Transnational lawyering is a field dominated by the large law firms and their lawyers. With transactions measured in the billions of dollars, these deals often fall into the “bet the house” category, which means it is not the occasion to try out a new law firm. The risk of experimentation comes at too high a cost. Transnational lawyering does not fit the normal categories of lawyering. The following is typical. Santander, a Spanish bank, listed its Brazilian subsidiary on the Sao Paulo stock exchange for $8 billion (McLeod-Roberts 2009). The New York law firm of Shearman & Sterling acted for the syndicate banks leading the deal (Santander Investment, Credit Suisse, BoA Merrill Lynch, UBS, and BTG Pactual). Davis Polk & Wardwell, another New York law firm, advised Santander in Spain. Even though Shearman had acted for Santander in Brazil for a number of years, the bank wanted its Spanish advisers to work with it, so Shearman switched sides in the deal. Two Brazilian firms advised on local law; and the in-house lawyers at Santander also worked on the deal. What is worth noting here is that this deal, picked at random, is not unusual. The law firms are essentially New York firms with international practices: Davis Polk has a Madrid office, and Shearman has one in Sao Paulo; and the lawyers are a mix of local and American. The local law firms in Brazil and the in-house lawyers in Santander were used for minor matters. These types of transactions commonly use large law firms from New York or London, or possibly from one of the other major world metropolises.

It is difficult to isolate the economic contribution of transnational law practice, but since it is primarily the realm of the large law firms, we can examine their contributions. In the United States, net legal exports amounted to $5.4 billion (US Bureau of Economic Analysis 2009). The largest US law firms earned
$65 billion in 2009 (Press and Mulligan 2010). In the UK, law firm exports totaled $463.7 million, and the largest 100 law firms generated fee income of $2.2 billion in 2007–2008 (IFS Research 2009, 2). When taken to the global level, the Global 50 law firms earned revenues of over $86 billion in 2007–2008 (2). Of this, UK law firms generated 20% of the Global 50 revenues while US firms brought in nearly 60% (2). Nearly 40% of this revenue came from corporate and finance work, and dispute resolution produced 28% (5).

The scale and size of these international law firms outstrips their predecessors. The largest global law firm, Baker & McKenzie, has 3,750 lawyers with offices in 69 countries (Baker & McKenzie 2011). Clifford Chance has 3,200 lawyers with 33 offices in 23 countries (Clifford Chance 2011). And the next 15 firms have over 1,400 lawyers each, and their revenues are each in excess of $1.6 billion (IFS Research 2009, 5). However, even the largest law firms pale in comparison with the scale of the accounting firms. For example, PricewaterhouseCoopers has approximately 163,500 professionals in over 750 offices in 151 countries (PricewaterhouseCoopers 2009).

This chapter is presented in three sections. The first lays out the theoretical issues involved in analyzing transnational law and law firms. The second sets out examples where the culture of transnational lawyering can be seen more closely. In the third, I focus on two ethical issues. Case study 1 concerns conflicts of interest, but in a different way than is normally presented in professional responsibility texts. Case study 2 deals with the problem of lawyers’ truth telling. While there is no explicit rule that says a lawyer must tell the truth, we have to consider to what extent the ethics of professionalism might impel lawyers toward appropriate behavior. And finally, I address whether we can expect a more rigorous form of ethical behavior from lawyers or whether we are being overly optimistic in our expectations.

It is important to explain my methodology. The world of large law firms has become increasingly popular among sociological scholars in recent years. This is matched by two other developments. One is a burgeoning legal trade press that reports on large firms, such as American Lawyer, International Financial Law Review, and Legal Week. These publications report on deals done, law firm

1. In describing the Lord Mayor of London, Sir David Lewis, Abramson (2008, 6) writes: “Crucially, being a lawyer has allowed David added facility in selling English law and our sophisticated dispute resolution regime to companies in other countries. . . . When travelling, he always sees the local Minister of Justice, a superb opportunity to discuss relevant legal issues of the day. The English legal system therefore becomes one further exportable item, an immediately apparent added benefit of having a solicitor in the Mansion House” (emphasis added).
mergers, partners' remuneration, and partners' defections from firms. They are a mine of information. The second development is that large law firms have opened up to allow themselves to become sites of research. Some scholars have been able to observe the workings of large law firms; others have interviewed law firm partners. In my research, I have done both. The data in this chapter's case studies are based on interviews with three law firm partners who were actively involved in the cases. The background for the chapter depends on interviews I have carried out with hundreds of lawyers over a number of years. I selected these cases because they are more or less typical of the work being done by transnational lawyers and are rarely viewed by these lawyers as ethically problematic. It is in the ordinary course of work that we perceive how "good people can do dirty work" (Hughes 1958, 49-50).

