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PROFESSIONAL INTEGRITY

READER — THE HON SIR MICHAEL HART

[Delivered to the Institute of Actuaries, 4 June 2003]

ABSTRACT

The lecturer discusses the subject of professional integrity, and considers the themes of: the particular space within which the professional operates; the independence and integrity of the professional, including regulation and competition; and how integrity is measured. The two professions on which he concentrates are the actuarial profession and the legal profession, particularly barristers.

KEYWORDS

Professional Integrity; Actuaries; The Legal Profession; Barristers; Regulation; Competition

When, last September, I was invited to give this reading, prominent among the list of topics suggested to me by former Presidents of the Institute were these five:

— Conflicts of interest: how are they dealt with in practice and how legally robust are our current practices?
— Should professionals do more than act with openness and transparency? What does accountability mean in practice for professionals? Should we actively seek to limit deception, the words 'limit deception' being a reference to Onora O'Neill's Reith Lectures last year (O'Neill, 2002)?
— How do we measure integrity?
— What is the proper content of a professional contract? How does one manage liability? How does one limit the scope of one's duties? When does one have a duty to whistle-blow? What obligations does one owe to one's professional body?
— Professional ethics.

In calling this talk 'Professional Integrity', I have sought to capture the spirit of some of these questions — I shall by no means try to cover them all

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— in just two words; but I propose to use those two words professional integrity in two senses. The first concerns the qualities which the individual professional must have and put into practice if it is to be possible to say of him or her that she has professional integrity. The second relates to the issue of the integrity of the professional body of which the individual is a member.

In addressing both aspects of my subject, I wish to reflect on three themes. The first concentrates on the particular space within which the professional operates and in which he is called upon to exercise his judgement, and where his professional integrity may be challenged. The second is concerned with the issue of the independence and integrity of the profession itself. Here I wish, in particular, to question the role which competition law and the competition authorities should play in the setting of professional standards and in judging the acceptability of particular professional practices. Thirdly, and perhaps on a lighter note, I shall briefly address the intriguing question of how we measure integrity.

Defining Professions

I do not propose to attempt any definition of what I mean by 'professional' for these purposes. Many attempts have been made to arrive at a satisfactory definition of a profession. You can find dozens of them collected and summarised in the Monopolies Commission Report of 1970. That distinguished body of the great and the good concluded that it was not possible to arrive at a definition of a profession. Speaking to an audience largely, but not exclusively, consisting of actuaries and barristers or former barristers, I am content to assume that we all know what we mean and that we would have a large measure of agreement, were we to discuss the matter, on whom we might exclude from that definition. Whether I would be able to make the same comfortable assumption if addressing an audience of, say, stock analysts or public relations consultants, I do not need to consider.

Values

Scrolling through the professional codes of the actuaries' and the barristers' respective professions, we will, not surprisingly, find a marked similarity in the language used to express the values to which each profession aspires and which it requires it members to exhibit:

— "... standards of behaviour, integrity, competence and professional judgment which [members of the profession] or the public might reasonably expect of a member [of the profession]" (Professional Conduct Standards (PCS) 1.8);

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— "Considerable reliance is .... placed on the conscience of each individual member and the collective conscience of all the members to maintain the highest standard of conduct'' (PCS 1.3); and
— users of a member's services are entitled to have "absolute confidence in the skill objectivity and integrity'' of a member of the profession (PCS 2.3).

These quotations are taken from the Professional Conduct Standards of the Institute and the Faculty of Actuaries.

Similar values can be picked out of the Barristers' Code:
— He or she has an "overriding duty to the court to act with independence in the interest of justice.'' (Bar Code 302).
— "A barrister is individually and personally responsible for his own conduct and for his professional work: he must exercise his own personal judgment in all his professional activities'' (Bar Code 306).
— The barrister must not permit "his absolute independence, integrity and freedom from external pressures to be compromised'' (Bar Code 307(a)).
— The barrister must not "compromise his professional standards in order to please his client, the court or a third party'' (Bar Code 307(c)).

