

# Northwestern Journal of International Law & Business

---

Volume 28

Issue 3 *Spring*

---

Spring 2008

## The Core Values of the Legal Profession for Lawyers Today and Tomorrow

Jonathan Goldsmith

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>

 Part of the [Ethics and Professional Responsibility Commons](#), [Legal Education Commons](#), and the [Legal Writing and Research Commons](#)

---

### Recommended Citation

Jonathan Goldsmith, The Core Values of the Legal Profession for Lawyers Today and Tomorrow, 28 Nw. J. Int'l L. & Bus. 441 (2007-2008)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

# The Core Values of the Legal Profession for Lawyers Today and Tomorrow

*Jonathan Goldsmith\**

## I. INTRODUCTION

This Article began life as a speech I gave on the fifth anniversary of the Flemish Bar in Belgium (Orde Van Vlaamse Balies) on 24 May 2007.<sup>1</sup> It addresses the changes which are taking place in Europe and elsewhere in the world in relation to the regulation of lawyers, particularly insofar as the core values of the legal profession are concerned.

## II. CORE VALUES

We have never spoken so much about the core values as recently, both in Europe and around the world. Why is this?

In 1977, the Council of Bars and Law Societies of Europe (“CCBE”), which is the body of which I am Secretary General, drew up what has become known as the Declaration of Perugia, a statement of the principles of professional conduct that bind European lawyers.<sup>2</sup> This has always been seen as the prelude to our drawing up in 1988 a Code of Conduct at the European level covering cross-border transactions.<sup>3</sup> I think we believed that we had then done our work on basic professional values. They might need reviewing and tweaking from time to time, but the issue was more or less settled. But suddenly last year, for a variety of reasons, we drafted and passed for the first time a statement of our core values, which we called the

---

\* Secretary General, Council of Bars and Law Societies of Europe.

<sup>1</sup> Address at the 5th Anniversary of the Flemish Bar in Belgium (May 24, 2007), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/Lawyering\\_today\\_and\\_1\\_1189500260.doc](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Lawyering_today_and_1_1189500260.doc).

<sup>2</sup> COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CONSULTATIVE COMMITTEE, THE DECLARATION OF PERUGIA ON THE PRINCIPLES OF PROFESSIONAL CONDUCT OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN COMMUNITY (1977), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/perugia\\_enpdf1\\_1182334218.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/perugia_enpdf1_1182334218.pdf).

<sup>3</sup> COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CODE OF CONDUCT FOR EUROPEAN LAWYERS (2006), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/2006\\_code\\_enpdf1\\_1182240432.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1182240432.pdf).

Charter of Core Principles of the European Legal Profession.<sup>4</sup>

What is extremely interesting about this Charter, highlighting what I have said about how we have never talked about the core values as much as now, is that at exactly the same time as we were drawing up our list, but quite independently, the International Bar Association (“IBA”), which has also had a Code of Conduct, including basic principles, for some decades (since 1956),<sup>5</sup> decided to look again at its own list of core values. Their list more or less corresponds to those of the CCBE. But that is not the point. Rather, it is interesting that two international bodies which have had Codes of Conduct for a long time, suddenly decided at the same time to look again at the core values of the legal profession. Why?

### III. THE FRAMEWORK OF CURRENT THINKING

It is a cliché which explains nothing to say that, in the last few years in Europe, there have been developments in many Member States towards removing control by lawyers over themselves. Control in this case means both control over lawyers’ own regulation through the bars, and also control over the way in which lawyers practise as lawyers, whether in firms or as individuals. Why I say that it explains nothing is because it does not give any explanation for the rise of measures to remove control from lawyers and the bars.

