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## Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?

Christopher J. Whelan

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# Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?

Christopher J. Whelan\*

## ABSTRACT

*This Article explores whether global self-regulation of the legal profession is desirable. The Author explains that as global law practice has grown over the past decade, so has the desire to formulate global rules of professional responsibility. The Article focuses on large law firms offering transnational legal services in many countries. The Author addresses whether and for whom the aspiration to deliver core values at the global level is desirable. He does so by comparing the rhetoric of global self-regulation with the reality of global law practice. In reality, the global law practice has undermined the power of nation states because large law firm clients are powerful enough to manipulate nation states; lawyers are not capable of independent professional judgment because competition for profits puts loyalty to clients at a premium; and lawyers are capable of manipulating the rule of law to their clients' advantage. The Author concludes that global rules of professional responsibility based on core values will add value to private clients, but they will add little to the public interest.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	932
II.	GLOBAL LAW PRACTICE—RHETORIC AND REALITY.....	941
	A. <i>Power</i> .....	941
	B. <i>Independent Professional Judgment</i> .....	943
	C. <i>Rule of Law</i> .....	946
III.	CONCLUSION .....	949

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## I. INTRODUCTION

Global law practice is part of the process of globalization.<sup>1</sup> As it has grown in the last decade or so,<sup>2</sup> so too has global professional regulation.<sup>3</sup> Professional services are an important element in the

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1. Thomas Friedman defined globalization "as the integration of finance, markets, nation states and technologies to a degree never witnessed before—in a way that is enabling individuals, corporations and nation states to reach around the world further, faster, deeper and cheaper than ever before, and in a way that is producing a powerful backlash from those brutalised or left behind." Thomas Friedman, *It's A Small World*, SUNDAY TIMES (London), Mar. 28, 1999 (News Review), at 1.

2. An OECD survey showed that the net trade balances in respect of U.S. and U.K. legal services were nearly two billion dollars. U.K. lawyers accounted for \$830 million of that figure. Peter Goldsmith QC, *Globalisation of Law—Tearing Down the Walls*, in GLOBAL LAW IN PRACTICE 139, 143 (J. Ross Harper ed., 1997). Between 1986 and 1996, U.S. exports of legal services rose from ninety-seven million dollars to \$1.9 billion; imports rose over the same period from forty million dollars to \$516 million. Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L L. 1, 4 (1999). In the year prior to Clifford Chance's merger with Rogers & Wells and Punder Volhard Weber & Axster in 1999, 37% of the firm's £585 million turnover came from global practice outside London; after the merger, non-London turnover accounted for 57% of revenues. Catrin Griffiths, *Legal Eagles Swoop to Grab the Power and the Money*, THE TIMES (London), Oct. 7, 2000, at 48. Of the eighty thousand solicitors in England and Wales, about three thousand practice abroad. Christian Wisskirchen, *The Policies of the Law Society of England and Wales on Cross-Border Regulation and Discipline Enforcement* (July 14, 2000) (on file with author).

3. See generally Kenneth S. Klimnik, *Lawyers Abroad: New Rules for Practice in a Global Economy*, 12 DICK. J. INT'L L. 269 (1994); INT'L BAR ASS'N, LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW (Edwin Godfrey ed., 1995) [hereinafter LAW WITHOUT FRONTIERS]; RIGHTS, LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE (Mary C. Daly & Roger J. Goebel eds., 1995); GLOBAL LAW IN PRACTICE (J. Ross Harper ed., 1997). Examples of such regulation include the Solicitors' Overseas Practice Rules 1990, the International Bar Association Code of Ethics (adopted by the Law Society as the basic code for solicitors practicing outside the jurisdiction) and the CCBE Code of Conduct for Lawyers in the European Community, The Union Internationale des Avocats. See CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION, (1998) [hereinafter CCBE CODE], available at <http://www.ccbe.org>. In 1994, the American Bar Association and the Brussels Bar agreed to the terms on which American attorneys would be permitted to practice in Brussels. If attorneys wished to advise only on ancillary issues in Belgian law, they had to agree to be bound by the CCBE Code of Conduct, unless it conflicted with applicable U.S. rules; if they wished to be able to advise on Belgian law, they had to agree to be bound by the Brussels Bar's rules of ethics, provided they were applied in accordance with the CCBE Code principles. Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part II: Applying the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 345, 347-48 (1993); Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L.J. 1382, 1436-39 (1998). Solicitors practicing in Europe are subject to the general principles of professional conduct of the English Law Society, the CCBE Code, the IBA's

development of international trade,<sup>4</sup> and self-regulation is one of the defining characteristics of a profession.<sup>5</sup>

Although global law practice can take many forms,<sup>6</sup> this Article focuses on those law firms—predominantly U.S. and English—that

International Code of Ethics, European law, local law and, possibly, local rules of professional conduct. *See generally*, CCBE CODE, *supra*.

4. Freedom to provide services and to establish businesses within the European Community was established by the Treaty of Rome in 1957. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 V.N.T.S. 11. More recently, multilateral trade agreements, such as GATS and NAFTA, have included legal services within their frameworks. *See infra* text accompanying notes 9-10.

5. *See, e.g.*, in the United States, MODEL RULES OF PROF'L CONDUCT, pmbl. para. 9 (1998) [hereinafter MODEL RULES] (describing the connection between the legal profession and law enforcement as a reason that the legal profession is self-regulated); in England and Wales, THE ROYAL COMMISSION ON LEGAL SERVICES, 1 FINAL REPORT, para. 3.18(d), at 30 (1979) (explaining how self-regulation allows higher standards than otherwise could be imposed). Lawyers' professional responsibilities often are set out in professional codes made and enforced by fellow professionals. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY (1980) [hereinafter MODEL CODE]; MODEL RULES, *supra* note 3; THE GENERAL COUNCIL OF THE BAR, CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES (1990); THE LAW SOCIETY, THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS (Nicola Taylor ed., 8th ed. 1999). Greater self-regulation implies the "rise of professionalism," lesser suggests a "decline." Richard L. Abel, *The Rise of Professionalism*, 6 BRIT. J. L. & SOC. 82 (1979); Richard L. Abel, *The Decline of Professionalism?*, 49 MOD. L. REV. 1 (1986).