Fine words are easy to say. The seven Nolan principles by which we expect those holding public office to be bound are: "selflessness, integrity, objectivity, accountability, openness, honesty and leadership.'' Giving each of these values concrete expression in a particular professional context is another matter. For my purposes, I do not use the word integrity simply as one of a list of values to which the professional must aspire. I use it in an inclusive sense, to comprehend all the characteristics which must be owned by the professional if he is to justify the trust which society as a whole or the individual user necessarily has in him. I use it, therefore, to include competence; I use it to include objectivity and independence of judgement; and I use it also to include, of course, honesty and candour.

The concrete requirements of professional integrity are not, I suggest, capable of being expressed in absolute terms. The requirements of different professions differ markedly from each other in what they require of their members, and each profession may expect different standards of conduct from its members depending on the particular role played by the professional in question. That is, perhaps, most true of that component of integrity which we call 'independence'. Let me illustrate that by comparing, for a moment, the profession of an actuary with the profession of an advocate.

One important distinction lies in the nature of the body of knowledge from which each draws in the exercise of his calling. It would be dangerous for me, in a sentence or two, to seek to capture the nature of actuarial knowledge, or, for that matter, legal; but no-one here would, I think, seek to quarrel with a description of actuarial knowledge as scientific (and therefore

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lending itself more easily to objective ascertainment) in a way in which legal knowledge is not. That, incidentally, gives the actuarial profession, as it seems to me, a head start when it comes to controlling entry into the profession. The intellectual skills required by the actuary are more precisely measurable and less widely spread among the population than those required of the lawyer in general or of the advocate in particular. So far as advocacy is concerned, the legal profession has only relatively recently come to regard it as a skill which can even be taught, and is still wrestling with the problem of how to examine the performance of the aspiring student.

Another distinction, more important for my present purpose, is a functional one. A client may look for an actuary's advice in connection with a wide variety of problems. Historically, the range and nature of these problems have been relatively confined. It is clear, however, that over the last, say, 15 to 20 years, the areas in which actuarial expertise is sought and in which you as a profession seek to offer your services has been a rapidly and possibly massively expanding one. In your Presidents' 'Agenda for 2003' I see reference made to the days when the actuary lived in a metaphorical broom cupboard, the door of which was not opened very often — "useful people to have around if you are running a life assurance company or a pension fund, but of limited value otherwise''. That has changed and continues to change. To an outside observer, however, the core content in this jurisdiction of the actuary's role lies in the statutory functions which you perform at the very heart of the system of regulation of pension funds and life insurance companies. These include, not only the deployment of your professional skill on behalf of clients, but also a central statutory role as part of the regulatory apparatus. That role has been increasing as well. The fundamental importance of those functions being performed both competently and objectively, and, where occasion demands, courageously, cannot be over-emphasised. The financial future of every member of the citizenry is dependent here on the integrity of the individual actuaries to whom that function is entrusted and on the actuarial profession which sets the standards to which he or she works. The trust which Parliament, and indeed we all, have chosen to place in members of the Institute and the Faculty for these purposes is a very fine compliment indeed to the actuarial profession.

In performing those statutory functions the actuary plainly owes duties, not to a particular client, or not simply to the client, but to a wider public. They are, however, performed in a highly client-driven business environment, in which the actuary may simultaneously be owing duties to a client, either in relation to the same function or in relation to other services being offered to the client by him or his firm. Your professional rules, of course, recognise this, identifying the concept of 'reserved advice', i.e. advice given in situations where legislation or regulatory requirements, or indeed a private law agreement, require that advice be given by a member of the Institute or the Faculty, while, at the same time, recognising that in other situations the

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member may be giving "advice which is formulated in the interest of a particular client". In both functions the profession recognises an obligation to serve the public interest. PCS 2.1 indeed proudly proclaims that: "the actuarial profession has an obligation to serve the public interest", and says that its individual members do so by maintaining and observing "the highest standards of conduct."

The advocate, by contrast, is almost by definition always formulating her advice and generally conducting herself in the interest of a particular client. The role is partisan, and the client may be neither good nor true. The core duty of the barrister is:

> "to promote and protect fearlessly and by all proper and lawful means the lay client's interests and to do so without regard to his own interests or to any consequences to himself or to any other person" (Bar Code 303(a)).

