

# *The Legal Profession and the Business of Law*

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## *Abstract*

'Professional Responsibility and Ethics' is one of the 'Priestley 11' law subjects compulsorily undertaken by Australian law students who aspire to be admitted to practice. Many of the brightest join the major corporate law firms. Nevertheless, there is little theoretical analysis of how those firms are functioning to affect the professional and ethical conduct of their practitioners in the neoliberal state. In this article it is argued that in the mature and highly competitive marketplace for legal services, rather than working as autonomous professionals, corporate lawyers are now finding themselves working more and more as functionaries subservient to the dictates of their corporate clients. Drawing on interviews with Australian major law firm corporate lawyers and Charles Derber's theory on the proletarianisation of professional workers, it is argued that corporate lawyers are losing key elements of their professional identity in the impetus to maintain the client list and the profit motive. Furthermore, as the balance of power in the corporate legal sector is shifting from law firms to clients, the professional ethics of law firm lawyers are at risk of being compromised as they find themselves being reduced to little more than 'flush' factory fodder for the major corporations.

## **I Introduction: the Legal Profession and the Law/Business Nexus**

For some years now scholars have been writing about the deprofessionalisation of the legal profession, a malaise which, it is claimed, has infected the profession to the extent that 'the noble profession'<sup>1</sup> is 'losing its soul'.<sup>2</sup> Indeed, just what it means, or should mean, to be a legal professional working in corporate legal practice in Australia at the beginning of the third millennium is highly contested. Lawyers searching for meaning in their working lives are caught up in the crossfire of a battle for ascendancy between two discourses.

The first is the discourse of 'professionalism'. The professions are market organisations whose legitimacy rests on a social bargain to exchange the status and

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<sup>1</sup> Michael Kirby, 'Billable Hours in a Noble Calling' (1996) 21 *Alternative Law Journal* 257.

<sup>2</sup> Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, 1995).

privilege they receive from their intellectual and organisational domination of their field for ethical and altruistic service in areas of social concern.<sup>3</sup> Professionals have been defined by sociologists as those having: expertise based on theoretical knowledge and extended education; practices and organisation to test the competence of members; an ethical code of conduct; and altruistic service.<sup>4</sup> The key to the integrity of professional practice and work has historically been 'autonomy'; that is, relative or absolute freedom from external authority and having the privilege of peer or self-supervision. It is the image of the 'free' professional that has distinguished the professional work of lawyers from that of non-professional, 'proletarianised',<sup>5</sup> industrial labour.<sup>6</sup>

The second discourse is that of 'neoliberalism'. Neoliberalism is driven by a rationality that privileges the logic of the market.<sup>7</sup> Within this logic, economic interests are favoured over the social realities of individual workers. Its effects, though the 'intrusive imposition of commercial values',<sup>8</sup> have the propensity to condemn old solidarities — such as professional associations — to the margins, if elements of their practices, such as professional autonomy and altruistic service, threaten to subdue profit maximisation and economic efficiency.<sup>9</sup>

As Thornton and Luker argue,<sup>10</sup> neoliberalism, with its emphasis on deregulation, entrepreneurialism and the maximisation of profits, has dramatically impacted on workplace relations with significant social consequences. Further, as a global phenomenon itself, neoliberalism has served to animate the phenomenon of economic globalisation. It is now the case that major corporate legal practice is caught up in the globalisation juggernaut that has seen the traditional boundaries to economic activity disappear and 'the most aggressive, innovative and intelligent players ... searching the world for opportunities to create global markets'.<sup>11</sup> The major corporate law firms are seeking to provide 'the infrastructure and certainty of expectations that wire together all the different parties in wide-ranging jurisdictions and make global business possible'.<sup>12</sup> Individual lawyers, however,

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<sup>3</sup> Marion Crain, 'The Transformation of the Professional Workforce' (2004) 79 *Chicago-Kent Law Review* 543, 550–1.

<sup>4</sup> G Millerson, *The Qualifying Associations: A Study in Professionalism* (1964) in S Ross and P MacFarlane (eds), *Lawyers' Responsibilities and Accountability: Problems and Commentary* (Butterworths, 1997) 18. See also E C Hughes, *Men and their Work* (Glencoe Free Press, 1958).

<sup>5</sup> In Marxian theory, by 'proletariat', Marx meant the class of wage-labourers who, having no means of production of their own, were reduced to selling their labour-power in order to live. See Karl Marx, 'The Communist Manifesto' in Robert C Tucker (ed), *The Marx-Engels Reader* (W W Norton, 1972) 331, 338.

<sup>6</sup> Charles Derber, 'The Proletarianisation of the Professional: A Review Essay' in Charles Derber (ed), *Professionals as Workers: Mental Labour in Advanced Capitalism* (G K Hall, 1982) 13, 13.

<sup>7</sup> Pierre Bourdieu, *The Essence of Neoliberalism* (December 1998) *Le Monde Diplomatique* (English ed) <<http://mondediplo.com/1998/12/08bourdieu>>.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> Margaret Thornton and Trish Luker, 'The New Racism in Employment Discrimination: Tales from the Global Economy' (2010) 32 *Sydney Law Review* 1, 3.

<sup>11</sup> James David, 'The End of Trade', *Business Review Weekly* (Melbourne), 25 August 2000, 88–9.

<sup>12</sup> John Flood, *Globalisation and Large Law Firms* (2008) <<http://www.johnflood.com>>. See also John Flood, 'The Cultures of Globalization' in Yves Dezalay and David Sugarman (eds), *Professional Competition and Professional Power* (Routledge, 1995) 139, 140–1. Flood asserts that

are finding themselves caught in the flux of the continually re-engineered workplace that marks 'flexible capitalism'.<sup>13</sup> In an economy of 'entrepreneurial disorder', indifferent to people and devoted to the short term,<sup>14</sup> it is not surprising that the pace of workplace change, with its concomitant 'increased commercialisation of the industry, lack of human contact, information overload and inadequate support for young lawyers', is engendering a somewhat negative mindset in commercial lawyers.<sup>15</sup>

The aim of this article is to utilise Charles Derber's theory on the proletarianisation of professional workers as an epistemological tool in order to better understand corporate legal practice in its current milieu.<sup>16</sup> In the first part, the research methodology is detailed and Derber's theory is explained. The methodological approach is based on a concern firmly to posit tangible human existence, rather than intangible market imperatives, at the centre of this analysis.

In the second part, qualitative research interviews are used to examine the mature and highly competitive market for legal services.<sup>17</sup> The attributes that are now required of lawyers for professional success are explored and it is argued that corporate law firms are (re)forming themselves into the image of the ever-merging, 'big business' clients they serve.<sup>18</sup> As such, it is contended that the professional identity of corporate lawyers is changing somewhat from 'wise counsellor' to 'slick marketeer'. Furthermore, there is evidence that the workplace regime which valorises a service ethic where 'the client is always right' is functioning not only to diminish the autonomy of lawyers vis-à-vis their powerful corporate clients, but also to impact deleteriously on the ethical standards of legal practice.

Finally Derber's notion of the ideological proletarianisation of professional workers is drawn on in order to examine the professional status of corporate lawyers. It is suggested that many of Australia's elite corporate lawyers are at risk of being reduced to mere functionaries, proletarianised in a process of capitulation to the power of their clients and to the productive forces of 'big business'.

## *The Research*

The qualitative research that informs this article was conducted in Melbourne in 2005 and 2006. Fifty lawyers working in 10 of the major commercial law firms

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any profession that serves corporate finance and commerce will be in danger of withering unless it can at least attempt to transcend national boundaries.

<sup>13</sup> Richard Sennett, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (W W Norton & Co, 1998) 9.

<sup>14</sup> *Ibid* 147.

<sup>15</sup> See LexisNexis, *Whitepaper: The Pace of Change in the Australian Legal Industry* (August 2011) <<http://www.lexisnexis.com.au/paceofchange/>>.

<sup>16</sup> Charles Derber, 'Professionals as New Workers' in Charles Derber (ed), *Professionals as Workers: Mental Labour in Advanced Capitalism* (G K Hall & Co, 1982) 3–7.

<sup>17</sup> The research was undertaken for the author's doctoral thesis on 'Work Practices and Culture in Major Australian Corporate Law Firms'.

<sup>18</sup> Marc Galanter and Thomas Palay, 'The Transformation of the Big Law Firm' in Robert L Nelson, David M Trubek and Rayman L Solomon (eds), *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Cornell University Press, 1992) 31, 31.

(five top-tier and five mid-tier firms by revenue) operating in Melbourne, with national and/or international affiliations and officers, were interviewed.

The research consisted of 50 semi-structured, in-depth interviews with partners, employed practitioners and also practitioners who have chosen to leave the employ of the 10 firms selected (that is, who have gone in-house or are part of the attrition rate). Participants were asked about their experiences and perceptions of work practices and the workplace culture within the firms in which they are working and in the legal profession in general. The questions were voiced with specific aims. They were: to examine the rationality that determines the organisation of work in contemporary corporate law firms; to discern how that rationality is affecting the professional identity of the individuals involved and the nature of the legal profession; to ascertain how entry to the top echelons of corporate legal practice is permitted or impeded; to identify any damaging or discriminatory effects which might flow from the organisation of work; and finally, to examine how the organisation of work affects practitioners' work/life balance.