6. English-speaking global law firms tend to structure themselves as one of four organizational types: international with assets and strategies centralized at home country headquarters, for example Lovell, White & Durrant; multidomestic with assets and strategies located in foreign offices, for example Freshfields LLP: "Our strategy as an international firm [means] being a leading firm in each local market." Griffiths, *supra* note 2, at 48 (quoting Anthony Salz, Senior Partner of Freshfields LLP); global with assets and strategies organized according to practice area, for example Ernst & Young; and transnational (assets and strategies distributed to locations world-wide, for example Baker & McKenzie. Patrick E. Mears & Carol M. Sanchez, *Going Global: How Do Law Firms Do It and What Does It Change?*, 10 BUS. L. TODAY, March/April, 2001, at 32. *See also*, John Flood, *Megalawyering in the Global Order: the Cultural, Social and Economic Transformation of Global Legal Practice*, 3 INT'L J. LEGAL PROF. 169, 191 (1996) (stating that while the largest global firms can sustain foreign offices that are conversant with local law, those that fall below the top category aim to "capture foreign clients" to either U.K. or U.S. law). Abel notes that multijurisdictional practice could be done "from home," via modem communications, transportation and technology. Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 761 (1994). There are also many forms of transnational law firm alliances and networks. *Id.* at 747.

Global law practice also takes place within corporate legal departments and within accounting firms. The "Big 5" accounting firms "rank among the largest law firms worldwide." Laurel S. Terry & Clasina B. Houtman Mahoney, *Future Role of Merged Law and Accounting Firms*, 41 PRIVATE INVESTMENTS ABROAD, 1998, at 7-6, 7-7. In 2000, Landwell, the law firm of PriceWaterhouseCoopers, had offices in 42 countries. Lucinda Kemeny, *Legal Eagles Spread Their Wings*, SUNDAY TIMES (London), Aug. 6, 2000, (Business) at 7.

The issue of the regulation of multidisciplinary practice is also about the regulation of global practice: MDPs are "intrinsically bound up with the forces of

offer transnational legal services in other countries. Anglo-American law firms enjoy a competitive advantage in global practice due to the dominance of Anglo-American capital markets and financial institutions and of New York and English law in regulating international financial transactions.<sup>7</sup> Anglo-American law firms also have experience in mergers and acquisitions and take-overs and in dealing with complex transnational transactions.<sup>8</sup>

Globalization has accelerated a trend towards universal standards of professional responsibility. The General Agreement on Trade in Services, part of the agreement establishing the World Trade Organization, "may serve as a basis for further development of cross-border legal practice standards."<sup>9</sup> Similarly, NAFTA "establishes a framework for evaluating and possibly changing the cross-border regulation in the signatory countries."<sup>10</sup> Professional bodies too have co-operated in the development of transnational professional standards, possibly in recognition of a need for harmonization, but also, perhaps, to preempt external regulation.<sup>11</sup>

globalisation. . . ." John Malpas, *American Bar Votes Down Union*, THE TIMES (London), July 25, 2000, (Law) at 17 (quoting Tony Williams of Anderson Legal, formerly with Clifford Chance). See generally, Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677 (2000) (noting that MDPs are common in Europe while generally prohibited in the US); Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869 (1999) (examining whether the current rule prohibiting a practicing lawyer from being a partner with, or sharing legal fees with, nonlawyers should be replaced).

7. Flood, *supra* note 6, at 172. Three-quarters of the Commercial Court caseload in London involves non-British disputants (obviously generating much trade for British lawyers). Andrew Boon & John Flood, *Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct*, 2:1 LEGAL ETHICS 29, 39 (1999). In 1989, the figure was 30%. THE TIMES (London), July 20, 1989, at 4.

8. Carole Silver, *Globalization and the U.S. Market in Legal Services - Shifting Identities*, 31 LAW & POLY INT'L BUS. 1093, 1095-96 (2000). Other factors, no doubt, have played a part in this as well, such as the restriction, only recently removed, on inter-city law firm mergers in Germany. LAW WITHOUT FRONTIERS, *supra* note 3, at 6.

9. Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L. J. 1382, 1396 (1998); GATS General Agreement on Trade in Services (GATS), Annex 1B to the Agreement Establishing the World Trade Organization, April 15, 1994.

10. Terry, *supra* note 9, at 1399.

11. See, e.g., Bernard L. Greer, Jr., *Professional Regulation and Globalization: Toward a Better Balance*, in GLOBAL LAW IN PRACTICE, *supra* note 2, at 169; Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117 (1999). A Working Party on Professional Services, established by GATS, has issued a background paper and posed questions to OECD Member States to identify barriers to trade in legal services rooted in the countries' regulatory and ethical regimes. Laurel S. Terry, *GATS' Applicability to Transnational Lawyering & its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001).

One of the stated objectives of the Council of the Bars and Law Societies of the European Community (CCBE), is the co-ordination and harmonization of the practice of the legal profession.<sup>12</sup> In principle, the CCBE Code regulates the cross-border activities<sup>13</sup> of over 500,000 lawyers in twenty-eight countries<sup>14</sup> throughout Europe with a population well in excess of 500,000,000. Laurel S. Terry hoped that the CCBE Code “[would] provide the first step towards a comprehensive code of ethical conduct for lawyers throughout the world.”<sup>15</sup> John Toulmin QC, former President of the CCBE, argued that a world-wide code could be founded on the U.S. Model Rules, the Japanese Code, and the CCBE Code.<sup>16</sup>

Global self-regulation may be inevitable, but is it desirable? There are lingering doubts about any kind of self-regulation and, indeed, about the whole idea of professionalism more generally. As George Bernard Shaw famously put it, “[Professions] are all conspiracies against the laity.”<sup>17</sup> Certainly, self-regulation of the legal profession on a domestic level has been a way of protecting lawyers from competition.<sup>18</sup> At the international level, similar

12. The CCBE Comité Consultatif des Barreaux Européens is composed of delegations from 28 countries comprising full members and observer members. *Other News from the CCBE*, 1 CCBE GAZETTE, (CCBE, Brussels, Belgium) 2001, at 2.

13. “Cross-border” means all professional contacts with lawyers of different Member States of the European Community and the professional activities of the lawyer in a Member State other than his own, whether or not he is physically present in that Member State. CCBE CODE, *supra* note 3, at Rule 1.5.

14. Acceptance of the Code is a precondition for observer status within the CCBE; hence, it applies not only within the Member States of the European Community and the European Economic Area, but also to countries in Central and Eastern Europe. *See generally* THE LEGAL PROFESSIONS IN THE NEW EUROPE: A HANDBOOK FOR PRACTITIONERS (Alan Tyrrell & Zahd Yaqub, eds., 2d ed. 1996). There are thirty-four legal professions in the European Union. *Id.* at 1.

15. Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part II: Applying the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 345, 348 (1993).

16. John Toulmin Q.C., *A Worldwide Common Code of Professional Ethics?* 15 FORDHAM INT'L L.J. 673 (1991-92) *cited in* Boon & Flood, *supra* note 6, at 30 n.8.