As Brougham put it, justifying his partisan defence of Queen Caroline against the King's charge of adultery:

> "To save [the] client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty.....Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."

It is not, of course, the case (and was not then) that that is the advocate's only duty. That duty is always trumped in theory by the barrister's over-riding duty to the court: "to act with independence in the interest of justice", and his duty to "assist the court in the administration of justice".

That is one important sense in which the barrister serves a public interest. It is certainly a different conception of public interest from that served by the actuary: either when discharging his statutory quasi-regulatory roles; or even when giving advice which is formulated in the interest of a particular client. In the case of the advocate, defining the point at which his duty to the court takes over from his duty to the client can sometimes be difficult; but the principle is clear: the duty to the court, to the justice system, always takes precedence, once engaged, over the partisan duty. So far as third parties are concerned, the duty to the client is, however, paramount. This may require the barrister to act in a way which is disconcerting, to put it no higher, to ordinary members of the public. How far is it *proper* to go in cross-examining the victim of an alleged rape, how far is one *obliged* to go? These are not easy areas. It is clear, however, that the advocate's professional duty may require him to behave in a manner in which he would not if he allowed his conduct to be guided solely by the promptings of his private conscience. The professional duty is not a *higher* one than that imposed by ordinary morality; it is a *different* one. Taken to an extreme, the ethic may indeed itself be, paradoxically, a morally corrupting one, as studies of the reaction

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of the French legal profession to the racial legislation of the Vichy regime have set out to show (Weisberg, 1992). One can, without much difficulty, find examples closer to home in our own times.

The main problems are solved in theory for advocates in this jurisdiction by a hierarchy of requirements, the duty to the court being paramount (albeit limited). More difficult questions arise for a profession such as actuaries, where duties may come into apparent conflict. You will be more aware than I of the many situations in which that occurs in practice. Indeed, insofar as I have a thesis this afternoon, it is that members of a particular profession are always better placed than anyone else to determine what rules and practices are best adopted to nurture and maintain their professional standards. This is precisely because it is very difficult for the outsider to judge the resilience of the professional carapace to the pressures and temptations to which participation in a fiercely competitive market inevitably exposes the professional. Let me, however, take as an example the position of the actuary advising the seller of part of a business as to what share of the pension scheme's assets should pass to the purchaser's scheme in respect of the transferring employees. One has only to add a few awkward facts to the basic scenario to make potentially conflicting duties spring from the ground like soldiers from dragon's teeth. The actuary is also the actuary to the seller's scheme, the rules of which are 'fuzzy' as to the approach to be taken, but which make the actuary's advice either crucial or determinative. The scheme is in surplus (to take an old-fashioned example). There is room for immediate potential conflict between the interests of the seller and the interests of the scheme beneficiaries affected by the transfer, between the retained members and the transferring members, for potential difficulty and conflict between the actuarial assumptions aggressively deployed on behalf of the seller for the purposes of the commercial negotiation and those which may later seem proper to employ for scheme valuation purposes, and so forth. Later, if called upon to be the arbiter of, or contribute to the process of, the splitting of the retained surplus as between the employer and the scheme, absolute alertness to the function that you are performing, and are being perceived to perform (not always the same thing) will be required if all the different interests potentially affected, employer, pensioners, actives and deferreds, are to be properly served. These are situations in which you will be acutely conscious of the range of possible judgements open to you as a matter of actuarial science and of the fact that the selection of the particular judgement within the range may not be purely a matter of actuarial science.

The duty and dilemma of the actuary in such a situation are not dissimilar to those of the expert witness in court. In a recent case (*Vernon v. Bosley* (No 1) [1997] 1 AER 577 at 612), Thorpe, L.J. said this:

> "the area of expertise in any case may be likened to a broad street with the plaintiff walking on one pavement and the defendant walking on the opposite one. Somehow the

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> expert must be ever mindful of the need to walk down the middle of the road and to resist the temptation to join the party from whom his instructions come on the pavement.''

This is not perhaps the happiest of metaphors, because jaywalking is not generally perceived to be a safe or a sound practice, and in any event a point equidistant between that espoused by two litigating parties will not necessarily produce the 'right' answer; but the general injunction of independence and objectivity in the deployment of the expertise is obviously right.