The data collected were analysed under four headings: 'Legal Practice', 'Professionalism', 'Women Lawyers', and 'Work/Life Balance and Young Lawyers'. Clearly, however, there is considerable interlinking between the many workplace issues impacting on lawyers' lives as individuals and as legal professionals and the material relations determining both capital accumulation and power accumulation within firms and with clients. This article draws primarily on the data collected relating to Legal Practice and Professionalism.

The interviews were taped and were generally in the vicinity of one hour's duration, with several 'time-poor' senior associates having to restrict the interviews to approximately 40 minutes and a number of the more expansive lawyers, particularly partners, generously contributing considerably more of their time to the research.

A small number of participants were lawyers who had been referred by colleagues to the author as people who might be prepared to participate in the research. In order to ensure methodological integrity, however, most participants were randomly selected from the websites of the selected firms and a small number of participants (solicitors) were obtained via the 'snowballing' effect with one interviewee recommending another. Gender balance and diversity of experience across areas of practice were aimed for. Of the 50 interviews conducted, 30 partners (18 men and 12 women) were interviewed; six senior associates (five men and one woman) and three senior counsel (one man and two women), with the balance being employed solicitors or solicitors who have left the particular practice (one of whom was male). For reasons of confidentiality, where quotes from interviews appear in this article the interviewee is referred to only by gender and position held in the firm; Female Partner or Male Partner; Female Special Counsel or Male Special Counsel; Female Senior Associate or Male Senior Associate; and Female Solicitor or Male Solicitor; and the city and date on which the interview took place. This article is necessarily an interpretative account of how these corporate lawyers view contemporary legal practice.

There is no doubt that the impacts and effects of workplace changes on major corporate law firm lawyers are profound:

Certainly competition for client business or market share has changed dramatically and probably the most dramatically within the last 15 years, with the nationalisation of practices, with globalisation of clients, with the breakdown of traditional client-firm relationships. All those things have really added very new dimensions to practices and have added substantially new requirements to what is expected of someone in practice.<sup>19</sup>

The work of legal professionals that was once characterised by the provision of frank and fearless advice which transcended self-interest and commercial self-advantage has changed:

We've still got our ethical rules but I think more and more we operate as a business. I mean I think that's evolutionary rather than revolutionary but we're certainly going down that evolutionary track.<sup>20</sup>

Q. Do you see legal practice as a business rather than a profession now?

A. Yes, we are selling something.

Q. Legal services?

A. Yes, and we're not one of the noble professions any more. The law, medicine and the Church have all been bashed about with this.<sup>21</sup>

Corporate legal practice is now very big business. It has been transformed into an industry — the 'legal services market'. As such, the legal services sector in Australia makes a significant contribution to the Australian economy<sup>22</sup> with legal services contributing A\$11 billion to economy and generating A\$18 billion in income in 2007–08.<sup>23</sup> Indeed, some of the larger Australian law firms have incorporated or are considering incorporation in order to release them from the restrictions they encounter under the 'very unsophisticated' and 'out-of-date' partnership model.<sup>24</sup> In Victoria, to facilitate change, the very concept of 'law firm' has been expanded under the *Legal Profession Act 2004* (Vic).<sup>25</sup> Australia's most prestigious law firms operate as mega-businesses advising many of the nation's top

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<sup>19</sup> Interview with Male Partner (Melbourne, 22 November 2005).

<sup>20</sup> Interview with Male Partner (Melbourne, 7 December 2005).

<sup>21</sup> Interview with Male Senior Associate (Melbourne 20 October, 2005).

<sup>22</sup> The Hon Robert McClelland MP Attorney-General for Australia, 'Outlook of Australia's Legal Sector over the Next Decade' (Speech delivered at the *Australian Financial Review* Legal Conference, Sydney, 31 March 2011).

<sup>23</sup> Australian Bureau of Statistics, 'Legal Services Contribute \$11 Billion to Australian Economy' (Media Release, 8667.0, 24 June 2009) <<http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/CC4B6B5439DC4482CA2575DE00214B24?OpenDocument>>.

<sup>24</sup> Confirmed by Blake Dawson Waldron (now 'Ashurst Australia') and Freehills (now 'Herbert Smith Freehills') at the *Australian Financial Review* Legal Reform Summit in June 2007. See 'Large firms Consider Incorporation' *Lawyers Weekly* (online), 23 May 2007 <<http://www.lawyersweekly.com.au/news/large-firms-consider-incorporation>>. Although not one of the large corporate law firms, Slater & Gordon Limited, an Australian law firm specialising in compensation and general legal services, was listed on the Australian Stock Exchange in May 2007.

<sup>25</sup> Several 'law practice' structures are now permitted under the Act, including incorporated legal practices ('ILPs'). See Rohan Harris, 'A Structure to Suit' (2008) 82 (09) *Law Institute Journal* 32, 32.

100 companies and leading multinationals in the region.<sup>26</sup> The problem for corporate law firms, however, is whether, as some believe, their proximity to business is excessive<sup>27</sup> and, if so, how that relationship functions to affect the professional autonomy of corporate lawyers.

### *A Paradox: the Proletarianisation of Legal Professionals?*

Marxian theory would appear to have become somewhat passé in law schools in the contemporary academy. Certainly, the Marxian critique of political economy does not sit easily with the notions of grandeur and enrichment evinced in the discourse of the 'economic and ethical logic of entrepreneurial private/corporate capital'<sup>28</sup> which attracts aspirant young lawyers to corporate law firms. As a scholarly interrogation however, it nevertheless represents one of the most profound critiques of the nature and function of work and productive activity in the history of political thought.<sup>29</sup> Therefore, in this article, Marxian concepts have been resurrected and appropriated in order to present the workings of corporate legal practice from an alternative standpoint.<sup>30</sup>

In the 1980s, Charles Derber, in developing his Marxian theory on the proletarianisation of professional workers, argued that the shifting status of professional workers from self-employment to employee status paralleled the proletarianisation of 19<sup>th</sup>-century craft workers.<sup>31</sup> He observed that, as profitable professional markets attract more capital, and because the work that professionals do depends increasingly on technological advances and institutional resources, professional work was vulnerable to a process similar to that of the industrialisation of the 19<sup>th</sup>-century crafts. As part of that process, he noted that individual professionals who lacked the resources to maintain economic independence were absorbed by large-scale corporate bureaucracies and therefore became subject, like other workers, to heteronomous management, authority and control. They experienced a slow degradation of their status and rewards and became de-professionalised.<sup>32</sup>

Derber posited that when salaried professional workers lost control over the goals and social purposes to which their work was put, they became subject to

<sup>26</sup> Michaela McNamara, 'The Big Six: Australia's Top Commercial Law Firms' *Australia Business Review* (online), 29 July 2010 <[http://www.businessreviewaustralia.com/money\\_matters/big-six-australia%E2%80%99-top-commercial-law-firms](http://www.businessreviewaustralia.com/money_matters/big-six-australia%E2%80%99-top-commercial-law-firms)>.

<sup>27</sup> Brett Walker, 'Lawyers and Money' (Speech delivered at the St James Ethics Centre 2005 Lawyers' Lecture Series, Sydney, 18 October 2005).

<sup>28</sup> Richard Collier, "'Be Smart, Be Successful, Be Yourself...?': Representations of the Training Contract and Trainee Solicitor in Advertising by Large Law Firms' (2005) 12 *International Journal of the Legal Profession* 51, 66.

<sup>29</sup> See Alison M Jaggard, *Feminist Politics and Human Nature* (Rowman & Littlefield, rev ed, 1988) 52–9.

<sup>30</sup> In 'standpoint theory', a standpoint is not an empiricist appeal to or by 'the oppressed' but a cognitive, psychological and political tool for more adequate knowledge judged by the non-essentialist, historically contingent, situated standards of strong objectivity. See Donna Haraway, *Modest\_Witness@Second\_Millennium* (Routledge, 1997) 198–9.

<sup>31</sup> Charles Derber, 'Managing Professionals: Ideological Proletarianisation and Mental Labour' in Charles Derber (ed), *Professionals as Workers: Mental Labour in Advanced Capitalism* (G K Hall & Co, 1982) 167, 167–8.

<sup>32</sup> *Ibid.*

what he termed ‘ideological proletarianisation’. Their professional integrity was threatened by the expropriation of their own values and sense of purpose in the workplace and they became like other workers, mere functionaries. Indeed, these professional workers lost the chance to align themselves with their central professional service goal. The goal is to serve clients with the highest standards of human and technical practice<sup>33</sup> and, for lawyers, that means providing clients with full and frank advice.

It must be noted that Derber contended that the structural conditions underlying ideological proletarianisation — that is, the transformation of the workplace in the capital-intensive knowledge and service markets in advanced capitalism — were not convergent with either the interests of professional workers themselves, or those of their clients.<sup>34</sup> It will be contended here, however, that the structural conditions which now underlie ideological proletarianisation favour the interests of lawyers’ corporate clients, to the extent that many corporate lawyers are forgoing their professional autonomy to the institutional interests of their clients.