**Background to Transnational Lawyering**

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

Before transnational lawyering became an established field with the rise of globalization in the late twentieth century, it had an important role in world commerce. The mid-nineteenth century gave rise to the railroads that were being constructed in all parts of the world—the United Kingdom, Canada, Mexico, the United States, Argentina, South Africa, and India, to name just a few locations. Much of the financing came from the major capital markets, of which London was the prime (Cassis 2006). Corporate lawyers were intimately involved in the promotion of the companies that built the railroads and with the banks that were financing them (Flood 2011a). As the focus of capital markets oscillated between London and New York, the legal industries that serviced them grew and spread as their clients demanded.

A few law firms started with an international dimension to their characters. The late Coudert Brothers originated in Paris and New York in the 1850s,
specializing in international law. The most distinctive approach to international law practice was that taken by Russell Baker with the formation of Baker & McKenzie in 1949 (Bauman 1999). Baker was taken with the internationalist viewpoint of his professors at the University of Chicago in the 1920s. The Chicago-based law firm was predicated on a deliberate internationalist model backed up by a profitable domestic insurance practice. Baker realized he could exploit certain provisions of the US Tax Code designed to assist trade with Latin America. By establishing foreign subsidiaries, US companies could make considerable savings. Baker actively marketed this legal "knowledge" to his clients, which led to the establishment of Baker & McKenzie offices in Latin America and later elsewhere (Bauman 1999).

Most other law firms that expanded overseas were less calculating and let circumstance dictate their moves. Some notable law firms—for example, Wachtell, Lipton, Rosen & Katz (New York), Cravath, Swaine & Moore (New York), and Slaughter & May (London)—refused to open overseas offices or did so only in limited circumstances. Yet all major law firms engage in transnational lawyering regardless of their office locations. Those with no or few offices outside their parent countries use networks or "best friends" where they ally with foreign firms on a repeat basis to obtain local capabilities (Morgan and Quack 2005).

Carole Silver (2002) has further shown a marked reluctance by US lawyers to move overseas, unless for a fixed term, although the credit crisis is changing attitudes toward working outside the United States (Bringardner 2008). While it is necessary for US law firms to export some lawyers to head a foreign office, the majority of the firms' employees tend to be locally trained lawyers (Faulconbridge and Muzzio 2008). Here there is a distinct difference between the legal professions of the United Kingdom and the United States. The United Kingdom has a long tradition of exporting lawyers overseas, partly because of the empire's needs and partly because of globalization (Flood 2011b). It is estimated that there are in excess of 6,000 UK solicitors in practice overseas (Law Society 2011).

What underlies the law firms' success? As the investment banks sought new markets, they relied on the law they were used to: New York and English law. For finance, therefore, these two forms of law became dominant, the new lex mercatoria (Flood 2007). To be somewhat skeptical, it is reasonable to say that institutional laziness (or path dependency) impelled these legal systems to the top rather than any inherent legal superiority. It enabled a global reach across
multiple legal jurisdictions at relatively low cost. The problem of the local jurisdiction was not totally removed, but at least it was contained. Perhaps this is best summarized rather whimsically by one in-house counsel who said, “Like all good professionals we make it up as we go along and hide our copy of Libyan Law for Dummies under a pile of learned papers” (Smith 2009, 16).

The Anglo-American hegemony is reinforced by the use of standardized documentation in transactions, either of a particular firm or of the organizations that promote standardized documents, such as the Loan Market Association (LMA), which is a European trade association for syndicated loan markets. Its membership includes banks, investors, law firms, and rating agencies, among others (Loan Market Association 2011). Another key organization is the International Swaps and Derivatives Association (ISDA), which has 820 institutional members around the world including corporations, government bodies, and professional service firms who subscribe to a master agreement and other documentation originated by the ISDA (ISDA 2011). Certain law firms such as Allen & Overy and Cravath, Swaine & Moore have formed close links with the ISDA and are intricately involved in the drafting of its documents. We can even portray the product of organizations like the LMA and ISDA as a new form of internationally accepted law or regulation by best practice, given their almost universal adoption. But what is critical for the discussion here is that this new law has been created by the US and UK large law firms that practice it. This gives them a powerful advantage in global law beyond most others.