I will address what has happened in the United Kingdom in due course. I think many people know that its Legal Services Act 2007 was recently passed by Parliament, which will place oversight of regulation of the legal profession with an independent body.<sup>6</sup> But in Denmark, too, a law has just been passed, following a review which recommended fundamental changes in the regulation of legal services, such as intensified supervision of lawyers and increased public disclosure of disciplinary sanctions.<sup>7</sup> In Italy, the Bersani Decree of summer 2006 liberalised a stroke the areas of

---

<sup>4</sup> COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION (2006), *available at* [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/Charter\\_of\\_core\\_prin1\\_1183986811.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Charter_of_core_prin1_1183986811.pdf).

<sup>5</sup> INT’L BAR ASS’N, INT’L CODE OF ETHICS (1988), *available at* [http://www.ibanet.org/images/downloads/International\\_Ethics.pdf](http://www.ibanet.org/images/downloads/International_Ethics.pdf).

<sup>6</sup> Legal Services Act, 2007, c. 29, § 1 (Eng.), *available at* [http://www.uk-legislation.hmso.gov.uk/acts/acts2007/pdf/ukpga\\_20070029\\_en.pdf](http://www.uk-legislation.hmso.gov.uk/acts/acts2007/pdf/ukpga_20070029_en.pdf).

<sup>7</sup> The amendment of the Danish Administration of Justice Act (Act Number 520 of 6 June 2007) was passed in June 2007. Under the amended Act, the Danish Bar & Law Society cannot represent the economic interests of lawyers, and the Society’s membership fee has decreased. The Act also requires continuing education, increased public disclosure of disciplinary sanctions, and intensified supervision of lawyers. It changes the requirements for entry into the profession and for ownership of law firms, and relaxes lawyers’ monopoly on civil litigation.

tariffs and fees, advertising and multi-disciplinary partnerships.<sup>8</sup> Now there is an Italian government proposal for a framework law on the liberal professions to be discussed by Parliament, which will liberalise access to the profession, the organisation of professional bodies, discipline and the creation of partnerships, among other things. In the Netherlands, there was a government review of the legal services market published in 2006, which made somewhat similar recommendations to the developments in the United Kingdom, and the Dutch Bar is now waiting to see what the government will do.<sup>9</sup> We see similar patterns in a number of European countries.

Most of the activity has been undertaken in the name of competition, but some also in the name of the public interest. I would like to examine the reasons behind these changes, because these ideas, and the consequences they bring with them, are likely to be with us for some years.

So, why is all this happening now?

#### A. Globalisation of Ideas

We live in a globalised world. Everyone knows that. This means the easier crossing of borders. And what cross borders are not just goods, and not just services like those of a lawyer, but also ideas. Part of the explanation for the recent changes in the European legal profession relates to the globalisation of ideas.

Of course, in Europe we live in a particularly globalised region, because ideas spread like wildfire among the Member States. EU governments meet regularly among themselves to exchange opinions, there is constant and comprehensive media coverage of developments, and most particularly in our case the European Commission, one of the three chief European institutions, has been deliberately spreading certain ideas to all corners of the European Union.

So, when a change takes place in relation to the governance of the legal profession in one country, it is not long before the authorities in the

---

<sup>8</sup> The Bersani Decree-Law of 4 July 2006 (transposed into law of 4 August 2006) provides for a liberalisation in a number of areas which will affect the legal profession: tariffs and fees, advertising and multi-disciplinary partnerships. To comply with this new statute, the Italian Bar Association has modified the Italian Lawyer's Code of Conduct with respect to advertising and success fees.

<sup>9</sup> In September 2007, the government gave fresh comments, stating that core values (independence, partiality, integrity, confidentiality, public responsibility and competency) will be incorporated into the Act on Advocates, and the legal profession and the regulations will have to comply with these. The government also made the following points: 1) the Bar should impose a mandatory institution that would advise on regulations, and the Minister of Justice should approve the regulation beforehand; 2) the legal profession should develop instruments like a by-law on quality; and 3) there should be an experiment with a "no win no fee" arrangement.

other Member States find out about it. Given the general ideas I am about to describe, which is a certain kind of common political weather, these other Member States are usually only too happy to give some of the new ideas a try-out.