I can, perhaps, add here that my experience at the Bar of actuaries as witnesses was that they tended to possess these virtues to a conspicuous degree. I remember one case in particular, where the issue was what the Scheme Actuary would have advised had he been asked the right question at the right time instead of (as had happened through no fault of his own) the wrong question at the wrong time. The answer that I needed him to give was any number short of £15.5m, and I knew from other expert evidence in the case that the answer was likely to be in a permissible range from about £14m to £17m. "Don't give me your answer now: go away and think about it.'' "Oh don't worry, I can do it now.'' Quick rattle of calculator: "...£15.756m, say £15.76m.'' Bless! I think that it was at the same consultation that I was trying to persuade the client to settle the case, explaining that there were four points on which our case hinged, success on any one of which would win the appeal, but each of which, although arguable, was flawed. I was asked to express the percentage chances of success on each point, and answered: "40%, 30%, 20%, 10%.'' The client pulled a long face (as I had intended him to), but after a moment's reflection the actuary beamed: "You have just explained that we have a chance just shy of 70% of success.'' I am confident that some of my audience will know immediately whether he was right, and that others (like myself) will take longer. I need hardly add that we fought and lost.

I have already touched on the fact that the point at which the advocate's duty to the client becomes subordinated to the duty to the court may be a matter of controversy. Several recent cases, as well as a recently published lecture by a colleague, illustrate this (Sir Gavin Lightman, 'The Civil Justice System and Legal Profession — the Challenges Ahead' reported in the *Times* of 8 April 2003 under the headline 'How the client is being sacrificed in the lawyers' drive for profit.'). A good example is the sequel to the case in which Thorpe, L.J. criticised the medical experts for not walking down the middle of the street (*Vernon v. Bosley* (No 2) [1997] 1 AER 614). An issue arose as to whether it had been counsel's duty to bring to the attention of the trial judge or to the other side certain matters which had occurred after the evidence in the case had closed, but before judgment had been delivered, and which, if known by the judge, were likely to have influenced his views as to

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the reliability of the medical experts on the question of the plaintiff's future psychological health. It is beyond the scope of this lecture to discuss the competing arguments. The point to note is that there was a wide disparity of views in the Court of Appeal as to the nature of the barrister's duty. Stuart-Smith, L.J. and Thorpe, L.J. agreed that the barrister had been under a duty to advise the client to make the relevant disclosure. Stuart-Smith, L.J. thought that, if the client declined to follow the advice, the barrister's duty was to withdraw from the case. Thorpe, L.J. thought that the barrister was under a personal duty to make the disclosure to the opposing side and (absent agreement to the contrary) to the court; while Evans, L.J. in a powerful and persuasive dissenting judgment, held that there had, on the facts, been no duty. Similar differences of judicial opinion in this difficult, but important, area were on display in two other recent cases which ultimately fell to be decided at the highest level: *Harley v. McDonald* ([2001] 2 AC 678); and *Medcalf v. Mardell* ([2002] 3 AER 721).

Views may also, I think, differ on another riddle which is likely to face most professionals at some point in their working lives. It is the case where the conflict is between the wishes and instructions of the client and the professional's sense of his own standards, but where no identifiable breach of professional duty would be involved in following the client's instructions. There are (at least) two variants of this. The first case is where there is a difference of opinion between the client and his professional adviser as to where the client's best interests lie. Is a duty to act in the client's best interests a duty to act in those interests as the client judges them to be or as you, the professional, judge them to be? Should a particular line of cross-examination be risked, should a particular witness be called, and so forth? The traditional approach of the Bar has, I think, been that, at least so far as concerns what occurs in the court itself, these are matters which fall within counsel's prerogative as against the client. I am not sure, however, that that is any longer a sustainable view. It is arguable that the notion of the 'autonomy' of the client (which now plays a prominent role in medical professional ethics and law), coupled with the removal of the advocate's immunity from liability in the conduct of litigation (*Hall v. Symons* [2002] 1 AC 615), has weakened the traditional way in which the concept of the 'independence' of the advocate, in this sense, has been interpreted. If I am right about that, that is likely over time to affect the nature of the relationship which the advocate has with the court.