Large law firms have become institutions riven by their success. Not many international law firms would be able to fit their partners in one room. The traditional notions of collegial partnerships have transformed into a form now referred to as the MPB, the managed professional bureaucracy (Hinings, Greenwood, and Cooper 1999). This is a structured, hierarchical organization that depends less on external inputs and more on its own modes of production. With the introduction of finance management, IT and human resources departments, law firms place more emphasis on their own in-house training and value creation as in the cases of continuing legal education and preliminary training of associates. They even train lawyers how to become and behave as partners as they approach the partnership decision. Emmanuel Lazega (2001), in his study of a New England corporate law firm, showed how law firms were internally competitive institutions in which niche groups of partners competed with each other over scarce resources such as associates and clients. Associates are assigned to partners who are busiest; conflicts involving different partners'
clients would be resolved in favor of rainmakers. These struggles enable the firm to hold onto its members but also force them to defect if necessary. With increasing bureaucratic control, however, comes greater internal regulation of action and behavior. The effect of the growth of the law firm is to diminish professional autonomy while instead permitting only degrees of discretion in behavior, as Goldsmith's Flemish lawyer suggests. Business targets, billable hours, and so forth become determinants of a continuing career for corporate lawyers.

Perhaps the most contentious part of corporate lawyers' existence is their relationship to the client. Most professional rules of conduct depict the relationship as dyadic, one on one, and most are presented that way, especially in the media. Yet, in corporate law it is not so straightforward. In chapter 7, Herbert Kritzer refers to Heinz and Laumann's (1982) two hemispheres of the legal profession and notes that the corporate part is more prone to client pressures than the individual one. Then in his analysis of insurance lawyers and their clients, he introduces new dimensions of an "in between" sort: in his case, the role of the insurer and the conflicts that portends because of business tensions. With transactional and transnational lawyers, similar tensions and conflicts exist. The example of a transaction I gave at the beginning of the chapter is typical in that capital markets revolve around a set of enduring relationships between lawyers and investment banks. If clients are borrowers or developers, then we are in a similar relationship to Kritzer's insurance clients. In this case, the relationship is tripartite between bank-lawyer-client (Flood 2009). But the question remains: Who is the client?

Let me provide one example in which the relationship becomes confounded. A large law firm banking lawyer told me that a corporate client was introduced to his London firm by an investment bank that the client had asked for funding. The bank had told the client, who was borrowing to finance a business expansion, that the client's usual law firm was too small to work with the bank and that the bank's usual law firm had more experience with this type of transaction. The lawyer told the "new" client that since more funding would inevitably be needed as his business grew, he might as well transfer all his company's legal business from its normal law firm so as to save time and effort in the future. The implication was that to continue to obtain funding, this new lawyer-client relationship would have to continue. It was a classic "bait and switch" operation for the benefit of the bank and the new law firm, which gained a potential raft of new business at the expense of the client's prior lawyer-client relationship.
The Ethics and Regulation of Transnational Practice

The transnationalization of law and legal practice now appears on the syllabus in law schools. While both US and UK legal education have regulated curricula, they have significant degrees of freedom in how their courses are delivered and what they contain (Silver 2006). Their freedom has been particularly exploited at the master’s level where myriad LLM programs have flourished to tap into the perceived need for specialist expertise or knowledge of other legal systems (Silver 2006). These programs have attracted large numbers of civil law-trained lawyers to UK and US law schools as their own civil law schools have traditionally not been able to offer courses on, for example, the globalization of law (Silver 2005). Observation of European law firms now shows that as many as a third of the junior lawyers have such LLMs (Muzzio, Faulconbridge, and Cook, forthcoming).²

