LAWYERS and MONEY

Bret Walker SC

When China – one of the most tremendous economic powers ever to present its potential as such – applied to join the World Trade Organization, at the top of the requirements of that arm of international government came the law and the legal system. China had to undertake that it would carry through root-and-branch reforms before it was considered eligible to join what is currently the most pervasive grouping dedicated to improving international commerce. Like it or not, the WTO manifests a coalescing of nationally sovereign and privately mercantile interests with an unparalleled influence – leaving aside previous military-backed empires. What the WTO's members say really counts.

The demand, made and accepted in 2001, was that China apply and administer in a uniform, impartial and reasonable manner all its relevant laws, regulations and governmental measures. China must establish and maintain the requisite

tribunals – to be impartial and independent of concerned agencies of the executive as well as of any substantial interest in the outcomes of disputes. The slightly sceptical but officially optimistic announcement of the Office of the United States Trade Representative at the time of China's accession was referring to these law and justice reform projects when it heralded China's commitment to systemic reforms that would promote transparency, predictability and fairness in business dealings – and thus accelerate the achievement of China's own reform goals.

The US Senate Finance and House Ways and Means Committees asked the US General Accounting Office to monitor China's implementation of its WTO commitments. A preliminary report was given by the GAO to the Congressional Executive Commission on China in mid-2002. The rule of law, and the new WTO's member's mandatory aspirations with regard to it, were the focus, because they were such a critical part of the accession protocol. It was reported that US businesses considered them very important – especially as current actual characteristics of the Chinese legal system included

subordination of law to Communist Party policy and a lack of independence of the courts. Also reported were the “challenges” – a synonym for difficulties and obstacles – conceded by some Chinese officials consulted by the GAO. This was alongside the detected considerable progress, “on paper”, in China's efforts to render its legal system WTO compatible.

Not just on paper, so the GAO concluded, were some of what it termed substantial legal developments related to the rule of law, and thus to China's development toward becoming a rule-of-law oriented society. Those developments included, as a climax of the GAO testimony to Congress, the recent proliferation of law schools and legal training. More lawyers, in the service of business, especially through a sound system of justice. “Lawyers and money” is not only a chapter heading of the most cutting part of a *New Yorker* style book of jokes and cartoons.

Lest a notion of American condescension remain, the next early twenty-first century occasion for reflexion on lawyers and money flows from domestic US financial scandals, albeit with

global consequences. The spectacular rort at Enron – now on the widescreen – was merely the example of a supposed mischief best known to the general public. A supposed mischief? It wasn't the spectacle of big business using clever accounting and innovative so-called financial products or structures – the devising and use of them are still securely approved by shareholders and wider markets. No, it was the perception of crimes and frauds – telling lies when asked to show someone the money – that spurred the United States Congress to action. And at the heart of the latest response to the excesses of capitalist greed is a special whistle-blower rôle for the lawyers of possibly delinquent business clients – that is, clients reasonably suspected by their own lawyers, employed or retained, of breaking relevant legal standards concerning corporate securities. This is not an exotic foreign frolic – it clearly has influenced the various legislative suggestions afoot now in this country.

The *Sarbanes-Oxley Act* of mid-2002 may even be an illustration of the same attachment to an internationalized concern as the WTO demands on China as a new member also show. Governments friendly to business, at least that of their

own nationals, and willing to trade reciprocal standards with other governments, are clearly persuaded of the crucial part for lawyers in the serious matter of money and moneyed exchanges.

Under section 307 of the Act, the United States Securities and Exchange Commission was required to issue rules for minimum standards of professional conduct for attorneys involved in the matter, put generally, of issued corporate securities, most obviously equity shares. Foreign lawyers were expressly in the frame. The only explicit requirement for these new rules was stipulated to be an obligation to report – "up the ladder" – untoward and, most typically, dishonest corporate conduct. The draft rules went on to permit reporting, or dobbing, externally, to the SEC, without thereby breaching duties of confidentiality. The touchstone is the involvement of the attorney in suspect behaviour, presumably unwittingly until he or she forms the reasonable suspicion in question. It can be seen how much further the Americans were prepared to consider going, compared with the current and understandable Australian professional worries about privilege and loyalty to clients.