17. GEORGE B. SHAW, *Preface on Doctors to a Doctor's Dilemma* xv (1911). In a similar vein, John Vickers, Director-General of the Office of Fair Trading (competition agency) recently stated that: “The professions are organised and run largely by producers for producers, and if you have a professional body laying down restrictive rules, there are clearly risks and small businesses may be the losers.” Wanda Kemeny, *Legal World Faces Biggest Shake-up in 700 Years*, THE SUNDAY TIMES (London), Mar. 11, 2001, (Business) at 14.

18. *See, e.g.*, Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 702-06 (1981) (explaining how the Model Rules constrain competition within the legal profession without being ultimately protectionist); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 653-67 (1981) (applying the theories of MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977), to the legal profession in the United States).

concerns have been expressed about professional rules:<sup>19</sup> “One does not have to be too cynical to believe that the CCBE’s primary objection [to MDPs] might be its own loss of market share rather than protection of clients or the public interest.”<sup>20</sup>

It has been argued that the function of professional codes, with their emphasis on a public service ideal, is ideological—“masking unpleasant institutional realities. . . .”<sup>21</sup> Professional rules have been used in the past to exclude “undesirables” from the profession,<sup>22</sup> including, at one time, all foreign practitioners.<sup>23</sup> As professional rules constitute “de facto lawmaking by a private group,”<sup>24</sup> their quality is suspect and their enforcement and effectiveness questionable.<sup>25</sup>

Not all proponents of enhanced professionalism and self-regulation are conspirators, monopolists, or xenophobes.<sup>26</sup> For them, the public service ideal of the profession is a meaningful one. It functions “as a noble aspiration, prompting successful attempts at piecemeal improvement.”<sup>27</sup> Professional rules should be adopted only if they further public interest goals.<sup>28</sup> The same goes for regulation of global practice, in which a number of concerns have been identified.<sup>29</sup>

19. See, e.g., Abel, *supra* note 6, at 737.

20. Terry & Mahoney, *supra* note 6, at 7-14.

21. Mark J. Osiel, *Lawyers as Monopolists, Aristocrats and Entrepreneurs*, 103 HARV. L. REV. 2009, 2021 (1990) (book review).

22. See JEROLD S. AUERBACH, UNEQUAL JUSTICE 106-108 (1976) (discussing the post-World War I attempts to exclude Eastern Europeans and Jews from practicing law in the United States).

23. Citizenship requirements were struck down by the U.S. Supreme Court in *In re Griffiths*, 413 U.S. 717, 729 (1973). The European Court of Justice did likewise in Case 2/74, *Reyners v Belgian State*, 1974 E.C.R. 631. Of course, rules that appear on their face to be non-discriminatory—that apply to all (“indistinctly applicable” in Euro-jargon)—can create barriers against foreigners. In Russia’s recent bid to join the WTO, it added a clause that legal services should be offered only by “individual entrepreneurship” and not in any corporate form. *Russia’s WTO Offer Sparks Fears of Office Closures*, in LAW SOC. GAZETTE, Mar. 3, 2001.

24. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 677 (1989).

25. Abel, *supra* note 18, at 639, 641-42 (questioning whether the vagueness of the ABA rules will render them unenforceable); Harry W. Arthurs, *A Global Code*, 3 LEGAL ETHICS 1, 61-64 (1999).

26. Schneyer, *supra* note 24, at 737 (explaining that “participants in the Model Rules process did not understand themselves to be engaged in a public relations charade that would legitimate the bar’s tradition of self-regulation but have no regulatory bite . . . lawyers expected the Model Rules to have real significance as a guide to lawyers with ethical questions. . . .”).

27. Osiel, *supra* note 21, at 2021.

28. See, e.g., MODEL RULES, *supra* note 5, ¶ 11 (1998) (stating that “the profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of the parochial or self-interested concerns of the bar”); THE ROYAL COMM’N ON LEGAL SERVICES, FINAL REPORT Volume 1 30, ¶ 3.18(d) (1979) (stating that “[a] rule of conduct or practice and any restriction should stand or fall on its capacity to protect the interests of, or to enhance the level of service to, the public”).

The development of large multinational law firms has been seen as "leading to an erosion of ethical standards to the detriment of the client."<sup>30</sup> It has been argued that "the maintenance of strict moral and ethical standards, and the safeguard of belonging to a regulated profession, are more than ever necessary in the complex business world of today."<sup>31</sup> Moreover, with elite firms stressing "their internationalization,"<sup>32</sup> their activities at a global level are likely to have an impact on the domestic market for legal services.<sup>33</sup>

A particular concern has been expressed about the concept of "global lawyer" in international business and capital markets:

While it is sound from a business perspective, the concept carries with it the danger of professional statelessness, a condition in which lawyers over time become disassociated from the legal profession's fundamental values, such as lawyer independence. Lawyering for a global organization runs the risk of creating a new legal elite whose commitment to this understanding [that the lawyer will help the legal system remain the centrepiece of our fragile sense of community, help it to function within our culture as the crucial mechanism for social cohesion and stability] is at best tenuous, and, at worst, nonexistent.<sup>34</sup>

Underpinning calls for global self-regulation there is a vision of the lawyer's role founded on what are claimed to be the core values of the legal profession and the "lore of lawyering."<sup>35</sup> Recently, for example,

According to the former President of the American Bar Association, "[r]egulation of the practice of law promotes the concept that a lawyer serves the public interest in addition to the client." Philip S. Anderson, *Remarks*, 18 DICK. J. INT'L L. 43, 45 (1999). According to Greer, "because of the attention focused on professional regulation by the WTO and the OECD and the coming debate over MDPs, every aspect of the regulation of our profession will be subject to intense examination and, in the end, will have to be justified, not by protectionist concerns, but by public interests, including the interests of the increasing numbers of direct participants in the global economy." Greer, *supra* note 11, at 182-83.

29. See, e.g., LAW WITHOUT FRONTIERS, *supra* note 3, at 234 (stating that "[l]awyers need to convince their actual and potential clients that their ethical rules are not merely restrictive practices designed to bolster the competitive position of lawyers, but essential and valuable safeguards to the modern client to and all others with whom the lawyer comes into contact").

30. *Id.*

31. *Id.*

32. Silver, *supra* note 8, at 1093.

33. *Id.*

34. Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L. J. 1057, 1111 (1997) [hereinafter *The Role of the General Counsel*] (quoting Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism"*, 41 EMORY L. J. 403, 423 (1992)).