In order to analyse how Australian corporate lawyers see the ‘professional paradigm shift’ to ‘law practice as business’<sup>35</sup> affecting their working lives and professional autonomy, it is necessary first to place in context the economic and social environment in which corporate law firms in Australia currently operate.

## II Corporate Legal Practice as a Profit-Driven Industry

### *Market Structure and Firm Structure*

Lawyers consistently describe the Australian legal market as mature and highly competitive:

For a long time it has been dog eat dog. It’s been very competitive, so I get very annoyed when I read things in the paper that say that we are a cosseted profession and we are not competitive and market forces don’t really apply to us. It’s just not accurate. It’s fiercely competitive.<sup>36</sup>

... You are effectively only as good as the last transaction.<sup>37</sup>

Further, being good enough to maintain your clients now turns on more than legal competence, practical wisdom and being cost competitive. For corporate lawyers in the contemporary turbo-charged world, ‘timetable is where competition is now’.<sup>38</sup>

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<sup>33</sup> Ibid 174.

<sup>34</sup> Ibid.

<sup>35</sup> See Chief Justice Murray Gleeson, ‘Are the Professions Worth Keeping?’ (Speech delivered at the Greek-Australian International Legal and Medical Conference, Sydney, 31 May 1999).

<sup>36</sup> Interview with Male Partner (Melbourne, 13 December, 2005).

<sup>37</sup> Interview with Male Partner (Melbourne, 6 February, 2006).

<sup>38</sup> Interview with Male Partner (Melbourne, 28 November, 2005).

The competition now in M and A<sup>39</sup> is on how quickly can you do it because the longer the bid's out there the more the business is going to decay... It's not 'We can do it for X'. It's 'We can do it within six weeks instead of 10'.<sup>40</sup>

There is no doubt that servicing the large corporates generates enormous revenue for top-tier firms, and their patronage is keenly sought.<sup>41</sup> Some lawyers from top-tier firms assert that they are the only firms with the breadth of expertise to service corporate Australia:

It's becoming more and more difficult if you're not one of the very few top firms, to grow. You've got certain advantages if your overheads aren't as high, and you don't have to charge as much, but the issue is whether you can provide what's required in major complex transactions in terms of your expertise, which obviously the major firms have.<sup>42</sup>

Brett Walker disputes that assertion. He argues that, not so long ago, firms that would be considered relatively small fry in today's terms were able to research and conduct large and complex commercial matters by standards of the time in order to win the hardest cases in the highest courts for their clients.<sup>43</sup> As such, he suggests that the phenomenon of the bigger and bigger law firm 'should not simply be witnessed passively as if it were a force of nature'.<sup>44</sup> For Walker, therefore, the proposition that only the mega-firms have the capacity to service the large corporates should be seriously challenged.<sup>45</sup>

The lateral drift of top-tier lawyers to smaller firms evidences challenge to the proposition, as does the successful 'poaching' of top-tier lawyers for corporate in-house legal services. The growth of firms to mega-firms in Australia is not monolithic. Some lawyers report that the gap between top-tier and mid-tier firms is closing as practitioners respond to the less congenial pressures placed on them by the big firms and their clients. Certainly, competition from mid-tier firms is proving to be a problem for the top-tiers:

So ... it's quite interesting. There were pundits years ago who were saying mid-tier firms were dead, and you either had to be big or boutique. Those same pundits are now talking about how big firms have to shed people effectively because they're too bloody big, and the mid-tiers, a lot of them, are making hay.

Q: They are up and coming, literally?

A: Yes, because they can do the work. I mean, and this is not a criticism, they may not have the quantity of lawyers, but it's not as though they don't have the quality of lawyer. It's also the case that there are a number of partners from big

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<sup>39</sup> Mergers and acquisitions.

<sup>40</sup> Interview with Male Partner (Melbourne, 28 November, 2005).

<sup>41</sup> Australia's top five law firms each generated more than \$400 million in revenue during the 2011–12 financial year: Ben Woodley, 'Australia's Top Law Firms Revealed' *Business Review Weekly* (online) 1 August 2012 <[http://www.brw.com.au/p/sections/focus/australia\\_top\\_law\\_firms\\_revealed\\_vvZ5sZcs7mnCsgi2pdqCFM](http://www.brw.com.au/p/sections/focus/australia_top_law_firms_revealed_vvZ5sZcs7mnCsgi2pdqCFM)>.

<sup>42</sup> Interview with Female Partner (Melbourne, 1 December 2005).

<sup>43</sup> Walker, above n 27.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*



firms who are jumping ship into the mid-tiers because they've got a bit more freedom to express themselves, if I can put it that way.<sup>46</sup>

The phenomenon of 'Big Law' having become 'too big' is borne out in an economic analysis of the business model of large law firms. Larry Ribstein argues that because large law firms do not own firm-specific property, pressures such as global competition, better-informed clients and the rise of in-house counsel have led to significant downsizing in recent years.<sup>47</sup>

Certainly, it is no longer the case that even the most prestigious law firms can rely on 'old boy' networks or their legal reputation for excellence in order to avoid the ever-increasing scrutiny that bottom-line watchers bestow on them. The pendulum of power would appear to have swung towards the might of general counsel who, in many cases, find themselves seated in the nation's corporate boardrooms.<sup>48</sup> There is also increasing pressure on lawyers within the major firms because of the effectiveness of the strategy adopted by large corporate firms to control their own bottom line by building up their in-house, or general counsel.

Q. When you were saying that the legal services market is shrinking, is that because of in-house counsel?

A: In-house counsel! Your clients don't want to pay your rates so they are increasingly building up their in-house team. ... In-sourcing it in-house. ... Yes.<sup>49</sup>

Nevertheless, it would appear that the major firms are not slow to consider the uses of adversity, as it were, by making the most of their losses in attrition costs when their lawyers choose to leave to take up in-house positions. It is not unusual for firms to cultivate continuing relationships with those lawyers:

In fact the amount of work we get, I don't know whether we've actually analysed it, but the amount of work we get from people who were here and have gone elsewhere, is just enormous. It really is enormous. So that's what I have to say about lawyer attrition.<sup>50</sup>

It is, after all, the in-house counsel of larger clients who control and regulate the procurement of their company or organisation's external legal services and the larger the client the more purchasing power they have in relation to external lawyers. The ability of in-house counsel to bring their external law firms to heel is high.<sup>51</sup>

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<sup>46</sup> Interview with Male Partner (Melbourne, 6 February 2006).

<sup>47</sup> Larry E Ribstein, 'The Death of Big Law' (2010) 3 *Wisconsin Law Review* 749, 752.

<sup>48</sup> Katherine Towers, Susannah Moran and Marcus Priest, 'Judgment Day: Lawyers Feel Heat Over Costs, Service' *Australian Financial Review* (Melbourne), 16 May 2005, 1.

<sup>49</sup> Interview with Female Partner (Melbourne, 23 September 2005).

<sup>50</sup> Interview with Female Partner (Melbourne, 30 November 2005).

<sup>51</sup> Suzanne Le Mire and Christine Parker, 'Keeping It In-House: Ethics in the Relationship between Large Law Firm Lawyers and their Corporate Clients through the Eyes of In-House Counsel' (2008) 11 *Legal Ethics* 201, 206.

### *The Good Corporate Lawyer: Competencies and Attributes for Professional Success*

It seems that the 'old' ideal of the professional lawyer-statesman as a practitioner with virtues resting on practical wisdom sustained by prudence, good judgment and a concern for civic mindedness<sup>52</sup> does not quite fit with the ideal of competency expected of corporate lawyers in the contemporary Australian workplace. Some elements of that construction, particularly good judgment, are nevertheless at the basis of attributes that lawyers describe as being evident in the best lawyers:

... the best lawyers are the lawyers who know what they know and know what they don't know.<sup>53</sup>

It should be noted, however, that although 'judgment' is revered by some as a competency or attribute necessary for professional success, no lawyer in the research mentioned a sense of 'public-mindedness' in discussing the best lawyers. Rather, technocratic lawyerly skills, such as a high degree of analytical skills, writing skills and drafting skills were often mentioned, as were people skills and communication skills. The dominant view is that it is those skills, along with marketing skills where one is savvy at selling the firm, which play a large part in delivering and maintaining the requisite client base and the consequent billable hours that flow to the firms:

A. I think, analytical skills. I think listening, being able to listen and hear what it is that the client is telling you, and I think being considered in your advice.<sup>54</sup>

Law firms today are heavily involved in marketing their services and unashamedly training their practitioners in the steps that produce the 'Rain Dance'.<sup>55</sup> There is little doubt that in the legal profession, rainmaking skills are highly prized:

I'm not a senior rainmaker who can justify spending a day on the golf-course and having lunch but they do exist and they do fulfil a very important role. But, you can't do that and stay at the cutting edge unless you're sort of superhuman. Larry Lawyer<sup>56</sup> at our Sydney office is the only person in this place I know who can do both the circuit rainmaker and work like a second year lawyer, and he's 61. As a consequence of that he's been consistently rated one of the best lawyers in the country. But they are the exception that proves the rule.<sup>57</sup>

What has changed, however, is the approach taken in marketing legal services:

Q: So the firm seems to have taken that market embrace, for want of a better term?