One essential component of legal education is the teaching of professional responsibility or legal ethics. Such teaching varies enormously from country to country with different principles imparted to students (Moore 2007). Moore argues that US lawyers are caught in the double deontological trap: Their home rules and their host rules are often quite different. For example, conflicts of interest rules in the United Kingdom are more relaxed than in the United States (see case study 1 below); in-house counsel privilege is not the same in Europe as in the United States (Ahzo Nobel Chemicals Ltd. v. Commission, 2010); unauthorized practice of law rules vary widely from country to country (in the United Kingdom they hardly exist). To which rules does the lawyer adhere? If they are contradictory, the lawyer is in a Catch-22 situation, with no escape.³ Legal education reflects those differences. In Europe, professional responsibility is not given the same attention as in the US classroom. For example, in the United Kingdom, legal ethics is “taught” during the Legal Practice Course (a one-year postgraduate vocational course for aspiring solicitors). It is, however, a “pervasive” topic, one that arises from time to time during the year’s teaching in whatever subject is being studied at the time. It has no defined identity in the curriculum as in US professional responsibility courses and has only a

². Many of these previously conservative countries’ law schools (e.g., China, Germany, and Italy) are now offering their own LLM programs in English (Vanistenfael 2004).


⁴. For an attempt at providing guidelines, see, e.g., IBA Conflicts of Interest Subcommittee (2010).
small examination, but nothing on the scale found in the United States (SRA 2009, 20). We should also note, however, that professional responsibility is not a compulsory course for LLM students in either country.

The formal professional rules do not provide much guidance to lawyers. Most of the English rules under the Solicitors' Code of Conduct apply to overseas practice without setting up any arduous requirements (Rule 15). Likewise, Rule 5.5 of the American Bar Association (ABA) Model Rules of Professional Conduct simply states, "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." Essentially, the core of the English and American rules applies to law firms wherever they practice. However, if a US lawyer practices US law in the United Kingdom without becoming a registered foreign lawyer or becoming a solicitor, then he or she is not subject to English disciplinary rules or regulation. The United States takes a different view: For example, New York State subjects foreign legal consultants working in New York to state discipline, even though they are not practicing New York law.\(^5\)

The English and American jurisdictions introduced their professional codes at different times. The ABA adopted its first canons in 1908, but the Law Society did not acquire rulemaking powers until 1933, and its first code did not appear until the 1960s. Its first complete professional code only appeared in 2007 and will soon be superseded by a new one that acknowledges the challenges of international practice (Boon and Levin 2008). The prospect of being a transnational lawyer or a global lawyer is a daunting one as lawyers wend their ways through the maze of conflicting rules that govern their working lives. This comes about because of the nascent state of global law and its regulation, which has yet reached maturity so the necessary institutions are still to be created (Goff 2007). Nevertheless, the major Anglo-American law firms have begun to navigate their way in global practice. The result, perhaps a perverse one, is that lawyers inside these firms do not think about cross-border ethical issues because of their intrinsic complexity and the pressures of work. This has instead become the responsibility of firms' own general counsel. For example, London's Allen & Overy has 15 general in-house counsel who deal with rules and general compliance (Denyer 2010; Parker 1999, 184).

The next section examines examples of the intricacies of transnational lawyering and some of the ethical concerns that arise, looking at what happens

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inside these deals. The first two occurred inside UK law firms, but the problems and difficulties they illustrate are not unique to that country. I make reference to US and English rules where appropriate.

Case Studies of Transnational Lawyering

Is There Such a Thing as a Conflict of Interest?

In 2005 Celtel, a Dutch telecommunications company with 5.3 million cellphone subscribers in Africa, sold 85% of its company to one of the Middle East’s largest telecoms companies, MTC of Kuwait. The key lawyers in the transaction were the international law firms of Clifford Chance, which acted for MTC, and Linklaters, which acted for Celtel, but as we shall see from the discussion below, these lawyer-client relationships are not always fixed. As previously noted, Clifford Chance has 3,200 lawyers operating in 33 offices across 23 countries (Clifford Chance 2010). Linklaters has 2,200 lawyers with 26 offices in 19 countries (Linklaters 2010). Given the size of these global law firms, it is no surprise that lawyer mobility is high and that transfers between firms of this scale are frequent and common, and therefore the potential for conflicts of interest is wide open.

As the Lawyer reported (O’Connor 2005), Celtel was “Sub-Saharan Africa’s largest mobile provider, with coverage in 13 countries and more than five million subscribers.” MTC, the buyer, had operations in Kuwait, Iraq, Jordan, and Lebanon. Tim Schwarz of Linklaters said:

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

This deal was occurring in the second phase of MTC’s strategy. MTC approached Clifford Chance’s Dubai office, which worked on the deal in conjunction with the firm’s London office. In this deal, Celtel asked an investment bank, Goldman Sachs, to run a controlled auction. According to MTC’s lawyer, a partner in a large London law firm whom I interviewed, the bank sent letters “to anyone they could think of who might be interested in buying this business. Any mobile operator, any telecoms company, and private equity houses as
well.” The MTC lawyer explained further: “You start by getting the investment banks running the deals from London. And because they are based in London they will turn to the English firms because we have some of the biggest firms in the world and that means with size comes depth of experience. Sophistication naturally resides here.”