The other variant (which, in a particular case, may overlap) is where the retainer requires you to consider, on behalf of a client, a strategy for the solution of his problem which, while technically feasible, makes you feel very uncomfortable. An example might be a particular method of tax avoidance or a scheme designed to comply with the letter of some regulatory requirement while ducking or bucking its spirit. Tax avoidance schemes, in particular, typically involve a spectrum of more or less artificial structures, at

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one end of which the degree of detachment from commercial reality is so striking as to attract the epithets 'bogus', 'sham' or 'fraudulent'. Is the professional, who, for his own reputational reasons, wishes to play well within the letter and spirit of the rules, to be blamed (for not exploring and explaining every avenue to the client) or praised (for his cautious and ethically motivated approach) if he omits to explain to the client the possible solutions available from other providers? Here again there has, I think, been a considerable shift of approach over the last two decades or so.

Self Regulation and Competition Law

Professional bodies play an essential role by the making of regulations, the issue of guidance notes and the exercise of their disciplinary powers in creating the climate in which these various professional dilemmas are both identified and resolved. It is absolutely right that such bodies should have mechanisms in their councils and procedures for enabling the public interest to be represented and considered. It is also right that they should be responsive to properly informed criticism from outside. That does not mean that the professions should meekly surrender to public authority their right and duty to regulate themselves. I believe that the public interest is best served by self-regulation, for the very reasons already indicated.

We all know that Adam Smith said that:

> "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices...Though the law cannot hinder people of the same trade from sometimes meeting together, it ought to do nothing to facilitate such assemblies, much less to render them necessary"

A reader of the *New York Gazette* on 10 August 1852 might have read the following exposition of the free trade mentality by a then obscure young journalist writing from another end of the political spectrum:

> "By Free Trade they mean the unfettered movement of capital, freed from all political, national and religious shackles.. There are....not to be tolerated any political or social restrictions, regulations or monopolies, unless they proceed from "the eternal laws of political economy," that is, from the conditions under which Capital produces and distributes. The struggle of [the Free Trade] party against the old English institutions, products of a superannuated, an evanescent stage of social development, is resumed in the watchword: Produce as cheap as you can, and do away with all the faux frais of production (with all superfluous, unnecessary expenses in production).....
>
> Royalty, with its 'barbarous splendors', its court, its civil list and its flunkeys — what else does it belong to but to the faux frais of production? The nation can produce and exchange without royalty; away with the crown....the House of Lords? faux frais of production..... The State Church....., with its riches,...? faux frais of production. Let parsons compete freely with each other, and everyone pay them according to his own wants. The whole circumstantial routine of English Law, with its Court of Chancery? faux

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frais of production. [*The chartered professions with their ethics and so called professional standards? Faux frais of production* ...]

I say "might have read", because I have slightly adapted the quotation, but not, I think, so as to alter its essential meaning. The principles of competition law and policy have evolved, not to destroy, but to fulfil that prophecy of the young Karl Marx (for it was he). The Director General of Fair Trading as was (since 1 April 2003 the OFT has been headed by a chairman: see Enterprise Act 2002), in his March 2001 report (¶4) avers the proposition that:

> "How goods and services are supplied is generally best determined by unfettered competition between producers for the custom of consumers. In most markets, the patterns of supply which emerge from this process are healthily unpredictable, mixed, and evolve over time. But in the professions there remain restrictions on competition which do, in effect, prescribe how services should be supplied. In assessing whether such restrictions should be permitted to remain, the onus of proof should be on the proponents of the restriction.....
>
> The aim of the Office of Fair Trading (OFT) is to make sure that markets work well — for the ultimate benefit of consumers (¶11)."

