoning and their skills as reflective practitioners. But it may also do the same for the academics involved in the schemes.

⁶ For a discussion of the changing face of student support needs in some institutions see Kenneth Umeh, 'The Home, the Classroom, and the Barriers to Attainment in Legal Education' (2011) 22 *UKCLE Newsletter*, www.ukcle.ac.uk/resources/directions/issue-22-spring-2011/umeh.

⁷ There are a variety of mentoring schemes, such as those at the University of Greenwich (details available via the SLS conference legal education stream at the 2011 annual conference: <http://conference.legalscholars.ac.uk/cambridge/section.cfm?id=6>), the University of Westminster e-mentoring scheme, and Newcastle Law School's international student peer mentoring scheme. On Newcastle's scheme see SK Ragavan, 'Acquiring Skills for a Globalised World through a Peer Mentoring Scheme: A UK Law School Experience', forthcoming in (2012) *Law Teacher* (March).

Two Initiatives to Improve Legal Ethics Regulation: *Correspondent's Report from China*

Richard Wu*

In the past few months, China has introduced two measures to improve legal ethics regulation at both the national and the local level. First, on 10 February 2011, the Supreme People's Court announced the 'Provisional Regulation on the Abstention of Party Cadres Occupying Court Leadership Positions and Trial Judges whose Spouses and Children are Lawyers' ('the Regulation').¹ This took effect on the same date.² Under the Regulation, both party cadres in positions of court leadership and trial judges must abstain if their spouses and children practise as lawyers within the jurisdiction of their court.³ Those concerned who met such criteria at the date of the Regulation were obliged to apply within six months for abstention. Their courts would then arrange for a change of job or role within 12 months of the Regulation coming into effect.⁴

Similarly, those party cadres and trial judges who had satisfied such criteria only after the promulgation of the Regulation were also obliged to apply for abstention within one month of fulfilling the criteria. In such cases, their courts would also arrange for a change of job or role for them within six months.⁵ Moreover, if these party cadres and trial judges do not apply for abstention within the stipulated period, their courts can either remove the party cadres from their court leadership positions or, in the case of trial judges, arrange for them to work in other jurisdictions again within six months from the end of the stipulated period.⁶ In addition, if their courts do not have power to remove the party cadres, they can recommend job changes or even dismissal to the authorities responsible.⁷ For those party cadres and trial judges who agree to resign or withdraw from their existing posts, however, they will be placed in new posts with the same rank and remuneration.⁸

Moreover, under the Regulation, party cadres and trial judges who are legally obliged to abstain could be subject to disciplinary proceedings if, *first*, they deliberately conceal the fact that their spouses or children practise as lawyers; *secondly*, if they resort to dishonest means

* Associate Professor, Faculty of Law, University of Hong Kong. Research for this article was fully supported by a Grant from Sumitomo Foundation (Reg No 108081).

1 The full Chinese text of the Regulation is available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=145200> (accessed 9 November 2011).

2 *Ibid*, art 12.

3 *Ibid*, art 1.

4 *Ibid*, art 4.

5 *Ibid*, art 5.

6 *Ibid*, art 6.

7 *Ibid*, art 7.

8 *Ibid*, art 8.

to avoid abstention; and *thirdly*, if they refuse to accept arrangements made by their organisations for a change of post.⁹

It goes without saying that those party cadres occupying court leadership positions and trial judges are not obliged to abstain if their spouses and children do *not* practise as lawyers in their court jurisdictions. However, if their family members 'secretly' do so in the form of agents, they will nevertheless be compelled to resign from their positions, vacate their posts, or change posts. What is more, they will receive disciplinary sanctions if they have knowledge of such 'secret' legal practices.¹⁰

With regard to the second measure, four months after the promulgation of the Regulation by the Supreme People's Court, the High Level People's Court in Hainan Province announced in June 2011 that it had entered into an agreement with the local Ministry of Justice and the Judge and Lawyer Associations entitled 'Several Opinions on the Establishment of a Good Interactive Mechanism between Judges and Lawyers' ('the Opinion').¹¹ It represents an important development towards establishing formal channels for interaction between judges and lawyers.

As explained by Zhang Guangqiong, Vice-President of the Hainan Province High Level People's Court, interaction between judges and lawyers in China was unsatisfactory because there were no proper and formal communication mechanisms.¹² The Opinion was therefore groundbreaking as it stressed the importance of professional communication in a lawful and open manner.