The globalisation of ideas also means that our societies around the world are becoming more like each other. It is not just that there is a McDonalds or a Starbucks on every corner, a Nokia or Motorola in every hand, a pair of jeans and trainers on every body, but we are all more or less living in the same kind of political world, where we face common problems. It is hardly possible any more to come across an isolated society like Tibet in the early twentieth century, completely cut off from developments elsewhere. Modern communications, if nothing else, have made that impossible.

But globalisation is a setting or a context, rather than a substantive idea in itself. So what is the substantive idea that has brought about the specific changes in relation to the legal profession?

#### B. Economics Rules All

This is not a philosophy or a history paper. Otherwise it would be very interesting to examine the origin and spread of this idea, "economics rules all." Of course, it is not new. But I believe that the fall of the Berlin Wall, and the triumph of democratic capitalism as the dominant world ideology afterwards, is the main motor behind the changes we now see.

I shall mention democratic capitalism frequently. Although it may sound as if I am attacking it, I am not. I am as much a beneficiary of it as are nearly all lawyers. I have no better alternative to suggest. But its monopoly within our political systems has consequences.

It might be said that we have nearly all of us, in western Europe, lived with democratic capitalism since the end of the Second World War, which is over sixty years ago. So, why are changes taking place now in the legal profession? I think what has happened is this. For so long as there was a communist superpower in the East, we in the West felt it important to stress the values of our system which made it different to, and better than, the communist East. We had the rule of law. We had a system of checks and balances. We had human rights, and respect for the individual. But since 1989, there is no competing ideology to the one that the market should, more or less on its own, make decisions. Underneath our democratic capitalism is the market. It was kept in check when there was a competing ideology, but now it has no enemies.

People try, particularly within Europe where there is much talk of the European social model, to moderate it. But it still governs to a large extent our decision-making.

We in the CCBE spend much time arguing, particularly against the

Competition Directorate General of the European Commission, that economics is not everything, and that there are values in our profession related to the administration of justice that go beyond the economic. The officials nod and pretend that they agree with us, but then continue to make decisions as if we have not spoken.

It penetrates every area of our lives. Recently, I bumped into a Flemish lawyer who works for one of the large law firms here in Brussels. He did not know that I was writing this paper, but he began to complain about his life as a lawyer. "There is no more idea of service to a client," he sighed. "It is all just billable hours. We are machines making money for the firm. We use precedents that have been agreed at head office, different precedents for different kinds of circumstances. Who cares how much money we make as individuals, even if it is a lot? The values have gone out of our lives."

### C. Removal of Class and Professional Differences

Another idea, which is really an offshoot of the triumph of democratic capitalism, is the democratisation of the classes. I come from the United Kingdom, and I know that the class system is considered to be particularly entrenched there. But I suspect that what I have to say applies more or less to all modern European societies.

There used to be a deference towards professionals. They used to be considered to be within a special category within society. I am not saying that that was a good thing, but it no longer exists. When the market rules, its values alone are the ones by which we are all judged. So the question arises as to why lawyers should be allowed to govern themselves. Why should they be considered to be any different or superior to bus-drivers, construction-workers or any other service providers in the economy? If economics is the only value, everyone turns out to be the same, or at any rate judged by the same values.

With the loss of deference towards certain classes in society, there has arisen a distrust about allowing people to regulate their own affairs. Part of it comes inevitably from "economics rules all." In the world of "economics rules all," it is believed that people make decisions based on their economic self-interest, because there is no other value which can be understood in such a world-view. So, a group of people in society can no longer be trusted to make a decision about their own actions, because it is assumed that the only way in which they will decide will be in their own economic interests. That is how taxi-drivers would decide, it is assumed, and so why not lawyers?

The notions which have been built up over generations of a different way of looking now have to be defended fiercely against these modern globalised ideas. It is not always easy, and of course it has led to a good

deal of soul-searching—healthy soul-searching, I must say—among the legal profession as to what it stands for.