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<sup>52</sup> Kronman, above n 2, 160–2.

<sup>53</sup> Interview with Male Partner (Melbourne, 7 December 2005).

<sup>54</sup> Interview with Female Partner (Melbourne, 23 January 2006).

<sup>55</sup> Jane Fenton and Anna Grutzner, *The Rain Dance: A Marketing Book for Lawyers* (Fenton Communications 1996) 2.

<sup>56</sup> Pseudonym.

<sup>57</sup> Interview with Male Partner (Melbourne, 28 November 2005).

A: Well, and of necessity to some extent, we all have. There was a time you know, when you would go up to the Australia Club and sit in an oak-panelled room in a leather chair with a glass of sherry. And, in the old days, the instructions would roll in, from that sort of environment. In the 60s and 70s that was how work was won. But these days, the mountain won't come to Mohammad. The clients expect you to go there and to tell what you can do for them and how you can add value, and it's a very, very different, and brave new world.<sup>58</sup>

Unlike the 'Magic Circle' firms in London where 'they see our marketing brochures and frankly they think it's crass',<sup>59</sup> in the brave new world in Australia, law firms expect their lawyers to be engaged in marketing the firm:

Top Tier Firm<sup>60</sup> has reduced it (marketing) to an art-form and they apparently have classes on how to shake hands and eye contact and professional coaching.<sup>61</sup>

There is a view among some lawyers that marketing legal services does not quite fit traditional professional ideals. Marketing, for these lawyers, is just a little bit unseemly and taints the image of their practice.<sup>62</sup> Indeed, for some:

... you do sometimes feel like a bit of snake oil salesman which doesn't quite tie up with your own self-image of what you do.<sup>63</sup>

Clearly, not all lawyers are happy about the degree of commercialism that modern marketing practices inflict on the operation of the major corporate firms. The emulation of their clients' activities, through public relations and marketing techniques employed to maintain and improve market share, represents a major change to the more sedate days of traditional professional legal practice. This trend is cited as a factor in the much vaunted 'loss of happiness' among lawyers that Kronman and others have observed.<sup>64</sup>

Yes, you're doing it (marketing) all the time, and so consciously you're doing it every single day. In everything you do you have to be thinking about the next opportunity and how you will convert that into work. So that can be quite stressful.<sup>65</sup>

In addition, as one lawyer has observed, the marketing techniques that firms are currently adopting might not, in any case, be having the desired effect on some clients:

Unlike in the UK where they don't have to worry because the work comes in, the market here is extremely competitive. I think sometimes that the firms think it is more important than the clients think it is. Having gone

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<sup>58</sup> Interview with Male Partner (Melbourne, 28 November 2005).

<sup>59</sup> Interview with Male Partner (Melbourne, 28 November 2005).

<sup>60</sup> Pseudonym.

<sup>61</sup> Interview with Male Partner (Melbourne, 28 November 2005).

<sup>62</sup> Kylie Beaufoy, 'Luck no Factor in the Ladder to Success', *Lawyers Weekly* (online), 19 December 2008, <<http://www.lexisnexis.com/community/lwau/blogs/legal-marketing>>.

<sup>63</sup> Interview with Male Partner (Melbourne, 28 November 2005).

<sup>64</sup> Lawrence J Fox, 'A Nation under Lost Lawyers: The Legal Profession at the Close of the 21<sup>st</sup> Century: Money Didn't Buy Happiness' (1996) 100 *Dickinson Law Review* 531, 536.

<sup>65</sup> Interview with Female Partner (Melbourne, 6 October 2005).

across [working in-house for a client], sometimes I think the clients would prefer faster delivery, more reliability and down-to-earthness than slick, glad-handing, but that is how they are competing at the moment.<sup>66</sup>

The view that firms think marketing is more important than their clients believe it to be is supported by a national survey conducted by the Australian Corporate Lawyers Association in which it was found that advertising, sponsorships, media exposure and entertainment ranked low as marketing strategies among clients. What clients most valued was better service and formal client reviews.<sup>67</sup> It would appear therefore that the core competencies and attributes clients seek in corporate lawyers, bearing in mind that exemplary legal competency is a given, are those skills grounded in something that approximates Kronman's deliberative 'practical wisdom' and judgment. Despite that, for these highly-educated professional workers it is evident that their craft is not perceived by those currently orchestrating the workplace regime to be an end in itself. The autonomy of lawyers is subject to the dictates of their particular firm's business organisational goals and lawyers are now being placed in a position where they must reform their professional identity to fit the repertoire of skills perceived as necessary to market their firm's wares.

### *Lawyers' Autonomy in a Profit-Driven Corporate World*

To what extent, in the fiercely competitive Australian corporate law business, is the professional autonomy of lawyers, either as professional employees or law firm partners, at risk of being compromised by the will and whim of their corporate clients?

Historically, the professions have long claimed the right to structure and regulate the education and credentials of their members. Within their authority to self-regulate, members are granted a personal right to autonomy at work and a collective right of peer review of the professional integrity of members.<sup>68</sup> This forms the basis of what Marian Crain calls the 'social bargain', in which occupational privilege is exchanged by professionals for the promise to undergo painstaking professional education and training in order to master the knowledge reserved to them and to dedicate themselves unselfishly to societal needs.<sup>69</sup> Because of the special expertise that stands them apart from competing social, economic and political bases of power, professional workers have been credited as major stabilising elements of modern specialised society.<sup>70</sup> Because of their specialised knowledge and the consequent autonomy they have commanded, so this narrative goes, professionals have been free to adhere to high values which are encoded in their canons of professional ethics. They are also held to embrace a sense of commonweal, which has been characterised in sociology by functionalist

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<sup>66</sup> Interview with Male Solicitor (Melbourne, 4 February 2006).

<sup>67</sup> Mary Rose Liverani, 'What Corporate Counsel Expect from Law Firms' (1996) 34 *Law Society Journal* 46, 46–7.

<sup>68</sup> Crain, above n 3, 549.

<sup>69</sup> *Ibid* 550.

<sup>70</sup> John P Heinz, 'The Power of Lawyers' (1983) 17 *Georgia Law Review* 891, 893.

theorists as a 'collectivity orientation'.<sup>71</sup> Within this view, lawyers have been able to exert great influence on the captains of industry through their professional role as 'wise counsellor'; that is, the lawyer who exercises independent judgment based not only on his or her black letter law expertise but also on the principles of equity, fair dealing and public policy.<sup>72</sup> Thus, as trusted business advisors<sup>73</sup> lawyers have been able to provide 'a kind of buffer between the illegitimate desires of ... clients and the social interest'.<sup>74</sup>

A competing view of the way in which professional autonomy plays out in modern society is that of conflict theorists who assert that professionals have autonomy and power but that it is based, not so much in their special expertise as their enhanced social standing, brought about through the status conferred upon them through credentialing. Credentialing legitimates their superior rewards and distances them from other occupations. Larson identified the propensity of professionals to build their status as their 'professional project'.<sup>75</sup> With wealth and status as the basis of their social power, it is said that corporate lawyers tend to function as 'hired guns', manipulating legislation and procedural tools that are there for working in a complex legal system, in order to meet the asocial goals of corporate clients to maximise profits.<sup>76</sup> 'Guns and money', according to this view, trump moral superiority or any mediative role in binding these professionals to societal groups.<sup>77</sup>

Although competing discourses underpin the notion of professional autonomy, it is evident that the extent to which lawyers are able to cast themselves in the 'wise counsellor' role has been declining. Earlier research into the social structure of large law firms in the United States suggested that, in the 'hemisphere' of large firm professional activity, lawyers were incapable of acting as disinterested observers who could serve either side of an issue<sup>78</sup> and were in fact, largely captive to their clients.<sup>79</sup> Research there<sup>80</sup> revealed that although lawyers in the top firms adhere to an ideology of autonomy in relation to their role in legal institutions and their relationships with clients, they are effectively dominated by their clients as they 'enthusiastically attempt to maximise the interests of clients

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<sup>71</sup> This denotes an obligation to take directly into account in a given situation values shared with other members of the collective, and includes an expectation that the professional will subordinate his or her private interest to that of the collective. See Talcott Parsons, *The Social System* (Free Press of Glencoe, 1951) 434.

<sup>72</sup> Bruce A Green, 'Thoughts about Corporate Lawyers after Reading the Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"' (2001) 51 *De Paul Law Review* 407, 407.

<sup>73</sup> Heinz, above n 70, 892.

<sup>74</sup> Erwin I Smigel, *The Wall Street Lawyer: Professional Organisation Man?* (Indiana University Press, 1969) 342.

<sup>75</sup> Larson in Heinz, above n 70, 894.

