

Transnational Lawyering: Clients, Ethics and Regulation

in

LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT

Edited by Lynn Mather & Leslie Levin

University of Chicago Press, forthcoming

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Introduction

Transnational lawyering is a field dominated by the large law firms and their lawyers. With transactions measured in the billions of dollars, these deals often fall into the “bet the house” category, which means it is not the occasion to try out a new law firm. The risk of experimentation comes at too high a cost. Transnational lawyering does not fit the normal categories of lawyering: in the 1980s there was much discussion in magazines like the *International Financial Law Review* on whether “international law” constituted a legitimate separate field of practice and meant anything other than drafting a US contract for a company overseas. The process of globalization has speeded up the thinking surrounding these debates, and though they still occur, there is more agreement on the existence of transnational practice.

Transnational lawyering therefore can fall under a number of heads. First, there is international law as, for example, expressed through UNIDROIT Conventions such as that relating to a Uniform Law on the International Sale of Goods (1964).¹ It has so far produced 12 conventions. Second, supranational law has become more common as in the case of European Law which has binding effect in member countries and those of the European Economic Area. Third, there is the rather more contentious realm of *lex mercatoria* which is characterized as transnational law delocalized from the nation state. Exponents such as Clive Schmitthoff (1988) saw it as new emerging legal order which because of its functioning within a small club of legal notables never required specific rules of conduct as everyone understood them as Dezalay & Garth (1996) found in their study of international arbitration. The final head includes private ordering as carried out by law firms, and, in some instances, through the intermediation of personal networks like *guanxi* (Appelbaum et al 2001; Gessner 2009). The chapter will concentrate on the final category of transnational lawyering of that carried out by law firms.

These transactions can be read in the legal press and the following is typical. Santander, a Spanish bank, listed its Brazilian subsidiary on the Sao Paulo stock exchange for \$8 billion (McLeod-Roberts 2009). The New York law firm of Shearman & Sterling acted for the syndicate banks leading the deal (Santander Investment, Credit Suisse, BoA Merrill Lynch, UBS and BTG Pactual). Davis Polk & Wardwell, another NY law firm, advised Santander in Spain. Even though Shearman had acted for Santander in Brazil for a number of years, the bank wanted its Spanish advisers to work with it, so Shearman switched sides in the deal. Two Brazilian firms advised on local law; and the in-house lawyers at Santander also worked on the deal. What is worth noting here is that this deal picked at random is not unusual. The law firms are essentially New York US firms with international practices: Davis Polk has a Madrid office and Shearman has one in Sao Paulo; and the lawyers are a mix of local and American. The local law firms in Brazil and the in-house lawyers in Santander were used for minor matters. These types of transactions commonly use large law firms from New York or London, or possibly from one of the other major world metropolises.

This chapter is presented in three sections. The first lays out the theoretical issues involved in analyzing transnational law and law firms. The second sets out examples where the culture of transnational lawyering can be seen more closely. And finally I summarize the issues raised in the chapter. It is important to explain my methodology. The world of large law firms has become increasingly popular among sociolegal scholars in recent years. This popularity has led to two developments. One is a burgeoning legal trade press that reports on them, such as *American Lawyer* and *Legal Week*. These papers report on deals done, law firm mergers, partners' remuneration, and partners' defections from firms. They are a mine of information. The second development is that as large law firms have opened up so they have allowed themselves to

become sites of research. Some scholars have been able to observe the workings of large law firms; others have interviewed law firm partners. In my research I have done both. The data in this chapter' case studies are based on interviews with three law firm partners who were actively involved in the cases. The background for the chapter depends on interviews I have carried out with hundreds of lawyers over a number of years.

Background to Transnational Lawyering

In this part I examine the context of transnational lawyering. Jonathan Goldsmith, Secretary General of the Council of Bars and Law Societies of Europe, provides a telling anecdote of meeting a Flemish large law firm lawyer in Brussels who said, "There is no more idea of service to a client. It is all just billable hours. We are machines for making money. We use [forms] that have been agreed at head office...The values have gone out of our lives" (Goldsmith 2008: 445). The quotation is important for a number of reasons that are relevant to this chapter. It tells us how law firms function; it tells us about the autonomy of professionals; it tells us about lawyer-client relationships; and it tells us about values and ethics. Let me deconstruct this.