I do not here wish, in any sense, to overstate a case. When I joined the English Bar in 1970 it enjoyed a monopoly over advocacy rights in the higher courts (and an immunity from liability for negligence in their exercise), and behind those shields it had come, over time, to develop and enforce practices which were not readily defensible and which served no obvious public interest. Amongst them was the rule that a QC could not appear in court without being accompanied by a junior. The rule that the junior had to be paid two-thirds of his leader's fee had been abolished only in 1966, but the practice continued, and it remained improper to accept a brief with a leader for no fee simply to gain experience (see Boulton's *Conduct and Etiquette at the Bar*, 5th (1971) edition, p50). The very limited extent to which it was possible for a barrister to advertise his existence required an exegesis by way of a lengthy appendix to a short statement of principles, which contained a level of detailed and quaint proscription to be found elsewhere only in the abominations of Leviticus. The profession had (in the eyes of many) become trapped in a time warp of sclerotic self-regard. It probably needed the shove it got from, amongst others, the competition authorities to jerk it to its senses in these and some other respects. But ... I question whether it is right that the presumption should be that all restrictions on the way in which professional services are supplied are to be outlawed as uncompetitive, unless justified according to a test of 'consumer benefit', which lacks objective definition and of which the OFT is to be the ultimate arbiter. According to the Director-General's March 2001 report, restrictions are only to be allowed if they are 'the minimum necessary' to achieve the goal of consumer protection, or if they "maximise overall consumer benefit by striking the right balance between consumer benefits from competition and from protection"; that

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'right balance' being in the final analysis a matter for the judgment of the competition authorities rather than of the professions or other regulators (see ¶9 of the Report and ¶13 of the appended LECG Report).

The Director General's report recorded (¶3) that the shove which the competition authorities have given to the professions in the past has resulted in evolutionary change, and promised that it had been studied in the accompanying review. I looked, however, in vain for the promised study in relation to, say, advertising by the legal profession.

My own sense is that the advent of advertising at the Bar has had little impact on correcting the 'informational asymmetries' which make it difficult, even for the professional client, to choose the right horse for the course. Nor does it appear to have done much in the way of encouraging price competition. It has certainly had a relatively profound cultural impact, leading barristers to conduct themselves with a keener eye to profit and to view themselves more as businesses than as disinterested providers of professional services. The need to include marketing in the overhead has contributed to the move towards the ever larger basic business unit. But no-one can say that these changes have produced more than marginal benefits (if that) for the public served by the profession.

Now, take solicitors' advertising. I read an article in a Sunday newspaper on 18 May this year, relevant extracts of which run as follows:

> " HEADMASTER Mike Millman was not shocked when the phone call came. A pupil had fallen over at his school in Dudley and now a lawyer was on the phone, seeking to make a compensation claim on behalf of the child's family.
>
> 'I was not even surprised,' Millman said. 'All the parents around here have been targeted by lawyers over the past year and this sort of thing is just becoming routine.'
>
> .....
>
> Millman cannot comment on this latest case, as it is pending. But he believes schools in the area are in danger of being swamped by legal cases. 'This is an issue of parents being exploited,' he said.
>
> Teams of compensation lawyers have visited homes in Dudley, handed out leaflets in town centre and approached parents at school gates. Firms have contacted families directly after reading about bullying cases or accidents in local newspapers.
>
> Many parents have complained about the harassment.
>
> Belinda Ball was shocked when her estate was targeted. 'There was a knock on the door, and when I answered it there were about 15 people in my street, all asking us if our children had had any accidents,' she said.
>
> .....
>
> It is thought that the number of compensation claims against schools has doubled in the past year. In total, such claims against local councils cost £200 million a year, with a large portion of that coming from the educational sector.
>
> Unions have warned that the explosive growth in compensation claims could damage schools ability to provide a decent education. Many claims end up being settled out of court because that is cheaper than defending them.
>
> Bob Carstairs, assistant general secretary of the Secondary Heads Association, said: 'It is taking a huge commitment of manpower just to deal with these cases as we are obliged to respond to any form of legal contact we get.' "

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There does not seem to me to be any way in which that phenomenon can be described as 'healthily unpredictable'. On the contrary, it seems to me both predictable, and unhealthy. If one says: "Let ambulance chasing thrive", ambulance chasers will not prove thin on the ground.

At the same time, relatively scant attention was paid by the OFT in the report to the one truly disfiguring feature of the justice system, namely the costs of going to law. To a judicial eye, jaundiced by the sight of too many summary costs schedules, none of the OFT prompted reforms seems to have grasped this particular tiger, even by the tail, let alone by any more significant part of its anatomy. Its cause and cure lie elsewhere than in any current rule of either branch of the legal profession (the oddity is that the 'market failure', if that is what it is, seems at its most acute at the most sophisticated end of the market). Let me not leave that subject without paying tribute in passing to the Institute's extremely thought provoking paper of 17 December 2002 on 'The Cost of Compensation Culture'. (Note also the OFT's announcement today of its impending review of the conditional fee industry.)