In the first stage, the investment bank, on behalf of Celtel, approached around 100 companies with a rough outline of the deal. The next stage was for the sellers to select, out of a field of 10 to 20, four who would submit binding offers. This would go to a final stage in which two bidders would negotiate the final terms. The final sale price was $3.4 billion. There is always a possibility that this kind of deal could turn sour and fail to complete. In part this is due to the complexity of the funding arrangements required to be in place for this size of transaction to go through. These transactions usually involve leverage, that is, other people’s money or debt, and therefore all types of guarantees have to be arranged, default conditions prepared for, and more. This particular transaction was being funded by loans from four banks in the Middle East, the United Kingdom, Switzerland, and the United States, namely, National Bank of Kuwait, UBS, Credit Suisse First Boston, and Barclays, all of which were represented by a single law firm in London, Allen & Overy. Allen & Overy would have to ensure that the banks’ interests were protected under English law. If the sale were to fail, the vendor’s lawyers were running a parallel track with the sale to place an initial public offering in the market. The hope was that the IPO would be unnecessary.

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

We need a lingua franca and that’s English law. The governing law of a transaction—a share acquisition—doesn’t really matter that much. The
terms and mechanisms are pretty much identical regardless of whether it's English, German, French or Dutch law. Obviously you take account of the peculiarities of national law but the agreements will look the same and they will all be in the English language, even in France where it's technically illegal. But people pay the 300 euro fine and don't mind.

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

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

Yet these relationships were not quite as straightforward as they appeared. Clifford Chance had a long-standing relationship with the acquirer, MTC, which is not unusual, but it had also advised Celtel some years previously on its plans to go public (O’Connor 2003). On the other side of the table was Linklaters for Celtel, with whom Linklaters had an established relationship. And, as mentioned, the four banks were all represented by Allen & Overy. Shortly after concluding this deal, the Clifford Chance Dubai partner, who brought in the deal to Clifford Chance, moved to head Linklaters’ Dubai office. As O’Connor (2005) puts it, “A canny bit of talent spotting . . . that.” Linklaters continued to act for MTC (now acquired by another telecom, Zain) on subsequent acquisitions, thereby ousting Clifford Chance as the MTC’s counsel.
English lawyers tend to be relaxed about these kinds of actual and potential conflicts, and they argue that sophisticated corporate clients understand these relationships and do not use them to conflict out lawyers. Moreover, the clients’ economic power allows them to assert authority in situations if their interests are threatened. US lawyers are more concerned about conflicts because their professional rules are more restrictive with respect to conflicts involving current and former clients. Joe Flom, senior partner of Skadden, Arps, Slate, Meagher & Flom in New York, predicted more than 25 years ago that large law firms would begin to find themselves harboring extensive conflicts as they grew in size and as lawyers circulated from firm to firm (Federal Bar Council 1984, 126). As Wald (2007) notes, these relationships bring the ABA Model Rules 1.6 (concerning confidentiality) and 1.7 (concerning conflicts of interest) into tension with each other, especially in the light of increased lawyer mobility. Yet English lawyers have not succumbed to the rigors of such rules.

Griffiths-Baker (2002) discovered that although official Solicitors Regulation Authority (SRA) rules forbade solicitors acting for both sides in transactions, large law firms regularly ignored them. And large solicitors’ firms developed screening procedures to protect clients’ interests when a firm is acting on both sides of a transaction. To resolve the conflicts problem, the City of London Law Society (CLLS), the large law firms’ lobby group, led an intensive lobbying campaign to revise the conflicts rules so that they would permit “sophisticated” corporate clients to agree to their lawyers acting for both sides in noncontentious matters (Dean 2010). In 2009, the SRA agreed to change Rule 3 on conflicts of interest to allow clients to consent to additional conflicts. Rule 3.02(2)(a) now states: “Your firm may act for two or more clients in relation to a matter in situations of conflict or possible conflict if: the clients are competing for the same asset which, if attained by one client, will make that asset unattainable to the other client(s).” Furthermore, the CLLS has been lobbying the New York Bar to permit New York lawyers practicing abroad—who at present follow New York rules—to be

6. The English rules on conflicts of interest currently state, in part:

You or your firm may act for two or more clients in relation to a matter in situations of conflict or possible conflict if:

(a) the different clients have a substantially common interest in relation to that matter or a particular aspect of it; and
(b) all the clients have given in writing their informed consent to you or your firm acting.