Large law firms have become institutions riven by their success. The classic ideal of partnership has long been lost in the large law firm. Not many international law firms would be able to fit their partners in one room. The traditional notions of collegial partnerships have transformed into a form now referred to as the MPB, the managed professional bureaucracy as described by Hinings et al (1999). This is a more structured type of organization which depends less on external inputs and more on its own modes of production. With the introduction of finance management, IT and human resources departments, law firms have placed more emphasis on their own in-house training and value creation as in the cases of continuing legal education and preliminary training of associates. They even train lawyers how to become and behave as

partners as they near the decision point. Emmanuel Lazega (2001), in his study of a corporate law firm, showed how law firms were internally competitive institutions where niche groups of partners competed with each other over scarce resources such as associates and clients.

Associates are assigned to partners who are busiest; conflicts of interest might be resolved in favor of rainmakers. These competitions have the effects of enabling the firm to hold onto its members and also force them to defect, depending on their outcomes. With increasing bureaucratic control comes greater internal regulation of action and behavior. The effect of the growth of the law firm is to diminish professional autonomy while allowing degrees of discretion, as told by Goldsmith's Flemish lawyer. Business targets, billable hours and so forth become determinants of a continuing career for corporate lawyers. Covenants within law firm bank loans were exercised during the recession to enforce both partner and associate layoffs to restore profitability and cashflow.

Perhaps the most contentious part of corporate lawyers' existence is their relationship to the client. Most professional rules of conduct depict the relationship as dyadic, one on one, and most are presented that way, especially in the media. Yet, in corporate law it is not so straightforward. In his chapter (this volume), Kritzer refers to Heinz and Laumann's (1982) two hemispheres of the legal profession and that the corporate one is more prone to client pressures than the individual. Then in his analysis of insurance lawyers and their clients he introduces new dimensions of an in between sort: in his case the role of the insurer and the conflicts that portends because of business tensions. With transactional and transnational lawyers similar tensions and conflicts exist. The example of a transaction I gave at the beginning is typical in that capital markets work revolves around a set of enduring relationships between lawyers and investment banks. If clients are borrowers or developers then we are in a similar relationship

potentially to Kritzer's insurance clients. In this case the relationship is tripartite between bank—lawyer—client (Flood 2009). But the question remains: who is the client?

Let me provide one example where the relationship becomes confounded. A London large law firm banking lawyer told me that a corporate client was introduced to the firm by an investment bank. The bank had told the client, who was borrowing funds to finance a business expansion, that its normal law firm was too small to work with the bank and that the lawyer's firm had more experience of the transaction. The lawyer told the client that since more funding would inevitably be needed as the business grew so it might as well switch over all its legal business from its usual law firm so as to save time and effort in the future. The implication was that in order to continue to obtain funding the new lawyer-client relationship would have to continue. It was a classic "bait and switch" operation for the benefit of the bank and the law firm, rather than the client's best interests.

Economics of Transnational Lawyering

It is difficult to isolate the extent of the contribution of transnational law practice but since it is primarily the realm of the large law firms we can examine their contributions. In the US net legal exports amounted to \$5.4 billion.² The largest law firms earned \$65 billion in 2009 and the 23 New York law firms in the Am Law 100 outperformed all others (Press & Mulligan 2010). In the UK law firm exports totaled \$4637 million in 2007 (IFSL Research 2009: 2). The largest 100 law firms generated fee income of \$22 billion in 2007-08 (Id.). When taken to the global level, the Global 50 law firms earned revenues of over \$86 billion in 2007-08 (Id.). Of this UK law firms generated 20% of the Global 50 revenues while US firms brought in nearly 60% (Id.). Nearly 40% of this revenue came from corporate and finance work and dispute resolution produced 28% (IFSL Research 2009: 5). And in the field of dispute resolution, London has

become one of the main centers of international dispute resolution with over 10,000 such disputes resolved in 2007 (IFSL Research 2009: 7). Without doubt legal services contributes significantly to the US and UK economies.

The scale and size of these international law firms outstrips their predecessors. The largest global law firm, e.g. Baker & McKenzie has 3900 lawyers with offices in 39 countries (www.bakermckenzie.com). Clifford Chance has 3,600 lawyers with 29 offices in 20 countries (www.cliffordchance.com). And the next fifteen firms have over 1,400 lawyers each and their revenues are in excess of \$1.6 billion (IFSL Research 2009: 5). However, even the largest law firms pale in comparison with the scale of the accounting firms. For example, PricewaterhouseCoopers has 163, 500 professionals approximately in over 750 offices in 151 countries (PricewaterhouseCoopers 2009).