<sup>76</sup> Green, above n 72, 408.

<sup>77</sup> Heinz, above n 70, 894.

<sup>78</sup> See John P Heinz and Edward O Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1983) in Cynthia Fuchs Epstein, 'Reviewed Work: Chicago Lawyers: The Social Structure of the Bar' (1985) 64 *Social Forces* 233, 233.

<sup>79</sup> Robert L Nelson, 'Symposium on the Law Firm as a Social Institution: Ideology, Practice and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm' (1985) 37 *Stanford Law Review* 503, 504.

<sup>80</sup> The data for the research was obtained by way of analysis of structured interviews with 224 lawyers in four large law firms in Chicago. See Heinz and Laumann, above n 78.

and rarely experience serious disagreement with the broader implications of their client's conduct'.<sup>81</sup>

More recent post-structural research analysing corporate influence on corporate junior lawyers in the United States suggests that the client/lawyer power relationship imbalance identified in the Heinz and Laumann research is unlikely to change.<sup>82</sup> Kuhn argues that young lawyers adopt the subject positions available to them through the competing discourses of 'legal professionalism' and 'managerialism'. As such they are constrained within an ideological frame which is grounded in the adversarial principles of 'zealous advocacy' and 'non-accountability' (from divulging clients' secrets). These lawyers are inhabiting subject positions characterised by extreme 'client-friendliness'<sup>83</sup> and show no signs of adopting other culturally available discourses that challenge the status quo.<sup>84</sup>

An understanding of the extent to which clients of Australian corporate law firms are effectively 'calling the shots'<sup>85</sup> must be disinterred from a bedrock of 'service delivery' rhetoric. 'Service delivery' is a mantra which is all-pervading within the firms and functions to legitimise the agency of lawyers who, if they had the time to reflect on it, might otherwise perceive themselves as the handmaidens of the new corporate economy:

I mean we are a service provider and the client is always right. Whatever a client wants they normally get, although you can push back occasionally when it is appropriate.<sup>86</sup>

Clients need a service and if they want to contact you 24 hours a day, then they should be able to. ...That's the service they want, that's the service we should be giving, so that just comes with the territory.<sup>87</sup>

Although one firm provided an exception:

The firm at the moment clearly exists and this is always an underlying purpose of any law firm, but here it is very much front and centre — this firm exists to make money. That is clearly the dominant value of the firm. So ... everything else is secondary to that, and there is an element of short-termism in a way in that even client service is secondary to that.<sup>88</sup>

All lawyers have a duty to serve their clients. It appears, however, that in the current market conditions, in order to maintain and attract future business, many corporate lawyers are subordinating their professional autonomy, by deferring to their clients' demands in the name of 'service'.<sup>89</sup> Australian corporate

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<sup>81</sup> Nelson, above n 79, 504.

<sup>82</sup> Timothy Kuhn, 'Positioning Lawyers: Discursive Resources, Professional Ethics and Identification' (2009) 16 *Organization* 681, 685.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* 698.

<sup>85</sup> Heinz, above n 70, 897.

<sup>86</sup> Interview with Female Partner (Melbourne, 19 August 2005).

<sup>87</sup> Interview with Male Partner (Melbourne, 20 October 2005).

<sup>88</sup> Interview with Male Senior Associate (Melbourne, 4 August, 2005).

<sup>89</sup> Nelson, above n 79, 544.

lawyers might well have devolved to the extent that 'lawyers supply what clients want'.<sup>90</sup>

Parker et al argue that lawyers are two-faced. At times they act as professional compliance monitors for their clients and at other times they act as faithful agents who pursue their clients' different objectives. From their research based on qualitative interviews with business respondents and quantitative survey data from the largest businesses in Australia, they conclude that neither the professionalism nor devolution theories accurately describe the complexity of the market for legal services.<sup>91</sup>

The interview data for this paper suggests that the majority of corporate lawyers in the major firms are finding themselves discursively positioned in the 'faithful agent' category. After all:

You'll go broke if you're absolutely brilliant but the client thinks you are not doing things the way they want them done.<sup>92</sup>

Nevertheless, it is clear that through a semantic cloak of 'service provision', corporate lawyers are attempting to claw back some agency and legitimacy for the 'guns and money' ethos that underpins the institutional values and goals adopted by many firms in order to practice the business of law today.

### *Competition and the Demise of Client Loyalty*

A marked change for lawyers working in contemporary corporate legal practice is the demise of traditional client loyalty. It appears that in business, the ties that bind do so only when they lock into bottom line imperatives:

I think loyalty doesn't really exist amongst clients, other than at a very personal level. The big firms have tried to tie themselves to the big companies, but those big companies use their purchasing power. So they get discounts.<sup>93</sup>

It is becoming the case that even for 'blue-chip' clients of corporate lawyers, the bottom line is the standard that regulates their conduct.<sup>94</sup>

Certainly the market is different, even in the 14 years that I've been practising. When I first started you had a very loyal stable of major blue chip clients who pretty much wouldn't be looking to obtain legal advice anywhere else except in exceptional circumstances. They were very good clients. Sometimes they would go somewhere else for a specific area but we'd be getting quite a good part of their work. But over the years that's

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<sup>90</sup> See Christine E Parker, Robert Eli Rosen and Vibeke Lehmann Nielsen, 'The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation' (2009) 22 *The Georgetown Journal of Legal Ethics* 201, 203.

<sup>91</sup> Ibid 238.

<sup>92</sup> Interview with Male Partner (Melbourne, 13 December, 2005).

<sup>93</sup> Interview with Male Partner (Melbourne, 7 December, 2005).

<sup>94</sup> John Goldring, 'Lawyers, Legal Practice and Values' (1996) 18 *Sydney Law Review* 249, 249.

changed. I mean we still have a core of very loyal clients but it seems the competition for their work grows all of the time.<sup>95</sup>

There is little doubt that, under the prevailing market conditions, Australia's largest corporate firms now have the whip hand over the corporate law firms who service them. Banks are a good case in point. Where once top-tier firms could rely on the loyalty and patronage of their banking clients, law firms now tender for banking work as well as that of other major corporates through a panel system. Law firms can no longer rely on brand loyalty to draw clients through the door. The work has to be won:

Q: And is there not the loyalty that there once would have been?

A: Well I think it operates to a much lesser extent. There is still some significant interplay between the establishment firms and the establishment banks. Probably, I mean TOP-TIER FIRM<sup>96</sup> and BIG BANK<sup>97</sup> would be a good example of that. But increasingly, corporates are getting sophisticated. I mean we are on BIG BANK's panel and they will often ask us to pitch. You can speculate as to whether it's real or whether it's just a means of keeping TOP-TIER FIRM on their toes. Either is possible. So I think there is a lot less brand loyalty these days and I think that's been a good thing for us and no doubt why we've been able to rise up the ranks without any Melbourne Club connections, if I can use that in a more generic sense.<sup>98</sup>

Another weapon large corporates have in their arsenal to subjugate their legal advisers is the threat of taking their business interstate or offshore where they can get 'better value for money'.<sup>99</sup> Despite the fact that with so much purchasing power they already attract sizeable discounts from law firms for their services, the threats effectively call the corporate lawyers to account by curtailing what the firms are able to charge:

Big firms have tried to tie themselves to the big companies, and those big companies use their purchasing power. So they get discounts, most of them get discounts in any event, and for example, some of the banks have talked about sourcing some of their bread-and-butter work out of Brisbane where the hourly rates are less.<sup>100</sup>

Some firms are consistently undercutting top-tier firms just to get a foot in with a particular client, but that process, in itself, is fraught as it can rebound when it comes to pricing the next transaction.<sup>101</sup> It can also serve to lower the quality of service that the firms can provide as these firms must then extract more and more work out of less experienced lawyers:

Q. So loyalty is dead?

A. It's pricing. For a lot of banking and finance work the client or finance institution doesn't pay. The borrower or their customer pays. Therefore, if

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<sup>95</sup> Interview with Female Partner (Melbourne, 1 December 2005).

<sup>96</sup> Pseudonym.

<sup>97</sup> Pseudonym.

<sup>98</sup> Interview with Male Partner (Melbourne, 28 November 2005).

<sup>99</sup> Towers, Moran and Priest, above n 48, 1.

<sup>100</sup> Interview with Male Partner (Melbourne, 7 December 2005).