So, now that I have set the background and framework, what are the specific manifestations of these ideas on the European legal profession? There have been a number, all of which reflect what I have just said. Many people consider the developments in the United Kingdom to be the most typical version of the developments I am describing, and so I will use them as an example. But, as I have mentioned, there are similar trends in many Member States. And, when I talk about the United Kingdom, I would like to stress that I shall use the term “U.K.” or “United Kingdom” as a reference to the Member State within which the changes are taking place, although the principal proposals relate just to the jurisdiction of England and Wales.

#### D. Introduction to the Changes in the United Kingdom

As is well known, the U.K. government in 2003 asked Sir David Clementi, who was not a lawyer but had a background in City of London institutions, to conduct a review of the legal profession in England and Wales. After the report's publication,<sup>10</sup> the U.K. government responded with a White Paper, called “The Future of Legal Services: Putting Consumers First.”<sup>11</sup> This was a very revealing title. Presumably no-one in the U.K. government really believed that consumers should come first in legal services. Any serious person, when asked what comes first in the provision of legal services, would say: “The public interest.” But the U.K. government, in a classic piece of spin, decided that they would declare that consumers should come first, presumably because it sounds so good—even if it is not true.

We know pretty well that they did not believe that consumers should come first, and that the public interest indeed does come first, because of subsequent developments in the Bill. When the first draft of the Legal Services Bill was presented to Parliament on 23 November 2006,<sup>12</sup> clause 1 of Part 1, the very first thing to be found in the Bill, described the regulatory objectives which the new oversight body, the Legal Services Board, will have to take into account in the regulation of legal services, and they were as follows:

---

<sup>10</sup> SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES, FINAL REPORT (2004), available at <http://www.legal-services-review.org.uk/content/report/index.htm>.

<sup>11</sup> DEPARTMENT FOR CONSTITUTIONAL AFFAIRS: THE FUTURE OF LEGAL SERVICES: PUTTING CONSUMERS FIRST (2005), available at <http://www.dca.gov.uk/legalsys/fo1wp.pdf>.

<sup>12</sup> Legal Services Bill, 2006, H.L. Bill [9] (Gr. Brit), available at <http://www.publications.parliament.uk/pa/ld200607/ldbills/009/07009.1-7.html#j170>.

- (1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—
- (a) supporting the constitutional principle of the rule of law;
  - (b) improving access to justice;
  - (c) protecting and promoting the interests of consumers;
  - (d) promoting competition in the provision of services within subsection (2);
  - (e) encouraging an independent, strong, diverse and effective legal profession;
  - (f) increasing public understanding of the citizen’s legal rights and duties;
  - (g) promoting and maintaining adherence to the professional principles.<sup>13</sup>

However, by the time the Bill became an Act, the regulatory objectives had been changed. Despite the government still pretending that the Act put consumer interests at its heart, the regulatory objectives now read:

- (1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—
- (a) protecting and promoting the public interest;
  - (b) supporting the constitutional principle of the rule of law;
  - (c) improving access to justice;
  - (d) protecting and promoting the interests of consumers;
  - (e) promoting competition in the provision of services within subsection (2);
  - (f) encouraging an independent, strong, diverse and effective legal profession;
  - (g) increasing public understanding of the citizen’s legal rights and duties;
  - (h) promoting and maintaining adherence to the professional principles.<sup>14</sup>

As will be noted, the objectives now run from (a) to (h) instead of (a) to (g). One more objective has been added: “protecting and promoting the public interest.” Not only is it added, it is there right at the top, so that there is no mistaking its importance, above “protecting and promoting the interests of consumers.”