Before transnational lawyering became an established field with the rise of globalization in the late 20th century, it had an important role in world commerce. The mid-nineteenth century gave rise to the railroads which were being constructed in all parts of the world, e.g. UK, Canada, Mexico, US, Argentina, South Africa, India. Much of the financing came from the major capital markets of which London was the prime (Cassis 2006). Corporate lawyers were intimately involved in the promotion of the companies that built the railroads and with the banks that were financing them (Flood forthcoming). As the focus of capital markets oscillated between London to New York, the legal industries that serviced them grew and spread as their clients demanded.

A few law firms started with an international dimension to their character. The late Coudert Brothers originated in Paris and New York in the 1850s, specializing in international law. The most distinctive approach to international law practice was that taken by Russell Baker with the

formation of Baker & McKenzie in 1949 (Bauman 1999). Baker was taken with the internationalist viewpoint of his professors at the University of Chicago in the 1920s. The Chicago-based law firm was predicated on a deliberate internationalist model backed up by a domestic insurance practice. Baker realized he could exploit certain provisions of the US Tax Code designed to assist trade with Latin America. By establishing subsidiaries American companies could make considerable savings. Baker actively marketed this legal technology to his clients which led to the establishment of Baker & McKenzie offices in Latin America and later elsewhere (id.)

Most other law firms that expanded overseas were less calculating and let circumstance dictate their moves. Some notable law firms, e.g. Wachtell Lipton, Cravath Swaine & Moore, Slaughter & May, refused to open overseas offices or only in limited circumstances. Yet all major law firms engage in transnational lawyering regardless of their office locations. Those with no or few offices outside their parent countries use networks or “best friends” where they ally with foreign firms on a repeat basis to obtain local capabilities.

Carole Silver (2002) has further shown a marked reluctance by US lawyers to move overseas, unless for a fixed term although the credit crisis is changing attitudes to working outside the US (Bringardner 2009). For American law firms while it is necessary to export some lawyers to head a foreign office, the majority of the firms’ employees tend to be locally-trained lawyers (Faulconbridge & Muzio 2008). Here there is a distinct difference between the legal professions of the UK and the US. In the UK there has been a long tradition of exporting lawyers overseas, partly because of empire’s needs and partly because of globalization (Flood forthcoming). It is estimated that there are in excess of 3,500 UK solicitors in practice overseas.

Another aspect of the transnationalization of law and legal practice is found in the localization of legal education. While both US and UK legal education have regulated curricula, they yet have significant degrees of freedom in how their courses are delivered and what they contain (Silver 2006). Their freedom has been particularly exploited at the master's level where myriad LL.M. programs have flourished to tap into the perceived need for specialist expertise or knowledge of other legal systems (Id.). This has attracted large numbers of civilian-trained lawyers to UK and US law schools since their own educational systems have traditionally been able to offer courses on, for example, the globalization of law (id.). Observation of European law firms now shows that as many as a third of the junior lawyers have such LL.M.s as Muzio et al (forthcoming) describe.³ But we should note, however, professional responsibility is not a compulsory course for LL.M. students in either the UK or the US.

The Ethics of Transnational Practice

One essential component of all legal education is the teaching of professional responsibility or legal ethics. How this is handled varies enormously from country to country and nor are the same principles imparted to students (Moore 2007). Moore is clear that US lawyers are caught in the double deontological trap (see Nagel 2007 for an explanation of how this affects US and UK lawyers in the European context): their home rules and their host rules and often they are quite different, e.g. conflicts of interest in the UK are more relaxed than in the US; attorney-client privilege is not the same in France as in the US; unauthorized practice of law rules vary widely from country to country (in the UK they hardly exist). To which rules do you adhere? If they are contradictory the lawyer is in a Catch-22 situation, with no escape clause. Legal education reflects those differences. In Europe professional responsibility is not given the same amount of attention as in the US classroom. For example, in the UK legal ethics is “taught” during the

Legal Practice Course (a postgraduate vocational course for aspiring solicitors). It is, however, a “pervasive” topic, one that arises from time to time during the year’s teaching in whatever subject is being studied at the time. It has no defined identity in the curriculum like US law school professional responsibility courses and has only a small examination but nothing on the scale of that in the US (SRA 2009: 20).