Briefly, the Opinion established a new system of joint meetings between the Judge and Lawyer Associations in order to facilitate future professional interaction. It also strengthened the regulation of the behaviour of judges and lawyers in their daily practice. For example, the Opinion set up new filing systems to monitor judicial corruption and lawyers' performance in court cases. In this manner, the High Court and Ministry of Justice are able to exert more effective supervision over the daily practice of local judges and lawyers. The Opinion also adopted a regular reporting mechanism whereby judges and lawyers can inform each other of changes in their practice in a timely manner. Most importantly, the Opinion expressly required judges to respect the role and importance of lawyers in the judicial system.¹³

In summary, the Regulation and the Opinion represent the latest Chinese efforts to strengthen legal ethics at national and local levels. The Regulation demonstrates the resolution of the national leaders to eliminate the abuse of court power by party cadres and judges in order to benefit their family members. Likewise, the Opinion reflects the desire of local leaders to regulate interaction between judges and lawyers as well as eliminate judicial corruption. We shall see how effectively these new measures can improve legal ethics in China in the days to come.

⁹ *Ibid*, art 9.

¹⁰ *Ibid*, art 10.

¹¹ For a summary of the Opinion see 'Provincial High Court Promulgating Several Opinions on the Establishment of a Good Interactive Mechanism between Judges and Lawyers' (in Chinese), 23 June 2011, www.hicourt.gov.cn/news/news_detail.asp?newsid=2011-6-23-9-53-9 (accessed 9 November 2011).

¹² *Ibid*.

¹³ *Ibid*.

Ethics of Aggregate Litigation: *Correspondent's Report from the USA*

John Steele*

How should US law manage lawsuits that involve dozens or hundreds of individual claimants who are not susceptible of being treated as a formal class under the class action rules? The controversies surrounding such suits—often called ‘non-class aggregate’ or simply ‘aggregate’ litigation—involve difficult issues of legal ethics. In October 2011, an important appellate court issued a scathing opinion regarding the ethics of the plaintiffs’ lawyers in such a case.¹ The case, discussed at length below, will no doubt shape the emerging jurisprudence of aggregate litigation.

Why does aggregate litigation present such difficult ethical problems? On the one hand, aggregation of claims can hurt the claimants by depriving them of the individualised care and attention that the ethics rules presuppose their lawyer will deliver in non-class settings; can lead to settlements that might be less than an individual client might have achieved as a solitary litigant; and can create incentives for the claimants’ lawyer and the defendant to reach a resolution that benefits them and ‘sells out’ the clients. And yet, on the other hand, the aggregation of many small or mid-sized claims makes it attractive for plaintiffs’ lawyers to pursue claims that they would otherwise not take; makes for a much larger total liability for defendants, thus depriving them of the ability to stonewall or ignore small individual claims; and potentially creates an incentive for defendants to pay out more to a plaintiff than the plaintiff could obtain on her own. In a nutshell, letting the lawyers ignore the individual characteristics of the client creates both promise and peril for the clients.

The recent case of *Johnson v Nextel Communications, Inc* illustrates these tensions. Because of the procedural posture of the case, the court was required to assume that all the plaintiffs’ allegations were true, and this article will do the same. Leeds, Morelli & Brown (LMB) is a plaintiffs-side firm that came to suspect that Nextel had engaged in widespread employment discrimination involving hundreds of employees. Claims of that sort are sometimes brought as class actions, but when the employees’ claims are not identical or very parallel, the class action mechanism is not appropriate. Indeed, in June 2011, in a massive employment discrimination class action matter against the retailer Wal-Mart, the Supreme Court of the United States held that class action treatment was inappropriate.² We might therefore suspect that aggregate litigation may become more common in employment discrimination suits.

* Member, State Bar of California; Visiting Professor, Indiana University—Maurer School of Law, USA.

¹ *Johnson v Nextel Communications, Inc*, ___ F 3d ___, 2011 WL 4436263 (2d Cir 2011).

² *Wal-Mart Stores, Inc v Dukes*, 564 US ___ (2011); 2011 US LEXIS 4567.

To sign up clients, LMB held meetings at which it made extravagant promises relating to the recoveries that would be obtained from Nextel. After signing up 587 clients, LMB met with the lawyers for Nextel and hammered out a complicated resolution that was governed by two documents: the Dispute Resolution and Settlement Agreement (DRSA) and the Dispute Resolution Process (DRP).

The DRSA richly compensated LMB. Nextel agreed to pay '(i) \$2 million to LMB to persuade en masse its approximately 587 clients to, inter alia, abandon ongoing legal and administrative proceedings against Nextel, waive their rights to a jury trial and punitive damages, and accept an expedited mediation/arbitration procedure; (ii) another \$3.5 million to LMB on a sliding scale as the clients' claims were resolved through that procedure; and (iii) another \$2 million to LMB to work directly for Nextel as a consultant for two years beginning when the clients' claims had been resolved'.³ That last term would serve the purpose of preventing LMB from representing other plaintiffs against Nextel for at least two years—an agreement that would be ethically suspect under ABA Model Rule of Professional Conduct 5.6(b).