Why is this story important? It is important because it shows what the U.K. Government had in mind when it introduced the new Act. Although, when pressed (as it was, in the House of Lords and elsewhere), it was forced to recognise that people in England and Wales are citizens before they are consumers, and that the public interest comes before the consumer

---

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

interest, it would have preferred that that was not the case. It would have preferred to see its citizens as economic actors alone, as consumers. There could be no clearer example of my argument that “economics rules all” is such a driving force.

I will now deal with some of the changes that the Legal Services Act has introduced.

### E. Split Between Regulation and Representation

Most European bars combine regulation of the profession with representation of the profession, and for a long time no one has thought further about it. In any case, both models have existed for decades within Europe: a split between regulation and representation (Germany being the leading example), and combined regulation and representation. The CCBE’s policy is that both are viable systems:

The CCBE would like to recall in this context the European Court of Justice jurisprudence finding that ‘the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law.’ It should be noted that national regulations or systems are embedded in a specific national context.<sup>15</sup>

In the United Kingdom, the legal professional bodies have for a long time combined regulation with representation. But now—particularly because the handling of complaints against solicitors in England and Wales by the Law Society has been a long-running problem—trust in the ability of lawyers to regulate and represent at the same time has been questioned. This is part of the “Why are lawyers any different to taxi-drivers?” argument. It is felt that lawyers cannot wear two different hats, one for the public interest in terms of regulation and one for personal interest in representation. If economics rule all, then they will make decisions in their

---

<sup>15</sup> COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CCBE POSITION ON REGULATORY AND REPRESENTATIVE FUNCTIONS OF BARS (2006), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/ccbe\\_position\\_on\\_regl\\_1182254709.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_position_on_regl_1182254709.pdf) (quoting Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 ECR I-1577, para. 108 (“[f]urthermore, the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law (see, to that effect, Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 33). Even if multi-disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means (see, to that effect, with regard to a law reserving judicial debt-recovery activity to lawyers, *Reisebüro*, paragraph 41).”).

own economic interest.

As a result, the Legal Services Act makes provision for the split between the two. In particular, it says that the Legal Services Board shall ensure, in relation to a legal professional body (or “approved regulator”):

- (a) that the exercise of an approved regulator’s regulatory functions is not prejudiced by its representative functions, or
- (b) that decisions relating to the exercise of an approved regulator’s regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions.<sup>16</sup>

Under this argument, as I have said, law is no different to any other commodity in the marketplace, and being a lawyer is no different to being any other provider of goods and services. Interestingly, lawyers in their role as individual actors in the administration of justice are often given duties which conflict with their economic interests, and they are then expected to act in accordance with the public interest. The best example—taken specifically from the United Kingdom, to show that even there lawyers in their private role continue to be expected not to act only in their economic interest—is the duty to the court, whereby if a lawyer comes across something, a precedent say, which runs counter to the client’s interest, the lawyer is bound to bring that to the attention of the court, regardless of the economic impact on the lawyer.<sup>17</sup> The same is true of provisions relating to confidentiality and legal professional privilege. No one questions those provisions, nor seeks to amend them. Lawyers are expected in their daily lives to juggle their economic interests with the public interest. But, suddenly, they are no longer trusted to regulate themselves on the same grounds.

This, as with other aspects of the “economics rules all” argument, can be seen as rather reductive of human behavior. It assumes that we are all only economic actors, and that we act only accordingly. Of course, lawyers are economic actors, but the question is whether lawyers are *only* that, and whether they act *only* in accordance with their economic interests.

As a result of the developments in the United Kingdom, the Competition Directorate General of the European Commission is now saying to other Member States: why do you allow lawyers to regulate and represent themselves at the same time? The argument from the United Kingdom is blowing across Europe’s boundaries.

---

<sup>16</sup> Legal Services Act, 2007, c. 29, §§ 29–30, sched. 4 (Eng.), available at [http://www.uk-legislation.hmso.gov.uk/acts/acts2007/pdf/ukpga\\_20070029\\_en.pdf](http://www.uk-legislation.hmso.gov.uk/acts/acts2007/pdf/ukpga_20070029_en.pdf).