The formal rules do not provide much guidance to lawyers. Taking the English and US rules, we see that most of the English rules under the Solicitors’ Code of Conduct 2007 apply to overseas practice without setting up any arduous requirements;⁴ while the Model Rules of Professional Conduct state, “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so”.⁵ The English and American jurisdictions introduced their professional codes at different time. The American Bar Association adopted its first canons in 1908 but the Law Society did not acquire rule-making powers until 1933 and its first code did not appear until the 1960s. Its first complete professional code only appeared in 2007 and will soon be superseded by a new one (Boon & Levin 2008). There is one other issue that arises in respect of corporate and transnational law which is legal process outsourcing. This is the offshoring of mundane legal tasks by law firms to lawyers in countries such as India, the Philippines, and South Africa. It has raised a host of ethical issues as to responsibility for work, client confidentiality, and unauthorized practice. As yet neither the US nor the UK authorities appear to have provided much guidance for lawyers (Ross 2010).

The prospect of being a transnational lawyer or a global lawyer is a daunting one as lawyers wend their ways through the maze of conflicting rules that govern their working lives. This comes about because of the nascent state of global law and its regulation, which has not yet reached maturity so the necessary institutions are still to be created (Goff 2007). The situation is

not, however, insoluble as the major Anglo-American law firms have begun to navigate their way in global practice. The result is, perhaps a perverse one, that lawyers inside these firms *do not think* about cross-border ethical issues because of their intrinsic complexity and the pressures of work: this has instead become the remit of firms' own general counsel—e.g. Allen & Overy has 15 general counsel—who deal with rules and general compliance (Denyer 2010; Parker 1999:184). What underlies the law firms' position is the prior paramountcy of the Washington consensus which enabled US capital to extend its reach throughout the world (Burki & Perry 1998). As the investment banks sought new markets they relied on the law they were used to, i.e. New York and English law. For finance, therefore, these two forms of law became dominant, the new *lex mercatoria* (Flood 2007). To be somewhat skeptical, it is reasonable to say that institutional laziness (or path dependency) impelled these legal systems to the top rather than any inherent legal superiority. It enabled a global reach across multiple legal jurisdictions at relatively low cost. The problem of the local jurisdiction was not totally removed but at least it was contained. Perhaps this is best summarized rather whimsically by one in-house counsel who said, "Like all good professionals we make it up as we go along and hid our copy of Libyan Law for Dummies under a pile of learned papers" (Smith 2009: 16).

The Anglo-American hegemony is reinforced by the use of standardized documentation in transactions, either that of a particular firm, or one of the organizations that promote standardized documents, such as the Loan Market Association which is a European trade association for syndicated loan markets. Its membership includes banks, investors, law firms and rating agencies among others (www.lma.eu.com). Another key organization is the International Swaps and Derivatives Association (ISDA) which has 820 institutional members around the world including corporations, government bodies, professional service firms who subscribe to a master

agreement and other documentation originated by the ISDA (www.isda.org). Certain law firms such as Allen & Overy and Cravath Swaine & Moore have formed close links with the ISDA and are intricately involved in the drafting of its documents.

The financial market has invested heavily in creating a form of best practice in document production which is not seen to the same extent on the corporate side of business. In this regard the law firms' own intellectual capital is crucial to delivering multi-jurisdictional transactions. We can even portray the product of organizations like the LMA and ISDA as a new form of internationally accepted law, given their almost universal adoption. But what is critical for the discussion here is that this new law has been created by the US and UK large law firms who practice it. This gives them a powerful advantage in global law beyond most others.

In the next section I examine examples of the intricacies of transnational lawyering and the ethical concerns that arise, looking at what happens inside these deals. The first two are based inside UK law firms. Despite this the problems and difficulties themselves are not bound by jurisdiction and I make reference to US rules where appropriate.

Case Studies of Transnational Lawyering

Example One: Is There Such a Thing as a Conflict of Interest?

In 2005 Celtel, a Dutch telecoms company with 5.3 million subscribers in Africa sold 85% of its company to one of the Middle East's largest telecoms company (MTC of Kuwait). As *The Lawyer* reported (O'Connor 2005) Celtel was "Sub-Saharan Africa's largest mobile provider, with coverage in 13 countries and more than five million subscribers." MTC had operations in Kuwait, Iraq, Jordan, and Lebanon. Tim Schwarz of Linklaters said,

MTC has what it calls its 'three-by-three-by-three strategy'. During the first three years—from 2002 to 2005—it invested in its home region. In the second three years it began to invest in its surrounding neighbourhood, buying Celtel. It's the third three years that will be the most interesting. That's when it plans to go global. It will be very interesting to see whether it makes it (Byrne 2006).⁶

The key lawyers on both sides of the transaction were the English law firms of Clifford Chance who acted for MTC and Linklaters who acted for Celtel. I explore the relationships between the lawyers and their clients below.