<sup>101</sup> Interview with Male Partner (Melbourne, 6 February 2006).



they have a transaction — say a 10 million dollar loan — they will ring around their panel of firms and say ‘What could you do this transaction for?’ So you work out the figure and you know if you get the job you were the lowest and if you don’t, then you weren’t the lowest. It is as simple as that. So what that does is that if you really want to chase work, you just reduce your price. And look, it is a very competitive world! Of course, the sting to that is that if you consistently underquote then that is fine but it sets a benchmark for every other transaction. ... So it is a double-edged sword. So you have to just maintain reasonable pricing parity. But the flip side to that is that you then have service delivery and quality issues, because in order to come in low you then have to delegate the work down to very, very junior staff. Therefore you do have turnaround and quality issues.<sup>102</sup>

### *Client Control of Lawyers*

In a world in which the top 200 corporations account for over a quarter of the economic activity on the planet,<sup>103</sup> it is little wonder that the power of corporate clients outweighs that of their lawyers, even taking into account the vast wealth and social power of the top law firms.<sup>104</sup> Based on British sociologist Terence Johnson’s analysis of occupations according to the allocation of power between the producer and the consumer, it would appear that corporate lawyering is a ‘patronage’, rather than a ‘collegiate’ occupation.<sup>105</sup> Were the provision of legal services a collegiate occupation, the producer (law firm) would have the power to define the needs of the consumer (corporate client) and the manner in which these needs are catered for. The reality of contemporary corporate legal practice, however, is that it is a patronage occupation in that, when purchasing legal services, the consumer (corporate client) is able to define its own needs and the manner in which they are met from the producer (law firm). Indeed, corporate clients are able to dictate operational matters to a firm, such as the location in which the lawyers are to undertake the work, reporting arrangements, and the minutiae of who will perform the work and when it will be performed:

The clients are screaming out for everything to be cheaper, so there is a slight twist in the way we’re working because what our clients are trying to do is to get us to source the work practice out of the cheaper centres, say Brisbane and Perth.<sup>106</sup>

Well, we now have itemised bills which we never used to give our clients 10 years ago, it would just been given a bottom line figure. Now they want itemised bills. They want to know who was on it. They want to know all the hours that they’ve spent. ... I think if clients are drilling down into that level of detail then there’s a lot of pressure on.<sup>107</sup>

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<sup>102</sup> Interview with Male Partner (Melbourne, 6 February 2006).

<sup>103</sup> Institute for Policy Studies Washington DC, ‘Corporate Influence — The Facts’ (2002) 347 *New Internationalist* 18, 18.

<sup>104</sup> Heinz, above n 70, 899.

<sup>105</sup> Terence J Johnson, *Professions and Power* (Macmillan Publishing, 1972).

<sup>106</sup> Interview with Female Partner (Melbourne, 6 October 2005).

<sup>107</sup> Interview with Female Partner (Melbourne, 6 October 2005).

It is evident that in the marketplace where corporations are making the rules<sup>108</sup> and clients are moving much more in panels and ‘playing firms off against each other for financial and other reasons’,<sup>109</sup> it is extremely difficult for lawyers to ‘call the shots’. Indeed the large corporates are ‘cherry-picking’ law firms who can do little more than present themselves, ‘ripe for the picking’ as it were, in their specialised areas of practice:

Clients no longer have long-term sole providers of legal services. ... They are moving much more to looking at provision of specialist services so if you happen to be the best, or as a client perceives the best operator in the capital markets, you’ll do their capital markets work. Someone else might be perceived to be the best operator in the industrial relations area. They’ll do the industrial. So you tend not to have blanket coverage of client practice.<sup>110</sup>

Lawyering for the big end of town is undoubtedly one sector of the neoliberal market economy in which the players are exquisitely aware that the faster capital is turned over, the faster it can realise a profit.<sup>111</sup> For one lawyer, the autonomy of corporate clients themselves, however, would appear to be questionable as they too are caught up in the turbulence of market-driven haste in the business environment in which they are operating:

[T]he clients are demanding that work be done quickly, not because they are difficult, although that is sometimes the case, but because of the nature of the transactions they’re involved in. There is just enormous time pressure when someone’s selling a multi-million or billion dollar business or tenders for expressions of interest and being sought to build a freeway or a tunnel or something. There’s enormous time pressures put on the bidders. And there’s an enormous amount of issues that they need to understand and address. So it’s actually the environment within which our clients are conducting the business which is driving their demands of us, in my view. What that means for us, is that we work longer hours and we are stressed frequently.<sup>112</sup>

Another interviewee pointed to the role of clients’ voracious corporate advisers, who trawl transactions for success fees, in producing both the pressure on lawyers and the turbo-charged haste in which they operate:

Q: So is it the clients who are driving it?

A: It’s the clients and their corporate advisers, bearing in mind that the corporate advisers are on success fees and for them every day that the deal’s running and they haven’t been paid is a cost to their business. So the constant driver for the investment banks, who are the main intermediary in M and A, is to put the shortest distance between throwing people on a job and getting their success fee, and the pressure on the law firms is the indirect phenomenon.<sup>113</sup>

If that is the case, then the degree of professional autonomy that many corporate lawyers can retain in the high-wired, contemporary business world is questionable.

<sup>108</sup> Institute for Policy Studies, above n 103, 18.

<sup>109</sup> Interview with Male Partner (Melbourne 22 November 2005).

<sup>110</sup> Interview with Male Partner (Melbourne 22 November 2005).

<sup>111</sup> Richard Swift, ‘Rush to Nowhere’ (2002) 343 *New Internationalist* 9, 10.

<sup>112</sup> Interview with Male Partner (Melbourne, 10 November 2005).

<sup>113</sup> Interview with Male Partner (Melbourne, 28 November 2005).

If lawyers are merely hard-pressed, time-constrained technocrats or ‘hired guns’ who are able to exert only limited influence over the means and ends of their own work, then it is highly unlikely that they have the power (or perhaps even the inclination) to stabilise modern society by modifying their corporate clients’ goals or objectives.<sup>114</sup>

### III Corporate Legal Practice as a Profession

#### *The Public Interest and Lawyers’ Values*

Here, Derber’s notion of the ‘ideological proletarianisation’ of professional workers is drawn on in order to ascertain to what extent contemporary professional corporate lawyers are functioning as agents of a power elite ‘who perpetuate the structures of domination and inequality which are essential to competitive capitalism’,<sup>115</sup> rather than as ‘autonomous’ professional workers.

Derber argued that salaried professional workers were subject to ideological proletarianisation as their integrity was being threatened by the expropriation of their values or sense of purpose in the post-industrial workplace.<sup>116</sup> He contended that, in losing their ability to define the ends to which their work was directed, employed professionals became, like other workers, mere functionaries.<sup>117</sup> How this expropriation of the sense of values and purpose to which the ends of their work is directed can play out in the Australian corporate law firm context is best articulated by a female solicitor working in a top-tier firm:

The values of the firm were like walking through Sea World. With that little tin can going (in song) ‘Sea World, Happy Families, Sea World, Happy Families’. Their slogans are ‘Clear Thinking’, ‘Turning the difficult into the simple’ or ‘Simple Solutions’ and ‘Client Focus’. The supremacy of law as a legal entity — You know that they are the supremos and they treated their clients like Gods and that was what they stood for. That was the value of the firm.

Q. So the client ruled supreme and determined their actions to that extent?

A. Yes, totally. I mean that is their purported values. That is what they present. But the real value of the firm is about profiteering by a select few partners and they see junior lawyers as mechanistic brain capital that they just pull in and churn out.<sup>118</sup>

Galanter and Henderson’s research also lends support to my contention that the structural conditions which now underlie ideological proletarianisation very much favour the interests of lawyers’ corporate clients. They note that in the highly atomised environment in United States law firms, partners are now finding

<sup>114</sup> Heinz, above n 70, 897.

<sup>115</sup> Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, 1977) 14–15, 52 cited in Stan Ross, *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia* (Butterworths, 2<sup>nd</sup> ed, 1998) 53.

<sup>116</sup> Derber, above n 31, 172.

<sup>117</sup> *Ibid* 174.

<sup>118</sup> Interview with Female Solicitor (Melbourne, 23 January 2006).

themselves de-equitised ‘in order to maximise profits for a proportionally smaller equity class’,<sup>119</sup> and in the highly pressured, competitive workplace environment that the systematic changes to the marketplace have brought about, individual lawyers are likely to find it more difficult to be able to adhere to professional and ethical principles that do not cohere with their client’s objectives. They argue that although in their research they encountered specific examples of large corporate law firms that continue to invest in the collective enterprise of the firm and consider ‘ethical lapses’ as threats to a hallowed firm reputation and the trust of long-time colleagues, that ethos is changing.<sup>120</sup> In the big firms today, with clients’ resurgent in-house counsel often braced by highly competent, laterally moved, ex-colleagues, it is more likely than not that ‘ethical grey zones’ will be resolved in the client’s favour in order to solidify client relationships.<sup>121</sup>

Derber theorised two responses by professional workers to ideological proletarianisation: First, ‘ideological desensitisation’ — that is the denial or separation of the ‘self’ from the ideological context of one’s job. This manifests as disengagement from concern with the social uses and ends of one’s work and a narrow preoccupation with questions of skill and knowledge.<sup>122</sup> Second, ‘ideological co-optation’, which involves recasting one’s goals and moral objectives to make them consistent with organisational imperatives.<sup>123</sup>

In order to evaluate the degree to which Australian corporate law firm lawyers are subject to ideological proletarianisation in their workplace, it is necessary to examine the value orientations of both the firms and the lawyers. A detailed study of the value orientations of lawyers working in large law firms, as a starting point for examining the question as to what extent lawyers can be expected to modify their clients’ demands and behaviour, has been conducted in the US by Robert Nelson.<sup>124</sup> Nelson concluded that lawyers in large firms adhere to an ideology of autonomy in their perceptions of both the role of legal institutions and lawyers vis-à-vis clients, but in practice these lawyers enthusiastically attempt to maximise the interests of clients and rarely experience serious disagreement with the broader implications of a client’s proposed course of conduct.<sup>125</sup>

Such a detailed study of the societal and personal values of lawyers is yet to be undertaken in Australia and was beyond the scope of the research undertaken for this article. Nevertheless, lawyers were asked for their perceptions of the values of their firm and if they agreed with them. They were also asked whether working for large corporates posed any ethical problems. The responses elicited provide interesting data in two respects; first, in relation to where lawyers see their firms on the law as a profession/business continuum; and second, in regard to their own professional identity and autonomy.<sup>126</sup>

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<sup>119</sup> Marc Galanter and William Henderson, ‘The Elastic Tournament: A Second Transformation of the Big Law Firm’ (2008) 60 *Stanford Law Review* 1867, 1906.