By August 2003, consultations were over, and the final rule was promulgated. Commentators from the organized legal profession had uttered various dire warnings, some with much substance. The requisite or desirable record-keeping was viewed askance by some, as increasing a corporate client's (or employer's) vulnerability in litigation by forcing reports which would be a treasure trove of selectively damning evidence. A new and glittering prize for pre-trial discovery. But the SEC pressed on, convinced that these new responsibilities for, and problematical dispensations of, commercial lawyers would enhance the proper functioning of the capital markets and promote efficiency by early remedy of illegal behaviour, thus boosting investor confidence – itself self-evidently good, however deluded some participants in irrationally exuberant booms have surely been.

How revealing of the most effective pressures for such radical change in professional obligations is it, that it was the perceived need for regulated and more or less honest capital raising which brought all this about. Congress's charge to the SEC in section 307, after all, was put in the language of "the

public interest and for the protection of investors". It they know the business of America at all, it seems Congressmen are – a majority at least – persuaded of the critical, protective rôle of lawyers in the world of money.

Of course, it is not only big business, international trade and the capital markets that display and need the good offices of decent lawyers. All the myriad transactions and relationships of private and business dealings, large and small, that are the economic and property aspects of modern society, evidence the same dependence. Whatever else should be boasted or confessed about lawyers and money, one is entitled to resent the nonsense of the legal profession being unproductive. Let wheat and beef growers, manufacturers of widgets and coal magnates imagine the results of their undoubtedly productive efforts without laws of contract, punishment of theft and enforcement of quarantine regulations. Then let them realize the essentials of government, and the integral component of government that is the part of lawyers. Even the most Luddite critic of the WTO, after all, shares its regard for the rule of law, differing only on the desirable extent of what may be called globalized jurisdiction.

The note of self-congratulation starts to falter at this point. The useful service of mercantile interests, in the public interest, poses conflicts and embarrassment for the legal profession, in ways that are not new but are newly urgent. Traditional restraint and constraints are freshly needed, but may not be adequate in their traditional forms. Imitation of clients is universally rejected when lawyers represent criminals, but is massively growing in the case of lawyers advising on and representing the interests of money, that is money lawfully obtained and used.

Before elaborating on this, there is the perennial but less pressing matter of fees – mostly called the cost of legal services in order properly to reflect the viewpoint of those who buy rather than the lawyers who sell. The price of all staples is a sensible topic of public discussion and scrutiny, and none the less so when the field or market can be graced with titles such as access to justice. That said, one fairly recent change, following about a decade after the Americans, has been the almost complete suppression of customary embarrassment at public disclosure, or

even boasting, of lawyers' revenues. This connects with observations about big-firm practice a bit later on.

Only about one-half of law-school graduates take up careers in private practice. There are other important ways of practising law, as government public servants, as corporate counsel, and in legal aid and other salaried non-profit sector positions. But public comment on lawyers and the money they get fairly focusses the emphasis on those lawyers – probably the largest category although a minority of the whole profession – who derive income from fees paid by clients. Are those fees too high? The answers range from the hostile affirmative from those who regard lawyer jokes as sound sociological observations, to the righteous negative justified by market concepts that has begun to dominate the organized profession's political position here and in similar jurisdictions. Because the question is framed in relative terms, and is usually posed in a judgemental context, the wide range of answers can simply be noted, with a quiet rider that very similar questions could be asked about every other profession, trade and occupation – and often have been.

Regulators of the profession, it is interesting to learn, have not seen evidence of any major, let alone growing, incidence of genuine complaints about over-charging. Such complaints recur, but not at rates that suggest anything like a major problem. Some reasons are, probably, that prior disclosure and agreement of legal fees are now not only compelled but also observed, that litigation fees are indirectly supervised by the courts especially through costs orders against losing parties, that commercial transaction fees increasingly are struck in competition against other advisers such as accountants and merchant bankers, and that – yes – there are in fact a lot of clients who observe how hard and well lawyers work to provide their services. It could be that a market moderated in these ways not only explains but could continue to reduce the lesser prominence of over-charging than populist attacks on the profession might suggest.

Complacency, self-satisfaction and a kind of guild smugness, however, await a legal profession content to leave issues about the level of legal fees, in this neat package. Other less well remunerated but also tertiary-educated occupational groups are entitled to challenge lawyers who call in aid their

years of study and early period of modestly paid apprenticeship: the one is not so long, comparatively, and the other is perhaps not long enough. Could HECS payments be the next form of this kind of self-justification? What multiples of annual earnings could one seriously claim on that account?