35. L. Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution IOF*, 133 WAKE FOREST L. REV. 133, 137 (2001) (discussing *In re Snyder*, 472 U.S. 634 (1985)).



former ABA President Philip S. Anderson identified four “core principles” on which he hoped there would be universal agreement.<sup>36</sup>

First, “the practice of law is a learned profession.”<sup>37</sup> It requires specialized training and the “lawyer must gain an understanding of the shared values of the profession.”<sup>38</sup> Second, a lawyer must be independent. The “lawyer must zealously represent the client;”<sup>39</sup> strict confidentiality must be maintained; and conflicts of interest must be “avoided absolutely.”<sup>40</sup> Third, lawyers must be regulated “to ensure competence and ethical conduct.”<sup>41</sup> The “practice of law must be governed by ethical principles.”<sup>42</sup> Regulation “promotes the concept that a lawyer serves the public interest in addition to the client.”<sup>43</sup> Fourth, a “lawyer has an obligation to the public in addition to obligations to a particular client, and a lawyer has a responsibility to respect the concept of the rule of law.”<sup>44</sup> The “legal profession, operating within the rule of law and a transparent system of justice, strengthens the disparate institutions of the world’s governments and reinforces [sic] the fabric of society.”<sup>45</sup>

In a similar vein, Rupert Woolf, the current CCBE President, stated that lawyers “[must] strive to maintain their share of the market,” but “[a]t the same time we will need to defend the core values of the profession, namely independence, autonomy, self-regulation and respect for the rule of law.”<sup>46</sup> These core values “constitute fundamental rights of the citizens.”<sup>47</sup> In short, the core values of the legal profession, it is claimed, mean the “profession of law is more than a job; it is a high calling.”<sup>48</sup>

What is significant about global self-regulation is the belief that the core values should be replicated at an international level.<sup>49</sup> According to the CCBE, despite their diversity in different countries, which make their professional rules “inherently incapable” of

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36. Anderson, *supra* note 28, at 44.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 45.

44. *Id.* at 44.

45. *Id.* at 45.

46. Rupert Woolf, *A Message from the CCBE President*, 1 CCBE GAZETTE 1 (Council of the Bars and Law Societies of the European Union) (2001).

47. *Id.*

48. Anderson, *supra* note 28, at 45.

49. There is also a hope that they can be preserved at domestic level. *See generally*, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice on the Law Governing Lawyers*, MacCrate Report (2000) (reporting on preserving core legal values in the face of changing legal markets and increasing globalization).

"[general] application," "nevertheless are based on the same values and in most cases demonstrate a common foundation."<sup>50</sup>

Similar values can be seen in U.S. codes, despite differences in the details of the rules.<sup>51</sup> The preamble to the ABA Model Rules sets out: "A Lawyer's Responsibilities." It declares: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility[ies] for the quality of justice."<sup>52</sup> Later, it states, "Virtually all difficult ethical problems arise from conflict" between these three responsibilities.<sup>53</sup> "Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules [of Professional Conduct]."<sup>54</sup>

The core values of the profession, it is asserted, should transcend the context of legal practice.<sup>55</sup> In relation to multidisciplinary partnerships, for example, which might exist at either national or international levels, an ABA Commission recommended that, in its proposed annual certification, the MDP must acknowledge that it will "respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen having special responsibility for the administration of justice."<sup>56</sup>

The CCBE Code strongly endorses this view. In its preamble it sets out "[t]he function of the lawyer in society:"

In a society founded on respect for the rule of law the lawyer fulfils a special role. His duties do not begin and end with the faithful performance of what he is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend and it is his duty not only to plead his client's cause but to be his adviser.

A lawyer's function therefore lays on him a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

—the client;

—the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf;

50. CCBE CODE, *supra* note 3, ¶ 1.2.2.

51. See Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 45-59 (1993).

52. MODEL RULES, *supra* note 5, prml. ¶ 1 (analyzing differences in the substance of the MODEL RULES and the CCBE CODE and how they indicate different ideas about the role of the attorney).

53. *Id.* prml. ¶ 8.

54. *Id.* prml. ¶ 12.

55. Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 278-79 (2000) at 278-79.

56. *Id.*

—the legal profession in general and each fellow member of it in particular;

—the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.<sup>57</sup>

At both domestic and international levels, therefore, one can find clearly expressed assertions of fundamental principles about the unique role of the lawyer. There is a perceived need to identify and preserve core values whatever the environment of legal practice.<sup>58</sup>

The claim is that some characteristics of the practice of law are universal.<sup>59</sup> There are “certain unifying principles and standards and a method of their implementation to foster and encourage transnational practice.”<sup>60</sup> As a result, it is possible to define a “global profession.”<sup>61</sup> The advantages of agreeing on “the contours of the legal profession with the shared values” are spectacular: Lawyers “can do more to ensure continued peace, productive commerce and enduring harmony in this world than all the armies of history.”<sup>62</sup>

The rhetoric of global regulation is full of references to fundamental human rights, the rule of law, due process, the independence of the lawyer and judge, and the role of the lawyer within the legal system. Self-regulation and professionalism in global legal practice, founded on the core values of the legal profession, are promoted as being in the public interest. Professional codes are there to establish and maintain high standards to protect the public and to encourage lawyers to “do the right thing.” It is thus “in the Public Interest to preserve the core values of the legal profession.”<sup>63</sup>

Nevertheless, is the aspiration to deliver the core values at the level of global law practice realistic? Is it desirable and, if so, for whom? Drawing on a range of Anglo-American research and scholarship this Article addresses these questions by contrasting the rhetoric of global self-regulation with the reality of global law practice.

57. CCBE CODE, *supra* note 3, pmb. ¶ 1.1.

58. See STEVEN C. NELSON, *Introduction to RIGHTS, LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE*, *supra* note 3, at xviii.

59. Anderson, *supra* note 28, at 43.

60. *Id.* at 45.

61. *Id.* at 43.

62. *Id.* at 45.

63. Anti-MDP resolution to the ABA House of Delegates, July 2000, *quoted in* Harrison in the work cited n. 65.

## II. GLOBAL LAW PRACTICE—RHETORIC AND REALITY

Independence—of the legal profession and of the lawyer—lies at the heart of legal professionalism at both national and international levels. According to the CCBE, an independent legal profession “is an essential means of safeguarding human rights in face of the power of the state and other interests in society.”<sup>64</sup> According to the ABA Model Rules, it is “an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the government for the right to practice.”<sup>65</sup>

Both the Model Rules and the CCBE Code acknowledge that a lawyer’s core duties—to client, court, profession, and public—can conflict.<sup>66</sup> As a result, a lawyer’s “absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure” is required; it “is as necessary . . . in the process of justice as the impartiality of the judge.”<sup>67</sup> In order to resolve potential conflicts, the lawyer should exercise independent professional judgment free from undue influence from the client.<sup>68</sup>

How far does this vision of the independent lawyer accord with the reality of global law practice? Does the power of the state, vis-à-vis the client, pose a threat; are global lawyers needed to protect global clients? To what extent are global lawyers likely to exercise independent professional judgment in the public interest? Does global law practice preserve government under law or does it undermine the rule of law?