MTC went to Clifford Chance's Dubai office which worked on the deal in conjunction with the London office. In this deal the African company, Celtel, asked an investment bank, Goldman Sachs, to run a controlled auction. The bank sent letters, according to MTC's lawyer, "to anyone they could think of who might be interested in buying this business. Any mobile operator, any telecoms company, and private equity houses as well." The lawyer noted about the banks,

You start by getting the investment banks running the deals from London. Most of the bankers won't be English. You tend to have the statutory retired colonel who went to Eton, but the majority of investment bankers come from anywhere. Lots of Italians, Germans, Americans, even some Dutch. And because they are based in London they will turn to the English firms because we have some of the biggest firms in the world and that means with size comes depth of experience. Sophistication naturally resides here.⁷

In the first stage around 100 companies were approached with a rough outline of the deal. The next stage was for the sellers to select, out of a field of 10 to 20, four who would submit binding offers. This would go to a final stage where two bidders would negotiate the final terms. The

final sale price was \$3.4 billion. There is always a possibility that this kind of deal could turn sour and fail to complete. In part this is due to the complexity of the funding arrangements required to be in place for this size of transaction to go through. These transactions usually involve leverage, i.e., other people's money or debt, and therefore all types of guarantees have to be arrayed, default conditions prepared for, and more. This particular transaction was being funded by loans from four banks in the Middle East, the UK, Switzerland, and the US, namely, National Bank of Kuwait, UBS, CSFB, and Barclays, all of which were represented by a single law firm in London, Allen & Overy. If the sale were to fail, the vendor's lawyers were running a parallel track with the sale to place an initial public offering in the market. The hope was that it would be redundant.

Although the operations were based in Africa, Celtel was headquartered in the Netherlands. No African country had the scale or sophistication in its legal market to handle such a large transaction. However, some local African law firms were used during the due diligence process to monitor minor regulatory matters. A Herbert Smith partner stated that "It used to be the case that there was little or no in-house regulatory capacity at many of the telecoms companies. Increasingly they've skilled up" (Byrne 2006). Local contracts would, however, be investigated by the UK lawyers on the basis that the content would be the issue not the law and that the content would be too complex for local lawyers. Moreover, as English lawyers were used, they naturally used English law. But as the lawyer remarked,

We need a lingua franca and that's English law. The governing law of a transaction—a share acquisition—doesn't really matter that much. The terms and mechanisms are pretty much identical regardless of whether it's English, German, French or Dutch law.

Obviously you take account of the peculiarities of national law but the agreements will

look the same and they will all be in the English language, even in France where it's technically illegal. But people pay the 300 euro fine and don't mind.

In this transaction, even though there were 16 operating subsidiaries, what was actually bought was a single block of shares in a Dutch company. The share purchase agreement was done under English law while various minor ancillary elements, such as the transfer documents because they were Dutch shares, had to be done under Dutch law. The lawyer said that usually share purchase agreements would be done under local law, but this was an exception because although the company was Dutch, the business was pan-African and there were more than 100 shareholders who came from a variety of locations. And the purchasers came from different places, so English law provided a common locus. In this respect the varieties of laws in play were significant as far as the regulatory issues were concerned but to the overall structure of the transaction they were relatively insignificant.

The transaction therefore was a combination of relatively simple company law issues, complex regulatory matters, and complicated financing and tax issues. The lawyers' tasks were to bring these together into a set of coherent structures which enabled the parties to complete their transactions under a range of headings that included private and state concerns. It helped that the lawyers from the different law firms were used to working with each other and that they were used to working with the investment banks. The enduring institutional relationships and networks were a vital key to the success of the transaction.

Yet these relationships were not quite as straightforward as they appeared. Clifford Chance had a longstanding relationship with the acquirer, MTC, which is not unusual but it had also advised Celtel some years previously on its plans to go public (O'Connor 2005). On the other side of the

table was Linklaters for Celtel with whom they had an established relationship. And the four banks were all represented by Allen & Overy. Shortly after concluding this deal the Clifford Chance Dubai partner, who brought in the deal to Clifford Chance, moved to head Linklaters Dubai office. As *The Lawyer* puts it, “A canny bit of talent spotting...that” (id.). Linklaters continued to act for MTC/Zain on subsequent acquisitions thereby ousting Clifford Chance as the MTC’s counsel. No adverse comment was ever made by lawyers or in the legal trade press about the lawyer moving to the other side.