Another link to observations a bit later about big-firm practice is that, increasingly, the pay of lawyers is justified by reference to the money offered in, say, London, New York and Chicago. It suffices here to ask, how does one define the supposed market in which the salaries given for professional serfdom in those centres of commerce somehow raises what should be paid in Sydney, Melbourne and Perth? Sanity checks can and should be applied. If you want a New York salary, go there. If you are embarrassed by your large local fees, why not call them excessive and therefore reduce them? Should lawyers perhaps see their most expensive colleagues as, just maybe, <u>not</u> the best value for their clients – at least until verifiable top performance shows the opposite to be true?

Litigation – the ugly word for what access to justice seeks to multiply – currently displays aspects of a legal culture war. The Bar's (and some solicitors') time-honoured speculative ("spec") briefs long ago won the High Court's admiring approval. Almost as long ago, barristers recognized the possibilities for corruption posed by the spec representation of plaintiffs for whom the best, or only, prospect of a financial return might turn out to be a settlement – that is, a compromise less than the client wants, as compromises tend to be. The Bar now has rules that try to corral those base instincts. Historians will say, however, that the existence of a prohibition is some proof that the prohibited practice is occurring, in fact. Conflicts of interest and duty are by no means theoretical, in all spec work.

In hindsight, it is not surprising that the noble if flawed tradition of spec briefs – no win, no pay – has flowered, or exploded, into the frankly entrepreneurial industry of litigation funding, usually associated with what are inexactly dubbed "class actions". No-one who has advised or appeared on either side of these models of modern litigation could be unaware of the fertile soil they present for conflicts of the most venal kind. Who are

the clients? Who is the master of the case? What does it mean, socially and professionally, for litigators to spur into action those whose claims were neither pressing nor large, but who belong to a formidably large group of similarly unenthusiastic pseudo-litigants? Apparently, it produces major litigation, enthused (if one should use that divine metaphor) by the money it promises for funders and lawyers. But who is to say, and on what grounds, that this kind of money for lawyers does not, in reality, provide justice where formerly access to it was too expensive? The High Court will soon be looking at these questions.

A former Bar President cannot depart the topic of legal fees without reliving shudders about lawyers and the flouting of taxation obligations which are meant to come – as surely as death to us all – from the receipt of professional income. Because it is lawyers, not just barristers, or New South Wales. There is a kind of reassurance of proper values being not quite moribund to be had from the grim reflexion that this was, and correctly, seen as the worst scandal in the Australian legal profession since convicts ceased to have a right of practice in penal colony days. Lawyers have no better immunity than anyone else from the

undemanding requirements to render annual returns of income and to pay the tax due on it. If anything, the publicly funded system in which all lawyers – not just litigators – work makes it all the more intolerable that some lawyers resist meeting such reasonable obligations. And the statutorily deemed debt that is income tax is not, contrary to a stray dictum in the Court of Appeal, indistinguishable from debts incurred in private life. Lockean theories of civil society can be taken only so far. Welshing on the democratically set tariff for benefiting from organized society is, as the Court of Appeal has well and truly held, a special sign of unfitness for the office of lawyer.

This peculiar, and one hopes temporary, embarrassment from a dysfunctional relation between lawyers and their money has undoubtedly added to the burdens of leaders of the profession when they lobby politically for the really very modest money demands of their most vulnerable clients, those who have suffered personal injury through the negligence of those with a duty to care for the physical safety of those clients. Lawyers are now constantly met with strident, if usually unmeritorious, protests that the lawyers are merely engaged in a colourable

crusade to line their own pockets. It is, of course, true that restored or enhanced rights to compensation for the injured will, in a society generally opposed to excessive bureaucracy, end up providing work for the lawyers engaged in such disputes – and that remuneration for those lawyers will be a part of those lawyers' incomes. The same truism applies to those who provide food, shelter and healthcare for those who need it – but that does not or should not disqualify providers of those social goods from being politically active in the promotion of fair and general access to those goods. Actually, providers quite often know quite a lot about the weaknesses of current methods of provision. But for some time to come lawyers will be handicapped, even more than by usual cynical responses, in their efforts to advocate the claims of injured people to fair compensation by money damages.