<sup>17</sup> See Solicitors’ Code of Conduct, 2007, rule 11.01, available at <http://www.sra.org.uk/code-of-conduct/198.article>.

### F. Self-regulation or Regulation by Others

Once the bar is split into two bodies, one representative and the other regulatory, the same question arises as to whether the regulatory side can be trusted to make decisions all on its own. If the bars cannot be trusted—in the public interest—to combine representation and regulation, then how can these same bars be trusted to regulate at all? If it is lawyers deciding, won't they just regulate themselves in their own economic interest? That is more or less the conclusion which has been reached in the United Kingdom, where the oversight of regulation of the legal profession in England and Wales will shortly be in the hands of an independent body, the Legal Services Board. The Legal Services Board must be chaired by a non-lawyer, and the majority of its Board members must also be non-lawyers.<sup>18</sup>

### G. Alternative Business Structures

As I said at the outset, the control by lawyers which is being loosened is not only over their own regulation, but also over how they run their businesses. There has been pressure on this for a long time. The idea of multi-disciplinary practices has been discussed intensely for over a decade. It peaked around the time of the collapse of Arthur Andersen and the decision of the European Court of Justice in the *Wouters*<sup>19</sup> case, after which people no longer thought it was such a good idea. There, the idea was that control over a law firm could be shared among different professions.

Now the idea is different, more radical. In the United Kingdom, the notion of "alternative business structures" is being proposed.<sup>20</sup> That will mean that complete outsiders, provided that they pass a fitness test, will be able to own law firms, whether they themselves are lawyers, or even other professionals, or not. It is part of the idea that law is a commodity to be bought and sold like everything else.

## IV. THE CHANGES IN AUSTRALIA

I have given just a few examples of the ideas which are changing the face of the European legal profession. This is not only a European phenomenon, either. In Australia, for instance, there have been similarly radical changes, which came earlier than the U.K. changes and partly inspired them.<sup>21</sup> The Clementi team, which introduced the changes to

---

<sup>18</sup> Legal Services Act, 2007, sched. 1 (Eng.), available at [http://www.uk-legislation.hmso.gov.uk/acts/acts2007/pdf/ukpga\\_20070029\\_en.pdf](http://www.uk-legislation.hmso.gov.uk/acts/acts2007/pdf/ukpga_20070029_en.pdf).

<sup>19</sup> Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 ECR I-1577.

<sup>20</sup> Legal Services Act, 2007, c. 29, §§ 27–70, sched. 4 (Eng.), available at [http://www.uk-legislation.hmso.gov.uk/acts/acts2007/pdf/ukpga\\_20070029\\_en.pdf](http://www.uk-legislation.hmso.gov.uk/acts/acts2007/pdf/ukpga_20070029_en.pdf).

<sup>21</sup> SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES

England and Wales, went as part of their review to Australia to see how things worked there, and brought back the ideas to the United Kingdom, no different to the spread of plants and animals when the first sea-voyages were being made. From the United Kingdom, the Competition Directorate General of the European Commission has been busy spreading them to all parts of the EU.

The Legal Profession Act 2004,<sup>22</sup> introduced in December 2005, governs legal practices in the Australian state of Victoria, and there is similar legislation in other Australian states such as New South Wales and Western Australia. This Act introduced the notion of incorporation, meaning that non-lawyers can be partners, directors, or owners of a legal practice. Incorporation is a legal prerequisite for flotation. This has led to the flotation of the first law firm in the world, Slater & Gordon,<sup>23</sup> on the Australian Securities Exchange (“ASX”) on 21 May 2007.

The interesting question is why such ideas have not spread everywhere. For instance, Canada and the United States, which share many of the characteristics of the United Kingdom and Australia, have not seen similar proposals. The reason may be that in those two countries there already exists a split between representation and regulation of lawyers, and so the pressure of “economics rules all” has not been felt so keenly.