Under the three-stage DRP, LMB's clients would engage in an interview and direct negotiation with Nextel, and, if that failed to resolve the matter, would then participate in non-binding mediation and, if necessary, binding arbitration. If any of LMB's clients opted out of the process, the compensation to LMB would be reduced.

After signing the DRSA and DRP, LMB asked its clients to sign an 'Individual Agreement and Pledge of Good Faith' ('Client Agreements'). The Client Agreements were admittedly vague about the amount of compensation that LMB would receive from Nextel and how those payments were tied to the processing of the clients' claims. Although the Client Agreements declared that the clients would have an opportunity to review the DRSA itself, the law firm made it difficult or impossible for the clients to see anything except a self-serving, deceptively selective 'Highlights of Settlement Agreement'. Because the DRSA created a future consulting relationship between LMB and Nextel, the Client Agreements were also, in effect, waivers of conflicts of interest between LMB and its clients. But, under Model Rules 1.7(b)(4) and 1.8(g), consents of that type are ineffective unless the lawyers have made detailed disclosures to the clients of all the relevant circumstances.

Some clients refused to participate in the process and instead brought a class action suit ('*Johnson*') in New Jersey against LMB for breach of fiduciary duty and related claims. The suit was removed to a federal court in New York, where the trial court dismissed the plaintiffs' claims and upheld the clients' consent to the conflicts of interest. (At roughly the same time as the action against LMB was pending, another set of LMB clients sued LMB on similar claims in Colorado and the matter headed for trial. In that case, the trial court instructed the jury that the conflict of interests faced by LMB was consentable and the jury returned a verdict for the law firm.)

In *Johnson*, the appellate court emphatically reversed the trial court and held that the conflicts were not consentable. The appellate court concluded that the DRSA was in effect an

³ Opinion (n 1).

employment contract between Nextel and the plaintiffs' lawyers under which the lawyers' job was to sell out their clients for Nextel's benefit. The court went so far as to reinstate the plaintiffs' claims against Nextel for aiding and abetting the lawyers in their betrayal of the clients. The court declared: 'Indeed, we express our candid opinion that the DRSA was an employment contract between Nextel and LMB designed to achieve an en masse processing and resolution of claims that LMB was obligated to pursue individually on behalf of each of its clients.'

Given the millions garnered by LMB after not fully disclosing the details of its agreements, it may seem impossible to defend the firm's behaviour. (Again, the appellate court in *Johnson* was required to assume that all the allegations were true.) And yet, there is an emerging argument that in some non-class cases the client is best served when the lawyers do not 'pursue individually' each client's claims and instead pursue the clients' aggregated claims. In a thoughtful article in the *New York Times*, legal correspondent Adam Liptak reported on a conference held to analyse a settlement in a products liability case against the makers of the painkiller Vioxx.⁴ At the conference, the late Professor Richard Nagareda argued that the individualised type of lawyering envisioned by the legal ethics rules can actually do the client a disservice in the modern world where non-class torts can be effectively remedied only through the aggregation of claims. According to Nagareda, 'The nature of representation in mass litigation, particularly in mass torts, is increasingly bypassing these individualized notions of loyalty'. Indeed, the American Law Institute has issued a series of (controversial) principles for guiding aggregate litigation.

Liptak's article, written before the appellate opinion in *Johnson*, makes clear that the notion that individualised representation is outmoded is not an opinion shared by everyone—least of all, we now know, a notion shared by the appellate court in *Johnson*. But for all the strengths of the appellate opinion in *Johnson*, the court failed to recognise the benefits to plaintiffs arising from aggregating claims and failed to suggest how these actions might be permitted to proceed. In the context of class actions, experience has taught us that the court must step in and independently review the agreements as to which the plaintiff class members and their own lawyers might have differing interests. One suspects that in the context of aggregate litigation, many US courts will gladly permit the plaintiffs to trade their right to individualised representation if there is adequate proof that the lawyers pursuing the aggregate litigation will serve the clients' best interests. One also suspects that this topic will generate case law, law review articles, and law suits for the foreseeable future.

⁴ Adam Liptak, 'In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty' *New York Times*, 22 January 2008, www.nytimes.com/2008/01/22/us/22bar.html (accessed 9 November 2011).