This may well delay the preferable solutions to the so-called insurance crisis – leaving the least well placed victims no better off. The utopia of prosperous insurance companies – for who nowadays wishes them to teeter on the edge of insolvency? – covering the legal (and moral) obligations of wrongdoers to a

proper compensatory extent is more distant than ever. Even the competition policy that permitted lawyers to advertize has been displaced in governmental resistance to personal injuries litigation as a business. Lawyers and their money have some measure of responsibility for this decline in civil decency.

Meantime, over the last two decades the legal profession, here somewhat in advance of the United Kingdom, Ireland, and North America, has been officially told to face up to being in business. Although there has been no legislation or official rhetoric that countenances any backsliding with respect to professional ethics and integrity, there has been any number of government enquiries and resultant statutory overhauls to enshrine, proselytize and – to a degree – compel the observance of competition principles. In this country, the regulatory politics have gone so far as to challenge, as anti-competitive, the Bar's definitional prohibition against the combination in business of advocates who would otherwise be each other's competitors. Fortunately, that challenge has yet to succeed.

The recent thoroughgoing reviews of the legal profession in England and Wales and in Ireland, themselves prodded by European competition policy and latterly informed by the experience in Australia, overall concluded that most aspects of the institutional structures and practice regulation of lawyers should conform to the laissez-faire model overtly driven by self-interest for money. In the lobbying clinches, time and time again consultants to these enquiries made clear their political economy bent: the provision of legal services is not so different from that of any goods and services, many of which also require obvious quality and honesty regulation. Otherwise, these pundits have successfully preached, government should remove all restrictions – especially those that might affect capital-raising (equity or debt) and new ways of aggrandizing revenue. Lawyers and money are thus treated as amounting to legal practice as entrepreneurial business, to be encouraged to act according to the profit motive.

None of the law reform reporters or Attorney Generals responsible for the slightly muted competition march in Australia has intended any weakening of the legal profession's ethical

vigour and contribution to the administration of justice. But their failure to slow let alone halt the slide into legal practice as a business brings about intolerable conflicts of interest and duty, old in kind but new in magnitude. Of course competition policy and principles have inspired some salutary changes to the profession, not least an insistence that the organized profession justify in the public interest its grab-bag of rules and customs, some of which could sensibly be thrown out or dusted off.

In parallel, and not by mere coincidence, the last three decades of litigation and court reforms illustrate a continuing paradox of that project. As the court system improves in the direction of "just, quick and cheap" – never forget that comma – one of the aims as well as a major technique is to reduce the volume of contested cases. This is to direct the public funding and the private expense of litigation to the tiny minority of cases where compromise is either not preferable or not possible. But as success lowers delays in lists and speeds up hearings and streamlines costly procedures, so the calculus that determines which cases are better settled or fought shifts in favour of fighting. In this endless circle, the relation of lawyers and money

displays in its most striking fashion the responsibility for and dependence on government and public funding, imposed on and enjoyed by all lawyers.

How could lawyers discharge that social responsibility and honour that dependence if the worth and standing of individual lawyers came to be measured in direct proportion to their generation of revenue? What chance would the practical tenets of litigation reform such as due proportionality of resources to a dispute have, if the profession, metamorphosed into business for profit, explicitly disapproves a lawyer devising the cheapest expedient for the client? Imagine if medical practitioners took the approach that professional kudos should go most to the doctor who performs the most procedures for the largest fees on a particular patient. Why should the mercantile aim of much contemporary practice of law not be just as shocking as those imaginary false doctors?

It is not as if, after all, competent and hard-working doctors and lawyers make inadequate incomes, however one assesses the relativities.

Or has that observation lost its force, by the much closer proximity of commercial lawyers, in the service of big-business clients in particular, to other providers of advisory services to capitalist enterprise? Lawyers are frequently parts of multi-disciplinary teams helping big business do business or government sell public assets as a form of very big business indeed. Other members of those teams are accountants, from whose international experience in the last decade one would have thought big-firm lawyers could yet learn. Leaving firm collapses aside, attempts to address the systemic ill of trying to do too many fundamentally different things at the same time to produce the same revenue-stream, from big-business clients, are the most obvious change in the accounting profession for many decades. The separation and hedging about of the audit function is the headline item.