<sup>120</sup> *Ibid* 1913.

<sup>121</sup> *Ibid*.

<sup>122</sup> Derber, above n 31, 180–1.

<sup>123</sup> *Ibid* 185.

<sup>124</sup> Nelson, above n 79, 504.

<sup>125</sup> *Ibid* 504–5.

<sup>126</sup> Derber, above n 31, 169

Certainly, a number of lawyers are swept up in the impetus of firms to serve their clients at all costs and, in so doing, dissociate themselves from any ideological context of their work. There is evidence of ideological desensitisation from a number of lawyers:

The values of this firm, it is to deliver excellent legal services to our clients, and to add value to our clients rather than just simply producing. ... And it obviously values integrity and professionalism, and they are the values which I think the firm espouses.

Q: Do they differ from what you perceive to be the values of the firm?

A: Not greatly, they're all admirable values, and so no, no not really.<sup>127</sup>

What is interesting is the number of lawyers who differentiate the professed values of firms from what they perceive to be the real values, even though any moral or social issues to which the firm may adhere may have been subtly removed from their purview by the functional rationality of their workplace organisation.

A: If we're talking what are the real values rather than the stated values?

Q: I'd like to know those.

A: Yes (laughter) the real values? I think for the most part integrity's important. They're a business and so being a successful business and turning a profit is a pretty important value. Teamwork to a degree, but the nature of the place, and look, I suspect law firms generally, is that at the end of the day if you're not a team player but you're bringing in money, that's again going to be tolerated. So it's not a real value in a sense. They're struggling so much with this at the moment. I think that there aren't any clear strong firm values. I just see a barren bunch of people who are trying to find that commonality at the moment.<sup>128</sup>

A: ...We have four values. We have, 'Performing, united, focused, and innovative,' and they are the four values that we say we have as a firm.

Q. A bit 'motherhood'?

A: Yes, they're pretty bland but ... But look, I think that one good thing about this firm is that, those things aside which are really just marketing things, it does have integrity and it does try and uphold the professional side of legal practice. ... We also don't deal with tobacco companies and that sort of thing.<sup>129</sup>

Lawyers who do work for large tobacco, or other large corporates which some might consider 'ethically challenging',<sup>130</sup> can be seen to show signs of ideological co-optation to the extent that their values or goals are congruent with those of their firm, but it must be said that it is difficult to assess whether their values have been redefined by their workplace experience:

I've done work for (a large and ethically challenging corporation) for 15 years, so outsiders would expect me to be in daily conflict with my ethical

<sup>127</sup> Interview with Male Senior Associate (Melbourne, 23 September 2005).

<sup>128</sup> Interview with Female Senior Associate (Melbourne, 6 October 2005).

<sup>129</sup> Interview with Male Senior Associate (Melbourne, 17 January 2006).

<sup>130</sup> Companies which, for example, market dangerous and/or addictive products to individuals.

position because of the terrible things that the client could ask me. I find that in fact when a corporation has a reputation like that, they are so concerned to be not only doing the right thing but being seen to be doing the right thing. There's no question of being put into a difficult position.<sup>131</sup>

Overall, most lawyers identify profit maximisation as the dominant, rather than professed, value of their firm:

I think we have a set of values which are really very abstract. You know, unity, excellence, ingenuity, commitment and I think the last one's integrity. But ... they are the adopted values. In terms of what makes everything tick, it's certainly about billable hours ... Everything is very much driven by the profits.<sup>132</sup>

Although some lawyers showed discomfort and cynicism about their firm's values, most seem to be deferring to the regime in which they find themselves working. As Parker et al argue, head partners and the work culture and practices within larger law firms can have a crucial influence on the ability of individual lawyers to identify ethical issues and to put their own values into practice.<sup>133</sup>

It is clear that the partners who head the working teams or 'silos' within the firms wield much power and influence over their particular cohorts of practitioners. That management structure would appear to militate against lawyers asserting their individual values:

The Partner will get the work and filter it out to people below. So a Partner will obviously have someone in their mind who they can rely on as Senior Associate and they will use a particular streamlining of people. So, 'Jack is a great Senior Associate. I can rely on Jack to get this particular work done'. And Jack will think, 'OK I'm going to get Jill, who is a second year and she can get this work done'. And Jill will say, 'OK I'll get Little Miss Muffet who is a new solicitor and I know she is really good and she will help get all that work done'. So you've got little silos of work happening, and you are constantly competing against other people and other people demanding work from people below them. You are not working as a team you are working in silos.

Q. That is quite different to team management isn't it?

A. Absolutely, you are managing a team, but a very narrow team. You are not managing a whole group of people across the board. It's in little silos.<sup>134</sup>

In this ever-competitive workplace regime, there would appear to be limited scope for lawyers, particularly junior lawyers, to exercise their professional autonomy by voicing disagreement with the broad implications of their client's course of conduct. Surely, only the mightily brave would risk truncating the client list. After all, 'you can't be complacent about the client list ... you've got to work at it'<sup>135</sup> in order to survive in an intensely competitive market. That being said,

<sup>131</sup> Interview with Female Partner (Melbourne, 30 November 2005).

<sup>132</sup> Interview with Female Solicitor (Melbourne, 16 September 2005).

<sup>133</sup> Christine Parker et al, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31 *University of New South Wales Law Journal* 158, 159–61.

<sup>134</sup> Interview with Female Solicitor (Melbourne, 4 February 2006)

<sup>135</sup> Interview with Male Partner (Melbourne, 13 December 2005).

with clients now ‘cutting the pie to match their needs with a particular type of service provider’,<sup>136</sup> lawyers who are working on only one aspect of a corporate client’s complex matter may not be in a position to appreciate fully the implications of their client’s plans or be in a position to advise how to modify them if they believe such conduct does not accord with broader societal interests, or duties to the court.<sup>137</sup>

## IV Conclusion

The propensity of corporate law firms to focus constantly on the client list and the profit motive no doubt functions to affect the professional autonomy of individual lawyers, ethical corporate legal practice and, it follows, the integrity of the legal profession itself.<sup>138</sup>

Justice Kiefel has noted the long-held concerns of judges in relation to the elevation of the profit motive in law firms and the adoption of business models for legal practice. Her Honour has warned against lawyers equating themselves too closely with their clients and conducting their practices as their clients run their corporations.<sup>139</sup> Commerce after all, does not have the same standing, confidence and trust of the public that is held by the law as a profession.<sup>140</sup> In her timely intervention into the discourse, her Honour reminds us that the standards of conduct required of lawyers are ‘professional standards’.<sup>141</sup> It is difficult, however, to see how the firms that constitute the major corporate legal sector and operate as a significant force in the world of global capitalism<sup>142</sup> will devolve into less corporate structures.

It is of concern that professionally trained lawyers working in the top echelons of the large corporate law firms which service the major corporations are

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<sup>136</sup> Interview with Male Partner (Melbourne, 10 November 2005).

<sup>137</sup> See Milton C Regan Jr, ‘Symposium, Corporate Irresponsibility: America’s Newest Export?: Corporate Norms and Contemporary Law Firm Practice’ (2003) 70 *George Washington Review* 931, 939.

<sup>138</sup> It must be noted that, in the wider profession, in the magistracy, for example, the concerns in relation to the loss of autonomy relate to matters of daily autonomy in connection with workloads and time pressures. See Sharyn Roach Anleu and Kathy Mack, ‘The Professionalisation of Australian Magistrates: Autonomy, Credentials and Prestige’ (2008) 44 *Journal of Sociology* 185, 199.

<sup>139</sup> Justice Kiefel, ‘Ethics and the Profession of the Lawyer’ (Speech delivered at The Vincents’ 48<sup>th</sup> Annual Symposium 2010, Queensland Law Society, 26 March 2010). See also Justice Marilyn Warren, ‘Legal Ethics in the Era of Big Business, Globalisation and Vonsumerism’ (Speech delivered at the Joint Law Societies Ethics Forum, Melbourne, 20 May 2010). Justice Warren’s particular concern is that the standard of conduct of legal professionals is losing its force.