When Shall the Twain Meet? *Correspondent's report from Australia*

Linda Haller*

Observing recent events in Australia, it would be easy to assume that legal practice and lawyer regulation are on quite different trajectories, and that dedicated lawyer legislation is increasingly irrelevant to large law firms' entrepreneurial ambitions. In particular, national regulation has hit further stumbling blocks while commercial firms enter ever more complex international structures and models for service delivery.

First, the regulators. Many years of planning and compromise went into reaching a national law for the regulation of lawyers with which all six States, two Territories, Federal Government and Large Law Firm group¹ would be happy.

However, despite their best efforts only four jurisdictions—New South Wales, Victoria, Queensland and Northern Territory—finally signed up. Although this is disappointing, because Victoria and New South Wales are the two largest States, 85 per cent of Australia's lawyers will be covered by the national model. Other jurisdictions are likely to wait and see how the new system operates, and, more importantly, how much it costs and who pays.

Victoria and New South Wales vied to be the host State where the national Legal Services Board and Legal Services Commissioner would be located. With a tied vote by stakeholder States, the Federal Attorney-General was required to break the deadlock by selecting New South Wales.

South Australia has expressed concern about joining the national framework for some time, primarily because of concerns about potential cost blow-outs. It was also concerned that the proposed model put the primary cost burden on new applicants for admission. Comments by the NSW Attorney-General may have fuelled those concerns by raising images of opulent premises: he promised not only that NSW would ensure that the national Board would be established 'on time, within budget' but also that it would be housed 'in premises that befits its role as the peak national regulator and the face of the Australian profession internationally'.²

* Senior Lecturer, Melbourne Law School, University of Melbourne, Australia. All websites accessed 9 November 2011.

1 The Large Law Firm Group is a coalition of nine of the largest law firms in Australia. They lobbied for and were granted direct representation on the peak Law Council of Australia; all other members of the Council are law societies and bar associations.

2 Hon Greg Smith, NSW Attorney General, 'NSW to Be Home for National Legal Board', media release, 19 October 2011, [www.ipc.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/191011_legal_board.pdf/\\$file/191011_legal_board.pdf](http://www.ipc.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/191011_legal_board.pdf/$file/191011_legal_board.pdf).

South Australia's position in all of this is an interesting one. It declined to join the national framework at this time and is still behind other States in some ways.³ However, it cannot be easily dismissed as having an inward-looking, parochial approach to discipline: it is the first Australian jurisdiction to have passed the national Australian Solicitor Conduct Rules⁴ and hosted an *international* meeting⁵ of lawyer regulators within days of snubbing a national approach at a meeting of Australian regulators.⁶

The trajectory of large Australian law firms is much less ambiguous. The move to international mergers, alliances and takeovers has gained momentum,⁷ the desirability of being a national firm taken as a given and the question now whether being national is *enough*.⁸ Not only are structures global, State and national borders are becoming less relevant to where legal work is undertaken. While once there had been suspicion that some large firms undertook onshore and offshore outsourcing of work and they were shy about clarifying their position,⁹ firms are now more willing to publicly embrace the perceived benefits of sending work offshore.¹⁰ Large commercial law firms have also seen some of their concerns¹¹ about regulation of costs addressed in the new national law.

It is not only the commercial law firms that seem to have taken destiny into their own hands, requiring regulators to play catch-up. Plaintiff law firms have also been busy. The world's first publicly listed legal practice, Slater & Gordon, continues to grow ever larger, making headlines with its entrepreneurial approach. Most recently it has been its decision to buy another personal injury practice, Keddies, for over \$30 million that has attracted attention.¹² While Slaters initially announced to the share market that it expected to complete due diligence on Keddies by January 2011, some speculated that the waters would be muddied by the number of complaints of overcharging,¹³ ongoing disciplinary proceedings and general

³ For instance, in providing for mental health interventions.

⁴ Law Society of South Australia, Australian Solicitors' Conduct Rules, 12 September 2011, www.lawsocietyysa.asn.au/PDF/rules_of_professional_conduct.pdf.

⁵ www.lawsocietyysa.asn.au/pdf/media_centre_releases/111018_ILACE.pdf.

⁶ Conference of Regulatory Officers, www.coro.com.au.

⁷ 'Law Firms Say Supersize Me' *Lawyers Weekly*, 24 November 2010, www.lawyersweekly.com.au/blogs/top_stories/archive/2010/11/24/law-firms-say-super-size-me.aspx; 'Global Firm Raids Minters to Open in Australia' *Lawyers Weekly*, 4 August 2011, www.lawyersweekly.com.au/blogs/top_stories/archive/2011/08/04/global-firm-raids-minters-to-open-in-australia.aspx.