Solicitors’ Code of Conduct Rule 3.02(1).
able to choose which jurisdiction’s rules they will follow (e.g., United Kingdom or France). The agenda of the CLLS is to have the same rule adopted in all jurisdictions throughout the world, so as to benefit global law firms.

Despite these moves and shared understandings, which are deeply entrenched in London law firms, lawyers still make seemingly incomprehensible and elementary mistakes. In another example of conflict of interest in a complex transaction, Philip Green, a fashion retailer, attempted to acquire the department store Marks & Spencer in a hostile takeover in 2004. Green was assisted in this $1.4 billion acquisition by Barry O’Brien, the corporate finance head of Freshfields, a big London law firm (Herman 2007). The problem was that Freshfields had a long-standing relationship with Marks & Spencer, the target. Freshfields undertook a conflicts check and found that although it had done work previously for Marks & Spencer on restructuring and litigation, the firm’s chief executive decided these were not material to the bid and the firm set up a series of “Chinese Walls”—information barriers to prevent the flow of information between certain lawyers in a firm (O’Connor and Jordan 2004).

O’Brien worked with 50 staff on the matter for months before Green went public with his bid. Marks & Spencer immediately obtained an injunction from a judge who had been a large law firm partner before joining the bench. O’Brien and Freshfields immediately appealed, but the Court of Appeal affirmed, forcing O’Brien and Freshfields to cease working for Green (Nisse 2004). Although the firm was dropped, it still billed Green over $1.5 million in fees. In addition, it had to pay over $400,000 in costs to Marks & Spencer’s law firm for the injunction. The conflict could not be any clearer, under either UK or US rules. Interestingly, Marks & Spencer decided it would not make a formal complaint having obtained its desired result, so the Law Society (the professional body), which had decided not to investigate the matter, then came under pressure from its governing members to initiate a complaints procedure. The judge who had granted the injunction questioned the effectiveness of Chinese Walls as screening devices. Freshfields attempted to claim the moral high ground by saying it would never reveal any confidential information, a maneuver that singularly failed to impress the Law Society.

O’Brien was disciplined and fined $14,000 by the Solicitors Disciplinary Tribunal in 2007 and ordered to pay costs of $78,000. He also paid another $78,000 to the Law Society for bringing the complaint (Aldridge 2009). O’Brien

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7. Freshfields Bruckhaus Deringer is a law firm with more than 2,400 lawyers with 27 offices in 15 countries (Freshfields Bruckhaus Deringer 2011).
was forced to resign his partnership, yet Freshfields retained him as of counsel (i.e., neither partner nor associate). At the tribunal, his counsel argued his error of judgment was a one-time blip on an otherwise distinguished career that included masterminding a rescue plan for Lloyd’s of London, the insurer, which was said to have saved the insurance market from collapse. The tribunal further heard excerpts from The Legal 500 and Chambers Directory that described him, with no hint of irony, as “the first choice, every time, for complex advice,” a “robust heavyweight,” and “first class adviser” (Herman 2007). Despite his conviction and the imposition of discipline, he continued to work for his regular clients. Although he was not an official partner, he behaved as such. No client left the firm as a result of his actions: Indeed, O’Brien worked on several multibillion dollar takeovers during this period. His expulsion from the Eden of his law firm was rescinded in 2010 when Freshfields made him a partner and head of corporate finance for the second time (Freshfields Bruckhaus Deringer 2011b; Aldridge 2009).

What these stories tell us is that the very notion of conflicts of interest is fluid rather than rigid. It is open to interpretation. In some contexts, as in the Freshfields case, it cannot be explained away as a “blip” since, as Griffiths-Baker would suggest, conflicts are not uncommon. But in most large-scale business transactions, business and legal relationships are complex and varied. A strict interpretation of conflicts rules would effectively halt a considerable amount of business or perhaps otherwise deflect it to other firms. So, in the United Kingdom at least, the situation has been revised by the regulator to permit what has been taking place informally for many years. It can also be argued that in transnational business, the ability to raise conflicts issues is diminished because there are relatively few law firms that engage in this work; partners are constantly moving between firms; and it is difficult for dispersed clients to bring complaints and actions in different jurisdictions. And given the relatively small number of actors who engage in this work, it contains the elements of a club that should not have its “dirty laundry” washed in public. Informal sanctions such as criticism and taking business elsewhere are more powerful than the formal regulatory process.