Note that the charm, for the OFT, of the hidden hand of market forces lies precisely in the *unpredictability* of the consequences of freeing up the market. It is, at root, an essentially romantic view: a world where honest and rational men and women pursue their self-interest and everyone prospers as a result. The natural starting point of the professional regulator is rather different. The regulator is conscious of the fact that the exercise of his profession necessarily involves an unavoidably large degree of 'informational asymmetry' between the professional and the client; but it is not 'market failure' that he fears as the result, but 'service failure'. The regulator is conscious of the need to design rules that can, with some confidence, be predicted to foster good practice (which protects the client and the reputation of the profession) rather than to authorise bad practice. Moreover, it is not just the client who needs protecting. The professional (each in his different way) owes wider duties than that. A degree of caution is therefore required, or at least pardonable, before restrictions which have been relied on in the past to foster the culture of integrity within a particular profession are sacrificed at the altar of competition. While it is clear that some balance has to be struck, it is not clear to me why the judgement of a properly organised and suitably accountable professional body as to what is required of its members if the public is to be properly protected should not stand, unless, from the perspective of competition law, it can be demonstrated that the particular rule is unnecessary and that its removal is likely to be positively beneficial. In adapting its practices to meet the demands of a rapidly changing society, the profession which chooses to proceed with caution is entitled, I would argue, to the benefit of the doubt. It should not be lightly assumed that every failure to relax a restraint is motivated by a flawed anti-competitive instinct. The first duty of a profession is to ensure that the public

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is safe in its hands. If that involves prohibiting its members from cultivating fields already well farmed by others (in the case of the Bar the examples of direct access and the right to provide litigation services are in point), the prima facie rule should be that the profession, if otherwise seen to be appropriately organised and run, is entitled to exercise its own judgement.

In suggesting that the Director-General's approach may have got the proper balance wrong, I am not a lone voice crying in the wilderness. The Legal Services Ombudsman, in her 2002 annual report, after noting that the OFT had been in the forefront of promoting change in the legal profession, wrote this (and did so, it can be assumed, from experience at the sharp end of consumer dissatisfaction with professional services):

> "Competition principles are important and undoubtedly have a role to play in ensuring the delivery of high quality legal services. But there is rather more to it than that.
>
> Where services are purchased by fully informed consumers (such as lawyers' commercial clients), who are able to choose from a wide range of products, market mechanisms will no doubt work well. But inexperienced purchasers of one-off services are in a rather different position. And, although the legal profession sometimes overstates its case, the arguments about the essential independence of the profession are not without merit."

I can also draw some comfort from European law for that view. In the case of W*outers v. The Dutch Bar Council* (Case C-309/99, Judgement of 19 February 2002), the ECJ had to consider a regulation of the Dutch Bar Council which prohibited partnerships between members of the Dutch Bar and accountants. Mr Wouters was a member of the Amsterdam Bar practising in partnership (as was permitted) with tax consultants. In 1994 he applied to become a member of the Rotterdam Bar and to practise in partnership with accountants. The Rotterdam Supervisory Board found that his application fell foul of a rule introduced in 1993 which prohibited such partnerships. Thus began his long struggle through the courts to become a partner in Arthur Andersen.

The ECJ ruled that the Dutch Bar Council was an association of undertakings for the purposes of Art 85(1), and that its 1993 Regulation did restrict competition: the blanket ban on the multi-disciplinary one-stop shop was inherently anti-competitive. However, it went on to hold that, although that was the *object* and *effect* of the Regulation, it was saved by its *aim*. Since its aim had been to ensure compliance with rules of professional conduct "having regard to the prevailing perception of the profession", the rule did not fall within the Art 85(1) prohibition. The Bar of the Netherlands could reasonably have considered that the regulation, despite its restrictive effects, was necessary for the proper practice of the legal profession.