English lawyers, as mentioned above, tend to be relaxed about these kinds of actual and potential conflicts and they argue that sophisticated corporate clients understand these relationships and do not use them to conflict out lawyers. Joe Flom, senior partner of Skadden Arps in New York, in 1984, predicted that large law firms would begin to find themselves harboring extensive conflicts as they grew in size and as lawyers circulated from firm to firm (Federal Bar Council 1984). As Wald (2007) notes, these relationships bring the ABA Model Rules 1.6 and 1.7 into conflict with each other especially in the light of increased lawyer mobility. Yet English lawyers have not succumbed to the rigors of such rules.

Griffiths-Baker (2002) discovered that although official SRA rules forbade solicitors acting for both sides in transactions, large law firms regularly ignored them. And at least large solicitors’ firms have developed screening procedures that protect clients’ interests when a firm is acting on both sides of a transaction. This led to an intensive lobbying campaign by the City of London Solicitors Society, the large law firms lobby group, to revise the conflicts rules so that they would permit “sophisticated” corporate clients to agree to their lawyers acting for both sides in non-contentious matters (Dean 2010). In 2009 the Solicitors Regulation Authority agreed to change Rule 3 on conflicts of interest to allow conflicts. It says: “3.02 (2)(a) Your firm may act

for two or more clients in relation to a matter in situations of conflict or possible conflict if: the clients are competing for the same asset which, if attained by one client, will make that asset unattainable to the other client(s).”

Despite these moves and shared understandings which are deeply entrenched in the City law firms, partners still make seemingly incomprehensible and elementary mistakes. In 2004 Philip Green, a fashion retailer, attempted to takeover Marks & Spencer in a hostile takeover worth \$14 billion with the assistance Barry O’Brien, the corporate finance head of Freshfields, a big London law firm (Herman 2007). The problem was that Freshfields had a longstanding relationship with Marks & Spencer, the target. Freshfields undertook a conflicts check and found that it had done work previously for Marks & Spencer on restructuring and litigation, but the firm’s chief executive decided these were not material to the bid and the firm set up a series of “Chinese Walls” (information barriers) (O’Connor & Jordan 2004).

O’Brien worked with 50 staff on the matter for months before Green went public with his bid. Marks & Spencer immediately obtained an injunction from a judge who had been a large law firm partner before joining the bench. O’Brien and Freshfields immediately appealed but the Court of Appeal affirmed forcing O’Brien and Freshfields to cease working for Green (Nisse 2004). Although the firm was dropped it still billed Green over \$1.5 million in fees. In addition it had to pay over \$400,000 in costs to the Marks & Spencer’s law firm for the injunction. The conflict could not be any clearer. Interestingly Marks & Spencer decided it would not make a formal complaint having obtained its desired result, so the Law Society (the professional body), which had decided not to investigate the matter, then came under pressure from its governing members to initiate a complaints procedure. The judge who had granted the injunction questioned the effectiveness of “Chinese Walls” as screening devices. Freshfields attempted to

claim the moral high ground by saying it would never reveal any confidential information, a maneuver that singularly failed to impress the Law Society.

O'Brien was disciplined and fined \$14,000 by the Solicitors Disciplinary Tribunal in 2007 and ordered to pay substantial costs of \$78,000. He also paid another \$78,000 to the Law Society for bringing the complaint. O'Brien was forced to resign his partnership yet Freshfields retained him as of counsel. At the tribunal his counsel argued his error of judgment was a one-time blip on an otherwise distinguished career that included masterminding a rescue plan for Lloyd's of London, the insurer, which was said to have saved the insurance market from collapse. It further heard excerpts from *The Legal 500* and *Chambers Directory* that described him, with no hint of irony, as "the first choice, every time, for complex advice", a "robust heavyweight" and "first class adviser" (Herman 2007). Despite his conviction, he continued to work for his regular clients. Although he was not an official partner, he behaved as such. No client left the firm as a result of his actions: indeed O'Brien worked on several multi-billion dollar takeovers during this period. His expulsion from the Eden of his law firm was rescinded in 2010 when Freshfields made him a partner and head of corporate finance for the second time.⁸