## V. THE FUTURE CHALLENGE FOR THE LEGAL PROFESSION

When reflecting on these changes, it seems to me that the challenge for the legal profession is to sustain the core values that we hold dear—for instance, independence, confidentiality, absence of conflicts of interest, plus others—over a purely economic argument.

And here I come to the answer to my question posed at the outset: why are the CCBE and the IBA suddenly looking again at the issue of core values at the same time? Isn’t that a strange coincidence? In my thesis, the answer is obvious. The waves emanating from the fall of the Berlin Wall, and the collapse of the competing ideology, have finally reached the legal profession. Suddenly, we have to justify ourselves against the new ruling ideology, “economics rules all.” Suddenly, we find ourselves in difficulties and go back to first base to define ourselves.

It is not an easy task. From an economic point of view, many of the things the bars do to uphold our core values seem to stifle competition. Entrance exams to uphold quality also keep some people out, and so reduce

---

IN ENGLAND AND WALES, FINAL REPORT 123 (2004), *available at* <http://www.legal-services-review.org.uk/content/report/index.htm>.

<sup>22</sup> Legal Profession Act, 2004 (Austl.), *available at* [http://www.dms.dpc.vic.gov.au/Domino/Web\\_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/9AB52919D5FDC852CA2572D40080E2B8/\\$FILE/04-99a015.doc](http://www.dms.dpc.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/9AB52919D5FDC852CA2572D40080E2B8/$FILE/04-99a015.doc).

<sup>23</sup> Slater & Gordon, <http://www.slatergordon.com.au> (last visited May 1, 2008).

our numbers in favour of those who manage to pass through the barrier. That makes the Competition Directorate General of the European Commission suspicious that we are acting anti-competitively, that we are acting purely in our own economic interest. The ban on multi-disciplinary partnerships also excludes people from entering our market. So far, at any rate within Europe, the European Court of Justice has upheld the core values, even when they technically have economic consequences, because a greater good is being served—see, for instance, the *Wouters*<sup>24</sup> case again.

The challenge is to find arguments that hold their own against the overwhelming power of “economics rules all.” Our notions of how lawyers and bars should behave have been established for an earlier age, and they now find themselves undermined by the creeping power of the economic theory.

Within the CCBE, we have already begun to fight back in the terms of the arguments made against us. In 2003, for the first time, we made an economic submission to the Competition Directorate General, to put our arguments in the same terms as they were being put to us.<sup>25</sup> Then in 2006, the Danish Bar commissioned Copenhagen Economics, a reputable economic consultancy used by the European Commission itself on occasion, to look into the reform of legal services from an economic point of view.<sup>26</sup> Is it an accident that we and the IBA are now formulating our core values, that we and the Danish Bar are submitting economic responses? No, they are linked, they are part of the response of the legal profession to being overwhelmed by market-based proposals.

However, we need to go further than a report here or there, or even a restatement of our core values, valuable though these steps are. We need to recognise the political framework within which we all now operate, and articulate the reasons for our existence and our rules in a way that deals, not with the political reality of thirty years ago, but the political reality of now. There is no prospect of a competing governing ideology on the horizon. As I am sure you know, an American theoretician, Francis Fukuyama, said that history had come to its conclusion with the triumph of democratic capitalism. I don’t believe that at all, although the next step is not yet obvious. But we must align our values and our justification with where we

---

<sup>24</sup> Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 ECR I-1577.

<sup>25</sup> COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CCBE ECONOMIC SUBMISSION TO COMMISSION PROGRESS REPORT ON COMPETITION IN PROFESSIONAL SERVICES (2006), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/ccbe\\_economic\\_submis1\\_1182239202.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_economic_submis1_1182239202.pdf).

<sup>26</sup> HENRIK BALLEBYE OLESON & CLAUDIUS KASTBERG NIELSEN, COPENHAGEN ECONOMICS, THE LEGAL PROFESSION: COMPETITION AND LIBERALISATION (2006), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/The\\_legal\\_profession1\\_1195120689.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/The_legal_profession1_1195120689.pdf).

are now.

