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Remembrance of things past & present

None of us should be surprised by the recurring threat of competition from accountants, says **Roderick Ramage**

Can companies be trusted? It depends. Fifteen years ago, the questions were: What did Sir David Clementi say in his final report on his Review of the Regulatory Framework for Legal Services in England and Wales? And, what will be the consequences? To the first Sir David answered, between the lines, that commercial incentives rather than ethics should be relied on to uphold professional standards. To the second, Parliament enacted the Legal Services Act 2007, by which alternative business structures (ABSs), in which the ownership of law firms could be split from their management, so that a law firm with outside equity investors or an existing business (eg Tesco, the RAC, the Co-op, accountancy firms), may be registered and authorised to practise the law as solicitors. The questions that might be asked now are: What has happened? And, does it matter?

Corporations & individuals

Law and morals are uneasy bedfellows. The concept of a moral or an immoral corporation is an oxymoron. A corporation is an artificial person with such powers as are given to it by statute or its constitution, its articles of association in the case of companies incorporated under the Companies Acts 2006.

Individuals can be greedy, dishonest and generally nasty and they can also be generous, conscientious and generally want to do the 'right thing'. That is human nature. The conduct of individuals is governed by influences including the law, economics and morality. For some money is the only purpose of work and for others it what you hope to get if you do your work right.

In contrast corporations have only one function, which is to make profits, and if they have to lie, cheat, steal or kill to make money, they will do so: although tobacco companies have no intention of killing anyone, it is beyond medical doubt that their activities do kill (ie shorten the lives

of) their customers. Corporations may obey the law (or even do the right thing), but not on moral grounds or because it is the right thing to do. Someone will have worked out whether it is more profitable to obey the law or to flout it and pay the fine.

The company law duty of a corporation's directors, long and well established by the courts, is to look after the interests of the shareholders, which means the maximisation of profits (whether income or capital). Directors who pursue any other aim are in breach of their legal duties.

Conflict of interest

In evidence to Clementi, the Bar Council, in contrast with the Law Society (which failed to address the question), referred to 'the conflict that would inevitably arise between the commercial interests of the owners and the ethical duties on which the practice of law is based. An owner of a law firm who was not a lawyer and therefore not subject to those duties would be perfectly entitled to pursue his own financial interests, even in circumstances where those conflicted with the best interests of clients of the firm or with other core values of the legal profession'.

Clementi dismissed the point without reasons, saying: 'It is not clear, however, that the Bar Council's argument is correct.' Thus we have a law, in which conflicts of duty for professional staff are structurally built into the models for professional practice with outside investors, so one must rely on regulation alone to ensure that corporate providers of law services behave in a 'proper manner'.

Regulation vs ethics

When you regulate individuals, eg to maintain professional standards, you are halfway there, because most of us want, more or less, to do the right thing but need guidance, and a few need to be stopped in their tracks. Regulating corporations is totally different. No matter how 'good' an individual working for a corporation might

be, the corporation itself knows nothing of good or bad, of public interest or doing what is right. Its directors' duties are not to do what is right, unless it happens to be in the corporation's (ie its shareholders') interests. A regulator of professional individuals has only to deal with the bad apples (hopefully a minority) and give guidance to the rest of us, but a regulator of a profession of corporations must deal with bodies, which are driven solely by their non-professional shareholders' demands to maximise profits, and so must set procedures on the assumption that there is no intrinsic willingness to follow guidelines.

The consequently increased reliance of regulation carries two dangers, one being over-regulation and the other being that high grade crooks are smarter than regulators. If we are to have outside shareholders, we will also need a corporate structure, which, whilst not losing the profit motive, draws back from the excesses to which we are inevitably driven by company law.

An answer to the ethics and regulatory problem is to require that every ABS with non-lawyer investors and managers to entrench in its articles, the purpose of (say) practising law in accordance with the mandatory principles in Pt 1 of the Solicitors Regulation Authority handbook. This would not be a cure-all, but it would provide a strong defence to professional staff, if put into a conflict between professional ethical and corporate pressures. If an 'outside' investor were to object to such a requirement, one must assume that, where there is a conflict of interest, commercial pressures will be bound to outweigh professional standards.

Future reality?

Early in his first presidency, during the extraordinary rendition scandal, George W. Bush was advised that parts of the Geneva Convention on humanitarian treatment in war were 'quaint' and 'obsolete'.

In the years from then until now, the coalescing for the profession into fewer larger bodies with offices in all parts of the country, is that the financial pressure of running large practices and the detachment of the 'equity' members of firms from the direct practice of the law create conflicts between commercial and ethical standards, even without outside investors. If that is so, we might have to accept that increasing regulation, rather than individual ethics, is the main method of maintaining standards and that the concept of personal responsibility for professional ethics too is regarded by many as quaint and obsolete.

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