What these stories tell us is that the very notion of conflicts of interest is fluid rather than rigid. It is open to interpretation. In some contexts, as in the Freshfields case, it cannot be explained away as a "blip". But in most business transactions business and legal relationships are complex and varied. A strict interpretation of conflicts rules would effectively halt a considerable amount of business. So, in the UK at least, the situation has been revised by the regulator to permit what has been taking place informally for many years. It is also the case that in transnational business the ability to raise conflicts issues is attenuated because there are relatively few law firms that engage in this work; partners a constantly moving between firms; and it is difficult for dispersed

clients to bring complaints and actions in different jurisdictions. And given the relatively small number of actors that engage in this work, it contains the elements of a club which should not have its “dirty laundry” washed in public. Informal sanctions are more powerful than the formal regulatory process.

The second study concerns the sale of a building by a consortium of Japanese banks to an offshore British Virgin Islands-based company involving a number of different jurisdictions.

Example Two: So What is Truth?

A lawyer is obligated in the preamble to the ABA Model Rules of Professional Conduct to “conform to the requirements of the law...[and] should demonstrate respect for the legal system...”, but nowhere does it say that a lawyer has to tell the truth. Similarly, the Solicitors’ Code of Conduct in Rule 1 talks about a lawyer acting with integrity, upholding the rule of law, and not to diminish the trust of the public, but it too fails to mention the role of truth.

The transaction involved a large office building in London worth £343 million. The building was being sold by joint venture of Japanese banks who were selling off their portfolio of European property assets. The purchaser was a UK public limited property company, Delancey (<http://www.delancey.com/>), a former plc that had gone private and established a series of offshore investment vehicles in the Caribbean. It is considered to be one of the most sophisticated players in the property market dealing in hedging and property derivatives. The purchase was being funded by another syndicate of Japanese banks.

The purchase was a joint venture between Delancey and an Australian pension fund. Delancey wanted the deal done in a combination of English, as the lead law, British Virgin Islands (BVI), Australian, Jersey, and Japanese law. The lawyer for Delancey took the lead in drafting the

documentation used. Initially he expected the transaction to take around several weeks, but the complexity of it combined, especially because of tax difficulties, with the respective needs of local laws meant that ultimately it took six months to complete.

Not all of the local laws played significant parts. To make the joint venture work BVI law was used to set up a special purpose vehicle to hold the assets of the transaction. For Delancey this was easily done for it undertook between 20 and 30 large property transactions a year, which has resulted in good relationships between Delancey and the BVI regulators. Jersey was where the bank accounts would be located; again offshore.

The key element in these types of transactions is minimizing the tax burdens that arise. Since Delancey is offshore, it is protected from the UK Revenue and Customs, though not always. The transaction was complex and as the lead UK lawyer said,

For various tax reasons we had to go through five or six different structures because they weren't working. The problem was that for the Revenue, tax domicile is a question of *fact*. Although Delancey is offshore in the BVI where 'management and control' are based, it also has a large office in central London, which clouds the issue. All my emails to Delancey *had* to appear to go to the BVI even though a number of important decisions were being made in the London office. The email trail had to be kept clear and direct so the Revenue wouldn't query anything.

Delancey used a big BVI law firm, which also had an office in London, for its transactions which acted for both borrowers and lenders by setting up a "Chinese Wall" in the firm. This is quite common in these classes of transactions.

The lead lawyer found he had difficulties with time differences. Dealing with the BVI meant a difference of only five or six hours which was acceptable. With Australia a time difference of 10 hours, he was compelled to make phone calls at 10 or 11pm. Being stretched between the time zones of BVI and Australia was physically tiring.

The lawyer unpacked the role of the transnational transaction lawyer as one who primarily concentrates on the deal, yet may do many of them for particular clients. He put it this way:

There's a problem for transaction lawyers around risk management. Transactions *are* individual items, but if you do a series of them for the same client, then do you become an adviser as well? How much do you have to recall about past deals? I always send an email to the client near the end of the deal to say that you must check these representations to ensure everything is covered. There is a strong possibility that the client's lawyers could be held to know about things and so not be able to state, "Oh, that was just a single deal."