It is fair to ask what that means. I suppose it means beginning with the current orthodoxy as the basic premise, that “economics rules all,”—since it is the basic premise used by governments and other regulators when dealing with us—and then going on to fashion our values and regulation on that premise, rather than on the premise that everyone knows we are special, that economics should not apply to us. The underpinnings of the legal profession might look different from that perspective, but at least the argument would serve to make us fit to survive in a modern environment. I am not saying that we should accept the premise as true. I am sure that many in the legal profession would reject it. But we need to argue with those who believe it, and so, we need to fashion our arguments as follows: To someone who believes that “economics rules all,” how do we justify self-regulation and the core values of the legal profession? Only in that way, will we begin to make progress.

Now I shall look into my crystal ball and try to predict the future. I think it is obvious that, until there is a competing ideology, we will face an increasing commoditisation of legal services. Why should there be a bar exam? Why should it not be possible to offer legal services with a law degree, or even without one? Should different parts of legal services be treated differently, so that whereas you need a bar exam to defend someone in a criminal trial, you do not need one in order to advise a company on commercial transactions—on the grounds that the company is a sophisticated player in the market, can look after itself and so does not need to be nannied by the state? Should a lawyer have to belong to the bar, or should membership be purely voluntary? Should lay-people, consumers, decide how the legal profession should be regulated (maybe with lawyers as technical advisers), since lawyers will just make decisions in their own economic interest?

It is possible to see how the economic premise can lead to the dismantling of every part of our current structures.

But I am not dismayed. The amount of attention facing lawyers from governments in Europe does not show that lawyers are on the way out, that they are of no importance. On the contrary, when governments have so many other very pressing concerns, the fact that they spend such energy on trying to reform the legal sector shows the importance of the legal profession. Our problem is one of adaptation of values: we need to show that the values of our profession are consistent with the modern governing ideology. I have no doubt that we will do that.

By way of conclusion, I shall give a brief indication of how we are likely to go about this new defense of our values. As a start, I suggest that we look at the report I mentioned earlier, the Copenhagen Economics Study

entitled “The Legal Profession: Competition and Liberalisation.”<sup>27</sup> Not everything in that report is in favour of the existing positions of the legal profession. But the report is a good example of our core values beginning to be submitted to the gaze of “economics rules all”—and coming out on the other side with approval. Here are some selected quotations from its summary, to illustrate the way ahead, and why we should not be afraid of it.

The body of the report goes through the economic arguments in relation to the main positions of the bar, with tables; and looks at the advantages and disadvantages of particular courses of action. And here is its conclusion in part:

However, liberalisation could also damage consumers and society. It is already difficult for the clients to assess the quality of legal services. Therefore, if a liberalisation reduces the requirements for legal advisers it could affect the quality of legal services. In particular, the problem will hit private clients and small enterprises because large business clients have better opportunities for assessing the quality of the lawyer’s work and therefore less need for protection. Liberalisation can also have damaging consequences if it decreases the independence of the lawyers or the quality of their court work. The citizen’s access to independent lawyers is a prerequisite for ensuring access to justice and the lawyers’ work in court contributes to define “case law” to the benefit of the whole society. . . . The legal profession should continue to regulate the code of conduct because this ensures the lawyer’s independence from the state and because lawyers themselves are best qualified to assess the quality of legal services. There are no signs that the rules for code of conduct are abused to restrict competition. The mandatory membership of the Danish Bar and Law Society should be kept because it is a condition for the current regulation of lawyers’ conduct and because the membership does not introduce any significant competition limitations.<sup>28</sup>

It would be the theme for a different and very interesting article to go item by item through the legal profession’s core principles, and give an economic justification for each of them. I feel confident that the job can be done, and it is doubtless the work we will be doing in the future.

---

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*