So, What Is Truth?

According to the preamble of the ABA Model Rules of Professional Conduct, a lawyer is obligated to “conform to the requirements of the law” and is urged to “demonstrate respect for the legal system.” Moreover, a lawyer shall not knowingly make a false statement to a tribunal or third party (Rules 3.3, 4.1, &.4). But
nowhere do the Model Rules say that a lawyer has to tell the truth. Similarly, the Solicitors' Code of Conduct in Rule 1 talks about a lawyer acting with integrity, upholding the rule of law, and not diminishing the trust of the public, but it too fails to mention the role of truth.

The second case study concerns the sale of a large office building in London by a joint venture of Japanese banks to an offshore British Virgin Islands–based company involving a number of different jurisdictions. The building was worth £343 million, and the purchaser was a UK public limited property company, Delancey (Delancey 2011), a former PLC that had gone private and established a series of offshore investment vehicles in the British Virgin Islands (BVI), a well-known tax haven. It is one of the most sophisticated players in the property market dealing in hedging and property derivatives. The purchase was a joint venture between Delancey and an Australian pension fund. Delancey wanted the deal done in a combination of English, as the lead law, BVI, Australian, Jersey, and Japanese law. The lawyer for Delancey at the London firm of Olswang LLP took the lead in drafting the documentation used. Initially she expected the transaction to take several weeks, but the complexity of it combined with tax difficulties and the respective needs of local laws meant that ultimately it took six months to complete.

To make the joint venture work, the lawyers used BVI law to set up a special purpose vehicle to hold the assets of the transaction, but the actual sale would occur under English law. The key element in these types of transactions is minimizing the tax burdens that arise. Since Delancey is offshore, it is usually protected from UK Revenue and Customs, though not always. The transaction was complex, and as the lead UK lawyer said:

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

8. Olswang ranks number 32 on the Lawyer UK 200 with 321 lawyers and offices in the United Kingdom, Germany, and Belgium. It also has a "best friends" relationship with a US law firm, Cooley LLP, a San Francisco firm (Lawyer 2010).
The Olswang lawyer unpacked the role of the transnational transaction lawyer as one in which the attorney concentrates primarily on the deal yet may do many transactions for particular clients, rather than act as a continuing adviser. She put it this way:

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

Corporate clients, as Heinz and Laumann (1983) describe them, do not sit in the traditional professional-client relationship that Carr-Saunders and Wilson (1933) analyzed where the professional is the dominant member of the professional-client relationship. To them the relationship was an inversion characterized by patronage (Johnson 1972) where the lawyer did not so much exercise autonomy but rather discretion (Evetts 2002). It is apparent in the Delancey example the lawyer had very little autonomy. Her instructions were clear and to the point: Tax liabilities were to be minimized. This involved some sleight of hand so that the e-mails had to be routed to appear to go from London to the BVI rather than from Olswang to Delaney's London headquarters. The key decisions had to appear to be made in the Caribbean, not in London where they were actually made. The construction of the deal had to follow a prescribed course that would satisfy both legal rules and the tax authorities. Some may see the lawyer's behavior as fraudulent, but she and the clients saw it as normal. She remarked that many of her deals with this client followed a similar pattern and so had now become normalized for her and therefore contained no anomalies.

Was she being untruthful? In a strict sense, she was. As part of the course of business, these actions were ordinary. She could claim that as far as she was concerned. Delancey's decisions were made in the BVI and not London. The trail of the e-mails backed this up. And as long as she did not allow her tiredness to make her careless, the performance could be maintained. The tax authorities could mount an investigation, and the lawyer (and client) could potentially face sanctions for fraud from them and the Solicitors Regulation Authority, yet this was considered highly unlikely. The main point here is that although the
attorney saw her actions as somewhat underhanded, the behavior was not perceived by either lawyer or client as dishonest or even unethical (cf. Kirkland, chapter 8). Elizabeth Chambliss (chapter 3) describes this behavior as “ethical fading,” the loss of ordinary morality as expertise develops. If ethical fading is characteristic of development through the large law firm (Kirkland 2005), then it could result from the psychological pressure on actors to conform to group norms (Levin 2009).