Accountants are well-paid, too, and it may be that some are so well paid that they have encouraged commercial lawyers to feel their own value somewhat under-appreciated by their common clients. But perhaps the star turns which should never

be emulated by practising lawyers, but have perhaps been the remuneration light on the hill for some, are the merchant bankers. Scarcely merchants, although very mercantile. Usually not really bankers, but rolling in money. With pieces of the action, capitalist venturers, and people the lawyers briefly knew at university. No wonder the published aspirations of many big law firms have much more in common with large accounting combines and dazzling millionaires factories, than with their legal colleagues in small firms, in the country and in sole practice.

So too, it may appear, much of the work of commercial lawyers, and not only in big firms, has a diminishing connexion with justice, let alone an involvement in its administration. The wrong fork in the road was taken when the profession determined to specialize and sub-specialize its brightest graduates almost as soon as they had obtained their generalist law degree and practical legal training. In many cases, the commercial lawyers are really part of the clients' entourage, being served with the client by the litigators and counsel. Perhaps it is time for that division to be recognized formally: by the business-services part

of the legal profession, the lawyers closest to the big money of their business clients, having nothing really to do with the general corpus of law and no real interest in the administration of justice, to leave the legal profession and join with the management consultants, accountants, finance brokers and merchant bankers.

Excessive proximity to business clients, and their money, seems to have produced elements of imitation unlikely to enhance professionalism. The phenomenon of the big – and bigger and bigger – law firm should probably not simply be witnessed passively as if it were a force of nature. If we pinch ourselves, it will be remembered that not long ago the leading firms in this country, big by the standards of their times, had so few partners and staff by the standards of our time that they would not even be considered as mid-tier firms. Were they able to conduct the largest and most complex litigation, minister to the most important property and commercial transactions, that their clients required? Could they carry out the legal research and inculcate the learning and scholarship needed to advance the law and win the hardest cases in the highest courts for their clients?

Were they good lawyers? Were they undervalued as members of society and as professionals? Did they live in penury? I suggest the answers to these questions utterly vindicate those many solicitors – fortunately, still a majority – whose practices are conducted through what are condescendingly called small firms. The answers to those questions certainly do not support the truth of slogans such as “grow or die”. They do not substantiate the claim that only mega-firms have the capacity, whatever that means, to provide the services required by mega-cases.

One of those mega-cases being fought at the moment caused a press commentator to wonder whether it was not so expensive even for the magnates involved as to be the last hoorah for such major litigation. For some, this would be wishful thinking, for others an appalling downturn in their market. It is as unlikely as the death of the novel. Very large pieces of litigation are not simply to be deplored – very large forces especially in commerce do have disputes with each other, sometimes on a tectonic scale. Of course this jurisdiction and its lawyers are the best place and people to help resolve such disputes, naturally at keen prices that represent good value.

Mega-cases are not really the problem. Thinking that the possibility of them from time to time means mega-firms need to exist constantly, is a problem.

The competition theorists mentioned earlier frequently talk up the promises of economies of scale. The idea is that a mass-produced motor car will be much cheaper than a custom-made one with comparable specifications, and may even be better. Everyone wins (apart from the custom-builders). If that analogy held good for the provision of legal services in private practice, the biggest firms would have the lowest fees. But they don't. If it held good, the biggest firms would provide legal services to the broadest range of willing clients. But they don't. Motor car manufacturers don't incur fiduciary and other obligations like confidentiality which prevent them from selling their models to all-comers. Lawyers do. The economy of scale is not a useful concept to justify more and more lawyers becoming less and less available to more and more clients – which is an inexorable effect of big firms, demanding business clients and reliable registers of conflicts.

The financial pages of serious newspapers, following a lead in Britain and North America starting about two decades ago, have started to report and discuss the performance of big and aspiring middle-sized law firms in a sometimes fascinating mixture of sporting journalism, theatre reviews and gossip columns. Virtually the only yardstick of performance, equated to professional quality, and thus held out to new recruits including the brightest and best, is money. Very occasionally, the money won for the client, never the money saved by the client, nor the value bought by the clients' money. Mostly just the money received by the firm, the revenue. To rub it in, the figures are presented and re-presented to drive a message home. Whether it is the journalists or the firms who want the message sent is difficult to say – but one rarely reads of disclaimers or resistance by the firms with the glittering figures. What is the message? That money defines the most desirable professional attainments in private practice: see the number of leveraged fee-earners per equity partner; the revenue per head of professional staff; the margins between revenue and costs; and especially the profit per partner. Business clients presumably put up with this perverse

publicity on the part of their chosen lawyers, because imitation is understood to be the sincerest form of flattery.