Not all the reasoning is at first sight internally consistent. Indeed, like some other pronouncements of that court, parts of it read like a Delphic oracle translated into runes before rendition into its official languages. So

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far, however, as my argument today is concerned, the key feature lies in the significance attached by the court to, and the respect shown by it for, the 'prevailing perceptions of' the particular profession, having regard to the ethics-based nature of the regulation in question. This seems to me to be an entirely welcome approach, and one which provides a useful counter-balance to that currently being trodden by the Office of Fair Trading in relation to the professions.

Professions, such as that of the advocate or the actuary, stand in a particular relationship to the social system, as a whole, in a way in which ordinary businesses do not. It is the public interest dimension of their function which distinguishes them. It is the public interest dimension, rather than a desire to pursue narrow self-interest, which historically explains, and alone can justify, the fact of collective association, collective self-regulation and, sometimes, collective self-restraint, which the free market economist finds so puzzling. The belief that particular skills can be identified, and that control of the way in which those skills are supplied is, or may be, necessary if their public value is not to be corrupted by inappropriate exploitation, is what (pace Adam Smith) makes it desirable that members of the same profession *should* assemble. The collective experience and wisdom of the professional body, expressed through its codes, its guidance notes, its educational requirements, its disciplinary practices and so forth, are necessary conditions of the professional integrity of its individual members. An admirable illustration of that process at work, if I may say so, can be found in your President's article on the actuarial profession and the public interest in the April 2003 issue of *The Actuary* (Goford, 2003).

Measuring Integrity

There has been an explosion of interest in the subject of professional ethics in the recent past. Some of the immediate reasons are not hard to see. Others flow from changes in the general culture, the causes and future shape of which are more difficult to discern. The rapidly changing social and commercial context in which the professional is called upon to exercise his skills can be guaranteed to throw up situations in which new ethical dilemmas are constantly being created, and for dealing with which new principles and rules may have to be devised. Perhaps one day a gene will be discovered or designed, possession of which would give its owner the moral equivalent of a long-dated index-linked bond, a capacity to answer all foreseeable future ethical liabilities. Would clients pay to have it inserted in their professional advisers, or pay not to have it inserted? To that question I offer no answer; but far from exhaustive research in the literature has brought to my attention some work that has been done on the question whether there are *degrees* of professional integrity. In a research paper

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written in 2002 for the Institute of Chartered Accountants, Professors Beattie and Fearnley summarised the literature available on the subject of the relationship between audit independence and the provision by auditing firms of non-audit services, an issue of much topical importance in the wake of the Enron scandal. They drew attention, *inter alia*, to a paper published by themselves in 2001, in which they had undertaken "case studies of six real-life auditor-client relationships covering 22 significant interactions, using grounded theory methods to develop a model of the contextual factors influencing the outcome of accounting interactions." The six main factors included the level of integrity of the audit engagement partner, and the full list comprised: level of integrity of audit engagement partner; company type and situations; effectiveness of corporate governance; clarity of accounting rules on issue; level of audit firm support and quality control; and quality of primary relationship.

From the analysis of the case studies, they had developed a taxonomy of four audit partner types:

— *crusaders*, who have extremely high professional and personal integrity and are prepared to escalate issues;
— *safe hands*, who have high professional integrity; they identify closely with the client and are also prepared to escalate issues;
— *accommodators*, who have moderate professional integrity; they will knowingly bend the rules under pressure; and
— *trusters*, who have moderate professional integrity; they may be insufficiently critical and questioning in their role as auditors and may unknowingly permit rules to be bent.

Although they did not find them in the case studies, they drily suggested that there was a theoretical possibility that two more partner types might exist in the real world, these being *incompetents* and *rogues*.

It is not necessary for a profession to aim that its members should all be crusaders: safe hands, but nothing less than safe hands, will do. Let the accommodators examine their consciences and let the trusters wake up.

References

Goford, J. (2003). When the public interest impinges on business relationships. *The Actuary*, April 2003.
O'Neill, O. (2002). A question of trust. www.bbc.co.uk/reith2002
Weisberg, R. (1992). *Poethics*. Columbia Press.

https://doi.org/10.1017/S1357321700004499 Published online by Cambridge University Press