We can also ask, was she a bad lawyer? From the client’s perspective, she was a good lawyer. If she had refused to do the deal in the way the client demanded, she would have lost the business and the client. It is significant that Delancy was a repeat player that generated significant billings for the firm. Even if the lawyer refused to do as told, the firm probably would have continued to act for the client with another lawyer. Goffman (1961) describes institutionalization—how people adapt to the mores of the situation they find themselves in. This is a capacity that law firms possess: They incubate their lawyers to act in particular ways with respect to clients and other lawyers. Delancy’s lawyer might have understood the moral ambiguity of her situation, but she did not let it trouble her as long as it continued with a semblance of normality. Corporate lawyers are put in this position all the time: they are subject to demands made by clients and senior partners (Kirkland, chapter 8). Their career paths depend on how well they carry out the demands. The pressures of work, clients, and billing do not give them much respite to reflect on what they do.

Conclusion

Transnational lawyering, especially of the transactional kind, exists in an ambiguous world of shades and shadows where nothing seems fixed. Clients take on new organizational forms. Lawyers move around from firm to firm, raising the specter of conflicts wherever they stop (Wald 2007). Transnational lawyering is the remit of a relatively small number of law firms which, by the nature of transactional work, are frequently working for the same range of clients. Clients demand tenders and estimates for work, and they are prepared to live with lawyers’ ethical conundrums as long as they don’t stop the flow of business. Moreover, in this area of legal practice, the client rules and the lawyer serves. Perhaps Goldsmith’s Brussels lawyer friend was not overly cynical in his description of practice as being all about billable hours and not service. I referred to Hughes’s conception of dirty work in my introduction, and here we can describe the lawyer as doing the dirty work of the client. The lawyer has
developed a carapace that removes the need to deliberate over moral ambiguity and instead accepts rule infringement as normal.

Kritzer (chapter 7) argues that the difficulty of understanding which of the many characters is the main client puts the lawyer in a position of continuing tension and conflict. If this is so, then how is a lawyer supposed to behave in an ethical manner? There is no easy answer. On the one hand, a lawyer should act with integrity as the rules state. But on the other, client demands can override the lawyer’s sensibilities. In most situations, the problems fail to arise because they are not brought to the attention of regulators except in exceptional situations as with Barry O’Brien. But even O’Brien and his firm, Freshfields, ultimately believed they had done nothing blameworthy, to the extent that O’Brien was rehired as a partner after a few years.

It may be that the perceptions of clients and lawyers are too far apart. Lawyers engage in a profession in which ethical responsibility is supposed to be taken seriously; however, clients demand total commitment from their advisers to their business ends. Here we see a double shift. The lawyer, to succeed in the corporate world, takes on the persona of business both in her own organization in maximizing her returns and as her guiding principle in serving her clients’ business. Does this mean business is amoral and that lawyers are prevented from acting ethically with corporate clients? Not necessarily. Even Adam Smith was aware of the role of morality in the marketplace when he wrote *The Theory of Moral Sentiments* (1759). And in the last few years, there has been a movement in business schools to introduce an MBA oath to “create value responsibly and ethically” (MBA Oath 2011).

Law firms are highly aware of the growing impact of the regulatory state on their practice, as repeated scandals like the US savings and loans debacle and the collapse of Enron graphically demonstrate. But what these appear to be telling us is what Simon (1998, 115) refers to as “another dimension of the loss of agency [which] is the lawyer’s insensitivity to the underlying moral stakes of his work.” Corporate practice is intensifying the moral anxieties of professionalism and will increase the pressures for external regulation over self-regulation. What these instances tell us is that socialization, conformity, and ethical fading are so prevalent, so deeply embedded into professionals’ lives, that there is no escape. These ways are the norm. Is it feasible to conceive of an alternative that could exist in the pressured world of the corporate law firm? I leave this open as I am convinced no quick fix is available; nor am I able to see how regulation would alter the situation. We may have to live with it.
References


Growth and Internationalization of UK and German Law Firms.” Organization Studies 26:1765-1785.


Cases and Rules


Solicitors’ Code of Conduct Rules 1, 3.02, 15 (2010).