⁸ 'National Firms Must Re-Think Strategy' *Lawyers Weekly*, 27 September 2011, www.lawyersweekly.com.au/blogs/top_stories/archive/2011/09/27/national-firms-must-re-think-strategy.aspx.

⁹ 'Legal Outsourcing Out in the Open' *Lawyers Weekly*, 23 July 2009, www.lawyersweekly.com.au/blogs/best_practice/archive/2009/07/23/legal-outsourcing-out-in-the-open.aspx.

¹⁰ Chris Merritt, 'Malleons Ready to Send Low-Level Work to India' *The Australian*, 28 October 2011, www.theaustralian.com.au/business/legal-affairs/malleons-ready-to-send-low-level-work-to-india/story-e6frg97x-1226178843545.

¹¹ LLFG Ltd, 'LLFG Ltd Response, COAG National Legal Profession Reform: Discussion Paper on Legal Costs', 22 December 2009, [www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(8AB0BDE05570AAD0EF9C283AA8F533E3\)~Legal+Costs.PDF/\\$file/Legal+Costs.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~Legal+Costs.PDF/$file/Legal+Costs.PDF).

¹² Slater & Gordon Ltd, 'Slater & Gordon to Acquire Keddies Lawyers', media release, 26 October 2010, www.slatergordon.com.au/media/news-media-releases/acquire-keddies-lawyers.

¹³ Paul Bibby, 'Keddies Overcharged Dying Man \$160,000' *Sydney Morning Herald*, 26 June 2011, www.smh.com.au/nsw/keddies-overcharged-dying-man-160k-20110626-1gluh.html.

bad publicity dogging Keddies.¹⁴ However, in its 2010–2011 Annual Report to Shareholders, Slater & Gordon Ltd continued to describe Keddies as a ‘leading NSW personal injury law firm’. Nor was there anything to suggest that its share price was adversely affected by Keddies’ woes. Some doomsayers continue to lament the existence of publicly listed firms and may point to this example, but it remains difficult to pinpoint any particular evidence that the duty to the court has been put under particular pressure by public listing.

Maurice Blackburn, another mega plaintiff lawyer firm—though not incorporated—has been acting for over 1,000 victims of the Black Saturday bushfires in which 173 people died. It recently settled one of the larger class action claims.¹⁵ Our US correspondent John Steele reports in this issue on potential conflicts of interest in class actions in the US context. Similar tensions are arising in Australia and Maurice Blackburn has entered the debate. While pleased that the government planned to exempt litigation funders and ‘no win, no fee’ firms like it from regulation as a provider of financial services, Maurice Blackburn wants further exemption. In a recent submission to government it argued that lawyers were already heavily regulated and there was no evidence of class action clients complaining or of any mismanagement of conflicts. Hence, any legislative demand that legal practices have ‘appropriate arrangements’ in place to handle conflicts was unduly prescriptive. Instead, legal practices funding their clients should be trusted to manage potential conflicts in the best interests of clients, they say.¹⁶

So where does all of this leave our regulators? It is undeniable that some law firms are getting more and more powerful, especially as they become international in structure and service delivery. This appears inescapable, as they compete for work from large and powerful corporate clients. They are driven to find new, imaginative ways to do business, such as by publicly listing and sending work off-shore. These same firms make powerful arguments as to why they must be free to innovate in this way and why over-regulation will harm vulnerable consumers of legal services, not just corporate clients. However, it often feels that regulators are left in their wake, thinking how they might respond to this brave new world. One thing is clear, however: the regulation of lawyers at a local rather than national level must signal a level of regulatory impotence and irrelevance.

14 Much of the legal action against Keddies has been run by another law firm, Firths: www.firths.com.au/keddies-claims. It’s getting heated: Keddies is suing Firths to prevent alleged misuse of confidential information and Firths has threatened to lodge a complaint about Keddies to the NSW Legal Services Commissioner: Samantha Bowers, ‘Keddies Hit for Overcharging’ *Financial Review* (Sydney), 11 November 2011, 40.

15 Cameron Houston and Michael Bachelard, ‘Bushfire Victims to get \$40m’ *The Age* (Melbourne), 23 October 2011, www.theage.com.au/victoria/bushfire-victims-to-get-40m-20111022-1mdvq.html.

16 Maurice Blackburn, ‘Exposure Draft—Corporations Amendment Regulations 2011—Funded Class Actions: Maurice Blackburn’s Submission’, 15 August 2011, www.treasury.gov.au/documents/.../MauriceBlackburnLawyers.PDF.