### A. Power

While globalization has increased the power of global law firm clients, it has undermined the power of nation states. States’ regulatory power and authority have been put under pressure from a variety of sources: “from neoconservative ideologues, despairing social democrats and deluded populists; from powerful corporations which have created transnational markets and world-wide manufacturing and sourcing strategies; from communications and transportation technologies which can move ideas, goods, money and people across national boundaries with relative ease and great

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64. CCBE CODE, *supra* note 3, prmb. ¶ 1.1.

65. MODEL RULES, *supra* note 5, prmb. ¶ 10.

66. *Id.* at prmb. ¶ 8; CCBE CODE, *supra* note 3, prmb. ¶ 1.1.

67. CCBE CODE, *supra* note 3, ¶ 2.1.1.

68. See MODEL RULES, *supra* note 5, prmb. ¶ 8.

speed.<sup>69</sup> States have also been directly challenged by global law firm clients.

The clients most sought-after by global law firms are very powerful, the repeat players in the international economy: the investment and commercial banks that structure financial transactions,<sup>70</sup> multinational corporations, and insurance companies. These clients can by-pass or resist states: "The essential characteristic of a global organization is that it has divorced markets from nation-states."<sup>71</sup>

Some clients indeed may be more powerful than state in which they do business. The capital value of the largest-multinational corporations and banks exceeds the GDP of some nation states. Exxon, the largest corporation in 2001, had assets of \$149 billion, revenues of over \$210 billion and profits in excess of seventeen billion dollars; Toyota, the 250th largest, had over seven billion dollars, nineteen billion dollars and seventy-three million dollars respectively.<sup>72</sup>

Transnational corporations "are responsible for increases in foreign investment and cultural concentration."<sup>73</sup> As a result, "[c]orporate power now undeniably challenges governments. Business can hold countries to ransom over investment regimes and deregulation of labour markets. Transnationals can manipulate markets, exploit subsidies or simply relocate if things get bad."<sup>74</sup> Global law firm clients are sophisticated and well-informed. Most have in-house legal departments to provide legal advice and representation and to monitor the performance of private law firms.

In short, the relationship between the clients of global law firms and the state is very different from the typical one envisaged by professional codes. Transactions are likely to be very large scale financially and in terms of the law firm resources devoted to them. As one partner in Allen & Overy, a major U.K. law firm, put it: "[W]e are only interested in clients that can afford us."<sup>75</sup> And global law firms' revenues reveal the fruits of their work. At the end of 2000, the single largest turnover ever in legal history—almost £1 billion—

69. H. W. Arthurs, *A Global Code of Legal Ethics for the Transnational Legal Field*, 2 LEGAL ETHICS 59, 61 (1999).

70. See Carole Silver, *supra* note 8, at 1132 (2000).

71. Daly, *supra* note 5, at 1111.

72. *2001 Global 5 Hundred, The World's Largest Corporations*, FORTUNE 500, July 23, 2001, at F-1, F-5.

73. War on Want, "The global divide: globalisation, work and world poverty," *quoted in* K.D. EWING AND TOM SIBLEY, INTERNATIONAL TRADE UNION RIGHTS FOR THE NEW MILLENNIUM 15 (2000).

74. *Id.*

75. EUROPEAN COUNSEL, Mar. 1998, at 28.

was reported by Clifford Chance.<sup>76</sup> In the same year, the gross revenues of Skadden Arps were just over, and of Baker & McKenzie just under, one billion dollars.<sup>77</sup>

### B. *Independent Professional Judgment*

The core values of the legal profession emphasize that a lawyer's duty to the client may be tempered in the interests of third parties, the courts, and society at large.<sup>78</sup> Independent professional judgment is needed to ensure that the lawyer is free from undue influence from the client and able to resolve potential ethical conflicts. In practice, though, lawyers may approach such conflicts in a more straightforward way.

In the United States, for example, a "libertarian" ideology<sup>79</sup> is said to predominate: the "image of the adversarial advocate who places [the] client's cause above every other consideration."<sup>80</sup> As Terry succinctly puts it: "Most United States lawyers probably would assert that their professional obligation is to please their clients."<sup>81</sup> According to Robert W. Gordon:

[There has been an] uncontrolled expansion of libertarian ideology into lawyers' common consciousness—to the point where lawyers have come to feel genuinely affronted and indignant when any authority tries to articulate a public obligation of lawyers that may end up putting them at odds with clients. We have no public obligations, they claim; we are private agents for private parties. . . ; our loyalties to clients must be absolute and undivided.<sup>82</sup>

This ideology "privatizes the lawyer's role"<sup>83</sup> and undermines the "norm that part of the lawyer's role is to represent the public purposes of the legal system to the client, as well as the client to the legal system. . . ."<sup>84</sup> If there is a conflict between the client and, for example, the justice system, the client's interest predominates. The

76. The Lawyer.com reported a turnover of £937 million, at [http://www.thelawyer.com/LawyerNews/Top100/firms\\_toptable.asp](http://www.thelawyer.com/LawyerNews/Top100/firms_toptable.asp).

77. *Law.com: Gross Revenue by Location*, at <http://www.law.com/special/professionals/amlaw/amlaw100/00/gross.html>.

78. See, e.g., MODEL CODE, *supra* note 5, at EC 7-39, DR 1-102(A)(5), Canon 8; MODEL RULES, *supra* note 5, at R. 8.4(d).

79. See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1085 (1988).

80. Andrew Boon & Jennifer Levin, *THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES* 107 (1999).

81. Terry, *supra* note 51, at 46.

82. Robert W. Gordon, *A Collective Failure of Nerve: The Bar's Response to Kaye Scholer*, 23 LAW & SOC. INQUIRY 315, 320 (1998).

83. *Id.* at 321.

84. *Id.* at 320-21.

Model Code reconciles this perspective: "The duty of the lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."<sup>85</sup>

The libertarian ideology has practical implications: "The American legal profession's endorsement of the lawyer's duty of zealous advocacy—as opposed to her duty to serve as an 'officer of the court'—encourages a more entrepreneurial form of legal practice than prevails in Europe."<sup>86</sup> Although this ideology operates to a lesser extent within England,<sup>87</sup> it is this ideology that is being exported by both U.S. and U.K. global law firms.