<sup>140</sup> Kiefel, above n 139.

<sup>141</sup> *Ibid.* It must be noted that some view the distinction between narratives that construct law as a profession which makes a virtue of high ethical standards, as against ‘mere’ business or commerce, as rhetoric that is ‘a bit overblown’ and ‘exhortation disguised as description’. See John Britton, Legal Services Commissioner, ‘The Business of Ethics’ (Speech delivered at the Alumni Luncheon Lecture, University of Queensland, 12 May 2010) <[www.lsc.qld.gov.au/\\_data/assets/pdf\\_file/.../business-of-ethics.pdf](http://www.lsc.qld.gov.au/_data/assets/pdf_file/.../business-of-ethics.pdf)>.

<sup>142</sup> See John Flood, ‘The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation (2011) 59 *Current Sociology* 507, 511. Flood points out that the Global 50 law firms earned revenues of over £55 billion in 2007–08, nearly 40 per cent of which came from corporate and finance work.

finding their professional autonomy compromised by pressure to march to the beat of their clients' drums:

There are some large corporate clients who we don't think have the same ethics as the professionally trained lawyers in this firm have and that can be very difficult, particularly when they are either running a transaction or they are your direct client and they are trying to get you to do things that ethically you don't agree with. So they're just pushing the deal so hard and there may be some borderline as to how ethical it is, but there are some who will just say: 'I don't care, do it.' So they do come up, they do. They are not infrequent either.<sup>143</sup>

It may well be, therefore, that those who have suggested that commercial lawyers are under increasing pressure to behave unethically or even illegally in order to maintain their corporate clients are correct.<sup>144</sup>

I think that people have forgotten what ethics are. I mean if you were to say 'What are your legal ethics — list them?' I would struggle to go beyond conflict and professional courtesy. I mean if you reminded me I would tell you — but other than doing a very short course of ethics before you get admitted, when does anyone remind you? There is no reminder — nobody trains you about it and then what you do get is an enormous amount of pressure to be commercial, to meet your client's objectives and I have encountered it many, many, many times over my career where people are aware that what they are being asked to do is not right, but they have no choice. Particularly where we have this concept of Chinese walls within firm, it's ridiculous, there are no Chinese walls. You can't have Chinese walls. You are acting for party A against party B, but somebody knows party B and that's a bigger target, so maybe you are not as hard on them as you might be. It's just a reality. I think people don't want to talk about it because they might stir up a hornet's nest.<sup>145</sup>

If that is so, the ethical implications of the loss of lawyers' autonomy in a workplace in which the *raison d'être* is to meet clients' commercial objectives, at whatever the cost because of the 'pressure to be commercial', is of major concern for the profession. It is a hornet's nest demanding to be stirred! That said, some lawyers interviewed are very confident that they do not experience any tension between the ethics of their large corporate clients and those of professional legal practice:

No, we are very lucky. The clients we work for are good corporate citizens — They don't ever — I mean this firm would never advise how to get around laws or anything that would compromise our ethics. We act for good clients who want to comply with the law and that is why they come to us.<sup>146</sup>

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<sup>143</sup> Interview with Female Partner (Melbourne, 6 October 2005).

<sup>144</sup> Suzanne Le Mire and Christine Parker, 'Keeping It In-House: Ethics in the Relationship between Large Law Firm Lawyers and Their Corporate Clients through the Eyes of In-House Counsel' (2008) 11 *Legal Ethics* 201, 202.

<sup>145</sup> Interview with Female Partner (Melbourne, 28 July 2005).

<sup>146</sup> Interview with Female Partner (Melbourne, 19 August 2005).



Others, however, see themselves as being reduced to bit-players in teams orchestrated by their large corporate clients and the goals to be scored are the business goals and objectives of those corporations:

The days of a lawyer being like your local GP — a stern, separate, independent person that you went to with your problem and they talked to you about the law and you went away and solved it, just don't happen anymore. Lawyers are now bit parts of project teams where you have a goal to achieve. And that means that you have an imperative which is the client's commercial aim and that is not always consistent with your ethical obligations in relation to conflict, and in relation to professional courtesy. All sorts of ethics are compromised because of this sense that a lawyer is part of a client's team rather than an independent legal provider.<sup>147</sup>

As the data for this research were collected prior to the global financial crisis of 2007, any impact it has had on the ability of Australian lawyers to act autonomously as legal professionals demands further research. A 2010 UK report, conducted by the elite London law firm Eversheds,<sup>148</sup> found that the resultant recession has accelerated both the globalisation of the legal profession and workplace change. That report, tellingly entitled '*Law Firm of the 21<sup>st</sup> Century: The Client's Revolution*', is based on interviews with 130 general counsel and 80 law firm partners. It finds that general counsel are now under increasing pressure to deliver more for less and as such are demanding reduced costs and greater value from their major corporate law firm advisers.<sup>149</sup> Indeed, the report shows that in-house lawyers are becoming far more powerful than they were before the downturn, with 55 per cent now assuming more responsibility for corporate governance and 33 per cent taking on the role of ethics. As a result, the major law firms are placed under increasing pressure to redefine their role and their worth to their corporate clients. With corporate clients now 'at the centre of the legal services solar system'<sup>150</sup> and the major law firms in obedient orbit, general counsel are demanding lower fee rates and value-added services, such as complimentary access to knowledge management resources and specialist expertise from firms, to ensure that their demands for greater efficiencies are met.<sup>151</sup>

The report confirms the trends already evidenced in the Australian research, and highlights the need for concern that corporate lawyers working in the Australian legal services market are losing key elements of their professional identity. Those elements include their autonomy, the control they have over the knowledge they command and the ethic of disinterested service that guarantees the provision of full, frank and fearless advice to clients. Time will tell whether the

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<sup>147</sup> Interview with Female Partner (Melbourne, 28 July 2005).

<sup>148</sup> Eversheds, *Law Firm of the 21<sup>st</sup> Century: The Clients' Revolution* (22 March 2010) 1–2. <[https://docs.google.com/viewer?a=v&q=cache:xpaekGNi6ewJ:weblaw.usc.edu/assets/docs/contribute/Eversheds21CClientRevolution.pdf+eversheds+report+client+revolution&hl=en&gl=au&pid=bl&srcid=ADGEEShE8VQuhRPx9WX7jtWOx7IHd1tKv2h\\_zEiLs0kDMd-Cs-fS8WSpXW6-IVPNJoPjT3oyiqQOArXBzplKkhXG9Y9-sN-pfCaJ-cH9grE8iJJsWoLopNmqrO6TfRH0yyCMESVPzofg&sig=AHIEtbRqcoOuQF0QRB2Kjrzc\\_pYSarcNeA](https://docs.google.com/viewer?a=v&q=cache:xpaekGNi6ewJ:weblaw.usc.edu/assets/docs/contribute/Eversheds21CClientRevolution.pdf+eversheds+report+client+revolution&hl=en&gl=au&pid=bl&srcid=ADGEEShE8VQuhRPx9WX7jtWOx7IHd1tKv2h_zEiLs0kDMd-Cs-fS8WSpXW6-IVPNJoPjT3oyiqQOArXBzplKkhXG9Y9-sN-pfCaJ-cH9grE8iJJsWoLopNmqrO6TfRH0yyCMESVPzofg&sig=AHIEtbRqcoOuQF0QRB2Kjrzc_pYSarcNeA)>.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.* 3.

<sup>151</sup> Bryan Hughes, 'The Power Shift from the Law Firm to the Client Will Be Permanent' (2010) May *Australasian Law Management Journal* 15, 16.

changes that are occurring here are in fact ‘revolutionary’ rather than ‘evolutionary’, but the magnitude and pace of change would suggest the former. Certainly, the fundamental change to the way corporate clients are seeking their legal advice in Australia would appear to mirror the UK research. Reportedly, post-global financial crisis, corporate counsel are demanding greater value from the major firms. In addition, the major firms are being usurped by corporate counsel as ‘trusted advisor’ within many organisations with senior executives tending to now seek in-house advice rather than turning to their external legal advisers.<sup>152</sup>

It is a paradox that, although corporate lawyers have long been the demigods of the profession and have signified the ultimate in successful legal practice, as professional workers they can now be seen to be subject to what Derber defined as ideological proletarianisation. They are losing control over the goals and social purposes to which their work is put.<sup>153</sup> Indeed, as paid professionals<sup>154</sup> who have been ‘hitherto honoured and looked up to with reverent awe’,<sup>155</sup> they now find themselves functioning more and more under the control and direction of their powerful and savvy corporate clients. As they are exposed to the vicissitudes and fluctuations of the market in the epoch of the 21<sup>st</sup>-century clients’ revolution, they appear to be at risk being stripped of their haloes and professional status and reduced to little more than flush factory fodder.

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<sup>152</sup> Nicolas Adamo, ‘Ignore Commercial Realities at Your Cost’ (2010) *Australasian Law Management Journal* 14, 14–15.

<sup>153</sup> Derber, above n 31, 169.

<sup>154</sup> Albeit, by any count, very well paid.

<sup>155</sup> Marx, above n 5, 338