It is doubtful whether the unparalleled, elaborate and intelligently managed businesses which are the big law firms have defenders who seriously claim those firms are uniquely capable of doing what only much smaller firms always used to do and what many much smaller firms still do – that is, deploy learning, integrity, imagination and loyalty in the fused service to clients in the administration of justice. What attribute necessary for that exercise may be found only in big firms? If really large teams are from time to time required, why not form ad hoc alliances? After all, the provision of the most skilled and sought after advocacy has been done in that fashion for over one hundred and fifty years in this country – it involves briefing a sole-practitioner barrister.

It would be demeaning to justify big firms getting bigger so as to provide lots of IT, word-processing and photo-copying. Those activities are no more professional than stationery is the business of a bank – they are means that can be bought in from

time to time. And they should be bought in, as a matter of ethics, at the lowest cost reasonably available for the appropriate quality, so as to avoid disloyalty to a client.

If all this misunderstands the way the world is, and vainly protests against progress, the path taken by lawyers imitating business clients has some interesting milestones coming up nearby. Business out-sources not only clerical drudgery but also highly-skilled and relatively capital-intensive IT and document management – and out-sources them to the ancient home of mathematics in India. Why shouldn't massive mindless discovery be conducted in Mumbai, with the requisite partner in charge going there to supervise paralegals retained just for the case, at much much cheaper prices than permanent paralegals on staff in Sydney? If money is the measure, who would dare to say that money for the lawyers is more important than money saved by the clients? Whenever functions or activities in the practice of law are no longer the essentially mental, personal and individual professional responsibility of lawyers, then the money spent on those other activities and functions surely should be spent as cheaply as possible in the clients' interest.

The money necessary to keep a big firm going, to open the doors every morning (assuming they ever close during the 24 hours), is pretty scary. Decent human and social responsibilities to the many members of staff and their families mean that the partners and lawyers must generate very large sums of money by fees from clients, at a more or less constant level. Perhaps it is time to question whether that business model does not present in the most obvious fashion imaginable an intolerable conflict between the partners trying to do the right thing by their colleagues and staff at the firm, and doing the right thing by minimizing their clients' expenditure on legal services.

That conflict is presented in a form of dispute that very rarely reaches public attention. One of the less pleasant areas of advice work for some lawyers is that of partnership disputes, once upon a time dissolutions but now usually expulsions, among the partners of the larger law firms. There is good reason, from the point of view of public relations if not on account of personal embarrassment, for these disputes very, very rarely to go to court. Increasingly over the last fifteen years, expulsions (and their

precursors, downgrading of remuneration and support) have been decided on the basis of performance. What could possibly be wrong with that? Well, performance is invariably measured by money – and only money in the form of revenue. The partnership deeds, the manuals and the protocols all have commendable and sincere statements of professionalism, ethical service to clients and adherence to the requirements of law and justice. Those explicit standards of practice, not measured in money revenue terms, only make it all the clearer how key revenues have become. The non-mercenary standards are available to judge performance, but they are not used. Only revenue. Financial reasons are obvious and understandable. They include equally understandable grievances at partners who are not pulling their fair share of the heavy weight of paying to keep a big firm in business.

One expedient, which may defer that intolerable conflict being seen to be intolerable by enough people for the temptations to be removed, is for lawyers to join their business clients lock, stock and barrel – not only the modest degree of corporatizing already permitted, but out-and-out commercializing with publicly

raised equity capital. Why should their own IPOs not become a new kind of professional achievement for lawyers?

When Teddy Roosevelt took on the Rockefellers and their ilk, Standard Oil must have appeared to be a natural growth of business conducted with appropriate self-interested vigour. There are probably still many who think anti-trust policy should never have made it into the statute books in the United States or anywhere else. As you may have gathered by now, I'm not one of those. Industrialists and money need curbs and controls especially in relation to size and domination. So too, lawyers and money.

18th October 2005