Global law firms operate in highly competitive markets, competing with each other and with "Big 5" accounting and professional service firms. It is not surprising that firms which serve corporations and banks have a strong commercial-entrepreneurial ethos.<sup>88</sup> In such markets, duties to the system, to the court, and to third parties inevitably become marginalised.<sup>89</sup> The very notion of lawyer independence thus "rings somewhat hollow in today's practice environment in which law firm partners focus closely on bottom line profitability, implement corporate-like organizational structures, and reward rainmaking more than legal skills."<sup>90</sup>

In a guide to clients on the American legal network in London, U.S. lawyers were described—by some British lawyers—as "chameleons," emulating their clients, rather than as "owls," wise, detached, and independent, like traditional professionals would be viewed.<sup>91</sup> British law firms have their chameleons too; at least, that is how some U.K. large firm lawyers are apparently encouraged to view themselves: "Chameleons fit in. Chameleons get on. Chameleons do not get sacked."<sup>92</sup>

In the United States, the culture of the mega law firm has been described as "Cravathis[t]:" "an Anglo-American model of corporate legal practice, [of] professionalism and private governance and,

85. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-19 (1983).

86. Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 38 (1994).

87. Christopher J. Whelan, *Ethical Conflicts in Legal Practice: Creating Professional Responsibility*, 52 S.C. L. REV. 697, 715-16 (2001).

88. See G. Hanlon, *A Profession in Transition?—Lawyers, The Market and Significant Others*, 60 MOD. L. REV. 798, 802-03 (1997).

89. Boon & Levin, *supra* note 83, at 80.

90. Daly, *supra* note 55, at 271.

91. Lucinda Kemeny, *American Lawyers Swoop on London*, THE SUNDAY TIMES (London), Feb. 25, 2001, (Business), at 3 (citing a survey by Baker Tilly, titled "Yanks a Million").

92. Jane Smith (pseudonym), *A Brave New World that Poisoned an Office Culture*, THE TIMES (London), May 8, 2001, (Law) at 7.

ultimately, of capitalism."<sup>93</sup> Pioneered by Paul Cravath in the nineteenth century, it is multipurpose and commercially oriented.<sup>94</sup> One large City of London law firm lawyer:

[W]itnessed an increasingly slick . . . PR and marketing machine with very clear goals—to dominate the chosen markets for legal services, strategically expand the firm and push profits. The future belonged to those who could rise to the challenge of globalisation. The competition would be fierce and only those with the right stuff would succeed. The goal—to be the world's premier law firm.<sup>95</sup>

This image of the lawyer and law firm behavior is the very antithesis of the exercise of independent professional judgment. Individual lawyers working in such firms are under enormous pressure to conform to the law firm culture. Thus, it is not only libertarian ideology that is being exported, but a particular kind of law firm culture.

In short, "[c]ompetition puts loyalty to clients at a premium."<sup>96</sup> It would be professional suicide for a global firm lawyer to exercise independent professional judgment at the expense of the client's perceived best interests. The CCBE Code, however, after its revision in 1998, has reinforced the duty of loyalty. It added the words "and fearlessly" to its original formula: A lawyer must "defend clients interests honorably *and fearlessly* without regard to his own interests or to any consequences to himself or to any other person."<sup>97</sup>

It has been argued that a libertarian ideology represents a slippery slope to excessive zeal and uncontrolled instrumentalism:<sup>98</sup> "It authorizes lawyers to advance novel legal claims and arguments, challenging or stretching existing doctrines, and asserting that it is the court's job, not the lawyer's to separate the wheat from the chaff."<sup>99</sup> At a global level, this has implications for the rule of law.

93. H. W. Arthurs, *supra* note 71, at 68. See also, H. W. Arthurs & Robert Krekewich, *Law, Legal Institutions, & the Legal Profession in the New Economy*, 34 OSGOODE HALL L. J. 1 (1996).

94. See, e.g., David Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 423 (1994).

95. Jane Smith (pseudonym), *supra* note 96, at 6.

96. Boon & Levin, *supra* note 83, at 80.

97. CCBE CODE, *supra* note 3, ¶ 4.3 (emphasis added).

98. David J. Luban, *Milgram Revisited*, in RESEARCHING LAW: AN ABF UPDATE (1998) 1, 9. See also, David J. Luban, *The Ethics of Wrongful Obedience*, in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 94 (Deborah L. Rhode ed., 2000).

99. Kagan, *supra* note 89, at 38.



### C. Rule of Law

According to the CCBE, the core values of the lawyer assume a society "founded on respect for the rule of law."<sup>100</sup> Similarly, the IBA acknowledges the "universal principle" of "respect for the rule of law."<sup>101</sup> Societies or legal systems that are not founded on the rule of law are encouraged to "reform," both by political movements in their battle cry for democracy and by other states. The European Union, for example, demands that Central and Eastern European countries establish institutions guaranteeing the rule of law in order to join the Union.<sup>102</sup>

In the context of global law practice, however, respect for the rule of law may take an unexpected turn. Rule of law rhetoric can be mobilized by private parties—and their legal advisers—not just to curb the arbitrary exercise of power by the state and its agents, but to challenge any exercise of power.<sup>103</sup> Private parties can use rule of law ideology not only to constrain abuse of state power—which may be "good"—but to defeat regulation made by the state to protect and further the public interest—which may be "bad."<sup>104</sup>

At the political level, rule of law rhetoric can be used to denigrate the scope and potential effectiveness of proposed regulation.<sup>105</sup> If successful, regulation designed to strengthen the framework for globalization and economic integration—to "ensure the orderly and honest operation of capital markets, the protection of intellectual property, predictable outcomes in credit transactions, physical safety and security and compatible technologies"—can be undermined.<sup>106</sup>

The rule of law can also be invoked at the level of legal practice. Corporate lawyers can use the law to undermine the state via private lawmaking<sup>107</sup>—creating law from the ground up, exploiting loopholes, and pushing the limits of the law—and via creative compliance<sup>108</sup>—complying with the letter of the law but defeating its spirit and purpose. The problem is not that lawyers are implicated in white

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100. CCBE CODE, *supra* note 3, prmb. ¶ 1.1.

101. Terry & Mahoney, *supra* note 6, at 7-16.

102. European Commission, Background Report, B/2/97, The Enlargement of the European Union, Feb. 1997.

103. See Doreen McBarnet & Christopher Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*, 54 MOD. L. REV. 848, 857 (1991).