Corporate clients, as Heinz and Laumann (1982) described it, do not sit in the traditional professional-client relationship that Carr-Saunders and Wilson (1933) analyzed where the professional is the dominant member of the professional-client relationship. To them it was an inversion characterized by patronage (Johnson 1972) where the lawyer did not so much exercise autonomy but rather discretion (Evetts 2006). It is apparent in this example the lawyer had very little autonomy. His instructions were clear and to the point: tax liabilities were to be minimized. This involved some sleight of hand so that the emails had to be routed to appear to go from London to the BVI rather than London lawyer's office to Delancey London headquarters. The key decisions had to appear to be made in the Caribbean not London where they were actually

taken. The construction of the deal had to follow a prescribed course that would satisfy legal rules and the tax authorities. Some may see the lawyer's behavior as fraudulent, but he and the clients saw it as normal. The lawyer remarked that many of his deals with this client followed a similar pattern and so had now become normalized for him and therefore contained no anomalies.

Was he being untruthful? In a strict sense he was. As part of the course of business these actions were ordinary. He could claim that as far as he was concerned Delancey's decisions were taken in the BVI and not London. The trail of the emails backed this up. And as long as he did not allow his tiredness to make him careless the performance could be maintained. The sociologist Erving Goffman depicted social behavior as performance. That which was for public consumption took place on the front stage while the preparation and corrections occurred backstage away from the public gaze (Goffman 1959). The difficulty for the lawyer here was remembering where he was situated at any time—in public or in private. It was not always clear. In addition the other participants understood the rules of the production and why events took their particular course. In order to complete the deal everyone had to participate and accept the rules.

We can also ask was he a bad lawyer? From the client's perspective he was in fact a good lawyer. If he had refused to do the deal in the way demanded by the client, he would have lost the business. This is compounded by the fact that Delancey was a repeat player who generated significant billings for the firm. Even if the lawyer refused to do as told, the firm probably would have continued to act for the client with another lawyer. Goffman talks about institutionalization, that is how people adapt to the mores of the situation they find themselves in (1961). This is a capacity that law firms possess: they incubate their lawyers to act in particular ways with respect

to clients and other lawyers. Delancey's lawyer might have understood the ambivalence of his situation but he did not let it trouble him as long as it continued with a semblance of normality. It is not an unusual position for lawyers to be in; they will be subject to demands made by clients and senior partners. Their career paths will depend on how well they carry out the demands. The pressures of work, clients, and billing will not give them much respite to reflect on what they do.

Conclusion

Transnational lawyering, especially of the transactional kind, exists in an ambiguous world of shades and shadows where nothing has a fixed identity. Transaction documents are continuously being altered, clients change their minds, law firms decide they no longer will practice in a certain area. Lawyers learn to identify with the law firm and their clients. One could say their own identity is at risk as they are subsumed into others. Clear cut decisions may seem crude and unsophisticated.

As Kritzer argues in his chapter, the difficulty of understanding which of the many characters is the main client puts the lawyer in a position of continuing tension and conflict. If this is so, then how is a lawyer supposed to behave in an ethical manner? There is no easy answer. On the one hand the lawyers should act with integrity as the rules state. But on the other client demands can override the lawyer's sensibilities. In most situations, the problems fail to arise because they are not brought to the attention of regulators except in exceptional situations as with Barry O'Brien. But even O'Brien and his firm, Freshfields, ultimately believed they had done nothing blameworthy, to the extent that O'Brien was rehired as a partner after a few years.

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¹ <http://www.unidroit.org/english/conventions/c-ulis.htm>.

² US Bureau of Economic Analysis statistics for cross-border trade in legal services (<http://www.bea.gov/international/xls/tab7a.xls>).

³ Many of these previously conservative countries' law schools are now offering their own LL.M. programs in English, e.g. China, Germany, Italy.

⁴ See Rule 15—Overseas Practice, <http://www.sra.org.uk/solicitors/code-of-conduct/rule15.page>.

⁵ See Rule 5.5—Unauthorized Practice of Law; Multijurisdictional Practice of Law, http://www.abanet.org/cpr/mrpc/rule_5_5.html.

⁶ In 2007 MTC was renamed Zain Group. According to its Wikipedia page (<http://en.wikipedia.org/wiki/Zain>) Zain has operations in 8 countries in the Middle East and 17 in Africa. It is listed on the Kuwait Stock Exchange and its largest shareholder is the Kuwaiti Investment Authority. At September 2009 it had close to 72 million subscribers. It also runs a money transfer service, Zap, via mobile phone. In March 2010 Bharti Airtel of India acquired the 15-country African operation from Zain for \$10.7 billion. Bharti's subscriber numbers increased by 42 million.

⁷ Interview with partner in London large law firm, 2008.

⁸ See <http://www.freshfields.com/people/profile/11/2623>, and also Aldridge (2009).