104. See *id.*

105. See *id.* at 871.

106. H. W. Arthurs, *A Global Code of Legal Ethics for the Transnational Legal Field*, 2 LEGAL ETHICS 59, 61 (1999).

107. Michael Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW AND SOC. INQUIRY 423, 423 (1993)

108. McBarnet & Whelan, *supra* note 103, at 848.

collar crime, such as money laundering, which is clearly wrong,<sup>109</sup> but in "whiter than white collar crime,"<sup>110</sup> which is perfectly legal, or arguably so.<sup>111</sup>

One reason why Anglo-American law firms dominate the global practice of law may be that maneuvers on topics such as mergers and acquisitions, take-overs, and debt restructuring "had all been developed first in the U.S. and British markets. As these sorts of deals proliferated across the international economy, U.S. and British firms found themselves with a natural, lucrative, niche."<sup>112</sup> Certainly, the creative use of law makes both law and lawyers more valuable. It allows lawyers to participate in their clients' activities when they otherwise would be excluded.<sup>113</sup> It also gives them a competitive advantage based on legal creativity.<sup>114</sup> No wonder City of London solicitors see English law as "a *product* marketed by English lawyers throughout the world . . . [and] that the primary purpose of City lawyers in the international market is to sell English law."<sup>115</sup>

Legal creativity not only undermines the effectiveness of specific regulations,<sup>116</sup> it also weakens the level playing field upon which the framework for globalization and economic integration relies.<sup>117</sup> Thus,

109. See William W. Park, *Anonymous Bank Accounts: Narco-Dollars, Fiscal Fraud and Lawyers*, in Daly & Goebel, *supra* note 58, at 331 (discussing lawyers' role in money laundering, including assisting in the creation of corporations designed to add a "screen of anonymity" between banker and client and opening bank accounts for individuals whose true identities have not been disclosed by the financial institution). Of course, lawyers might look to professional rules to protect them from organized crime, for example. There is a view that the rules are ineffective in this regard and obstruct professionals from taking action. See, e.g. EUROPEAN PARLIAMENT RESOLUTION TO COMBAT ORGANIZED CRIME, C 371/183, 1997 O. J. 40 (urging that professional codes provide for immediate termination of contacts with clients and also for legal means to approach authorities). See Steven R. Salbu, *Battling Global Competition in the New Millennium*, 31 LAW & POL. INT'L BUS. 47 (1999).

110. Doreen McBarnet, *Whiter than White-Collar Crime: Tax, Fraud Insurance and the Management of Stigma*, 42 BRIT. J. SOC. 3 (1991).

111. DOREEN MCBARNET & CHRISTOPHER WHELAN, CREATIVE ACCOUNTING AND THE CROSS-EYED JAVELIN THROWER (1999) [hereinafter CREATIVE ACCOUNTING].

112. Carol Silver, *supra* note 8, at 1098 (2000) (quoting Debora L. Spar, *Lawyers Abroad: The Internationalization of Legal Practice*, 39 CAL. MGMT. REV. 8, 16 (1997)).

113. *Id.* at 1098-99 (quoting Robert Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 344, 355-57 (1994)).

114. DOREEN MCBARNET & CHRISTOPHER J. WHELAN, INTERNATIONAL CORPORATE FINANCE AND THE CHALLENGE OF CREATIVE COMPLIANCE (1992) [hereinafter INTERNATIONAL CORPORATE FINANCE].

115. Flood, *supra* note 6, at 191.

116. CREATIVE ACCOUNTING, *supra* note 116.

117. See generally INTERNATIONAL CORPORATE FINANCE, *supra* note 119. See also Abel, *Transnational Law Practice*, *supra* note 6.

if “[t]he key to humanising globalisation lies in regulating TNCs,”<sup>118</sup> the key to resisting it may fall to global lawyers. As one partner in the Paris office of Cleary Gottlieb Steen & Hamilton concluded: “If you really want to reduce the power of the state, then you have to increase the role of law and lawyers.”<sup>119</sup>

It is also no wonder that “[t]he pervasiveness of government regulation in the modern economy, the vast increase in the scope of corporate enterprise and activities, and an era of relatively modest regulatory enforcement have led to demands that lawyers be more attentive to the social impact of their clients’ activities.”<sup>120</sup> Professional self-regulation is seen as insufficient. In the United States, both the Securities and Exchange Commission and the Office of Thrift Supervision have challenged lawyer and law firm behavior in relation to corporate representation.<sup>121</sup> The OFT brought charges alleging a law firm assumed the regulatory compliance and disclosure duties of its federally insured thrift institution by interposing itself between the client and the regulatory agency.<sup>122</sup>

At an international level, however, external regulation of the profession is more complex still. Globalization has created “forces that even the ABA or the SEC are unable to combat.”<sup>123</sup> Can any kind of regulation withstand such forces? If globalization overrides the rule of law, global lawyers are implicated in actions that are contrary to the public interest and to the core values of the legal profession. As one practitioner put it, “while lawyers are advising their clients to obey the law, they are often finding ways to ‘wink at’ or avoid complying with local practice rules which may be unreasonable or arbitrary.”<sup>124</sup> The rhetoric of the core values adds value to the client, but at the expense of the public interest.

In short, the rule of law rhetoric is particularly suspect for those transnational lawyers who work against the “spirit” of the law in deal making and advising: “[F]ar from being means to the implementation of rights . . . lawyers create the devices which obviate them and render them ineffective.”<sup>125</sup> These business lawyering methods “are transforming Europe’s national legal fields and revolutionizing the old European mode of production of law.”<sup>126</sup>

118. *War on Want*, *supra* note 76, at 15.

119. Flood, *supra* note 6, at 191.

120. Milton C. Regan, Jr., *Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 197, 204-05 (2000).

121. *Id.*

122. *Id.* at 206 n.51.

123. Malpas, *supra* note 6, at 17.

124. Greer, *supra* note 11, at 181.

125. Doreen McBarnet, *Law, Policy & Legal Avoidance: Can Law Effectively Implement Egalitarian Policies?*, 15 J. L. & SOC’Y 113, 118-19 (1998).

126. Trubek et al., *supra* note 98, at 426. In world terms there may be a ‘race’ between the common law, civil law, and Islamic law cultures. See J. Flood, *The*

### III. CONCLUSION

Proponents of global professional regulation assert that core values are necessary for global law practice. By contrast, this Article suggests that the core values may not only be unnecessary, they may legitimate behavior that is contrary to the public interest. In short, they may be counterproductive.

That they are unnecessary is suggested by the experience of in-house counsel. In-house counsel are excluded from the CCBE Code because they are deemed to lack independence and identify too closely with the client.<sup>127</sup> In Europe, therefore, a key group of global lawyers “who represent exceedingly powerful multinational business entities but lack professional identities associated with the rule of law”<sup>128</sup> are largely unregulated.<sup>129</sup> While this may be a matter of concern to general counsel, for whom “the gaps . . . at the international level present a major problem,”<sup>130</sup> should it be so for the public? Or does the lack of regulation simply reflect the realities of such legal practice?<sup>131</sup>

Similar questions could be asked of global law firm lawyers. Do they really need professional identities? Arguably, their function is not dissimilar to in-house counsel. The more lawyers become associated with economic forces in a competitive marketplace, the harder it is for them to justify and to sustain professionalism.

*Cultures of Globalisation: Professional Restructuring for the International Market, in PROFESSIONAL COMPETITION AND PROFESSIONAL POWER: LAWYERS, ACCOUNTANTS AND THE SOCIAL CONSTRUCTION OF MARKETS* (Y. Dezalay & D. Sugarman eds., 1995).

127. This view was endorsed by the European Court of Justice in Case 155/79, *Australian Mining & Smelting Europe Ltd. v. Comm'n*, 1982 E.C.R. 1575. The Court recognized the existence of lawyer-client privilege as a matter of basic right derived from the principles and concepts common to all Member States. *Id.* However, it limited the privilege to communications emanating from “an independent lawyer . . . based on the conception of the lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs.” See Daly, *The Role of the General Counsel*, *supra* note 34, at 1104.

128. Daly, *The Role of the General Counsel*, *supra* note 34, at 1058.

129. Note, however, that it has been reported that Belgium in 2000 has created a new separate profession for ‘in-house’ lawyers, complete with its own governing body. EUROPEAN COUNSEL, Feb. 22, 2000.

130. Joseph Pratt, *The Parameters of the Attorney-Client Privilege for In-House Counsel at the International Level: Protecting the Company’s Confidential Information*, 20 NW. J. INT’L L. & BUS. 145, 147 (1999).

131. Inside counsel in large American corporations, while they retain their professional identities, emphasize their dedication to management objectives, and defer to management’s judgments about legal risk. Their entrepreneurial tendencies reflect their efforts to “adapt their images and lawyering styles to the prerogatives of contemporary management.” See Robert L. Nelson and Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC’Y REV. 457 (2000).

Globalization, with the enormous development of industry and commerce and with the corresponding increase in the complexity of fields of law, means that the needs of business clients cannot be met in the old, traditional way. Instead, there are law firms, with thousands of people, with formal management structures, business plans, recruiting, and promotional activities. As a result, one practitioner asked: "Is this the beginning of the end of the legal profession as we know it?"<sup>132</sup>

Globalization is an economic phenomenon. Its "driving idea . . . is free-market capitalism,"<sup>133</sup> and lawyers are the agents of transnational economic actors. Maintaining professional privileges in such a free for all environment is increasingly difficult. There may be a place for business ethics in the international marketplace—or there may not—but professional ethics appear surplus to requirements.

The former ABA President argued that lawyers could do more good "than all the armies of history,"<sup>134</sup> but we should not forget that armies—and lawyers—can also do a lot of damage. In the balance between nation states and global markets, the attitudes and actions of investors in key financial centers such as Wall Street, Hong Kong, London, and Frankfurt can have a huge impact: "The United States can destroy you by dropping bombs, and Moody's can destroy you by downgrading your bonds."<sup>135</sup> In this sense, the rule of law has a political value and globalization has moved the market theory of professions from the national to the international sphere.<sup>136</sup>

This does not mean that multinational practitioners and global law firms are not concerned with professionalism. Indeed, they may be very concerned with it—with core values, with professional identity and status, and with professional standards. But why? In an economic environment where the "level playing field" is stressed—and much regulation is designed to create it—professionalism provides an oasis where competitive forces are constrained. It is not simply a case of higher standards to justify higher fees, but a case of imposing standards that lawyers can meet and others cannot.

In the revised CCBE Code, the lawyer's obligation of confidentiality has been strengthened and the information protected expanded. Originally, the confidentiality to be respected related to client-specific information—"given to [the lawyer] by his client, or

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132. LAW WITHOUT FRONTIERS, *supra* note 3, at 234.

133. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 8 (Rev. ed. 2000).

134. Anderson, *supra* note 28, at 45.

135. Frank Partnoy, *The Siskel and Ebert of Financial Markets? Two Thumbs Down for the Credit-Rating Agencies*, 77 WASH. U. L.Q. 619, 620 (1999), quoting *The News Hour With Jim Lehrer*: Interview with Thomas L. Friedman (Feb. 13, 1996) (transcript on file with Frank Partnoy).

136. See *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM* (Terence C. Halliday & Lucien Karpik, eds., 1997).

received by him about his client or others in the course of rendering services to his clients."<sup>137</sup> Now it is much broader: "[A]ll information that becomes known to [the lawyer] in the course of his professional activity."<sup>138</sup>

In the original version, confidentiality was asserted to be the "primary and fundamental right and duty of the lawyer."<sup>139</sup> In the revised version, the assertion is explained: "[t]he Lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State."<sup>140</sup>

The rationale in the CCBE, as in domestic codes, is the need for full and frank disclosure of information to the lawyer by the client.<sup>141</sup> Under the revised rule, however, compromising information, whether or not it was actually disclosed to the lawyer, and whether or not it relates to the services the lawyer is rendering to the client, must be kept confidential.<sup>142</sup> This gives the lawyer no discretion to disclose information in any circumstance, unlike, for example, the Model Rules. In any case, even at domestic level, the rhetoric of confidentiality—which is "expansive, grandiose, and one-dimensional"—contrasts with the reality—which is "determinedly multi-faceted, issue sensitive and policy responsive."<sup>143</sup>

Abel argued that for lawyers not to observe confidentiality would be "professional suicide."<sup>144</sup> The reinforcement of the rule in the CCBE Code may make it easier for the cross-border lawyer to behave in the public interest—according to the Code—and in the firm's private interest: "[C]onfidentiality is one of the strongest market advantages legal professionals possess."<sup>145</sup>

The same goes for the core values more generally. It may be instructive to note that in the United Kingdom, the legal profession "advanced 'independence' as its core legitimation at the very moment when that claim was increasingly compromised by the growing power of both the state and large clients."<sup>146</sup> Other core values may also serve this purpose.

The core values proposed for global law practice simply add value to the private client, to the benefit of the transnational lawyer,

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137. CCBE CODE, *supra* note 3.

138. *Id.* ¶ 2.3.3.

139. *Id.*

140. *Id.* ¶ 2.3.1.

141. *Id.*

142. *Id.*

143. Charles W. Wolfram, *The U.S. Law of Client Confidentiality: Framework for an International Perspective*, 15 *FORDHAM INT'L L. J.* 529, 554 (1991-92).

144. Boon & Flood, *supra* note 7, 42.

145. *Id.*

146. Richard L. Abel, *Researching Law*, 12:1, Winter 2001.

rather than the public interest. Global clients and their lawyers may want the benefit of the core values, but they do not need them. In the global legal market, consumers of legal services can protect themselves. While the rhetoric of global regulation focused our attention on professional ethics, in practice, to the global lawyer, professional ethics, if they exist at all, lie beyond the horizon.