subject for the bar examination in Japan. The passing rate of the bar exam is 20 per cent. Accordingly, the students are most concerned if they can pass the bar examination after graduating from law schools. So they concentrate their energy on the subjects of the bar exam such as civil law, criminal law and company law.

As I mentioned before, the bar associations understand the importance of legal ethics in terms of self-governance. They provide the training to newly registered attorneys and provide training to the attorneys every five years. This training is compulsory. They provide young attorneys with a mentor system. A mentor is usually a former president of a local bar association. Young attorneys can consult their mentor at any time for any problem, except 'lend me money or give me a loan!'

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Conflicts of interest: its definition, and the importance of its regulation in our profession*

There are certain professions where clients are unable to evaluate the quality achieved by the supplier of the services, such as lawyers, and where it is impossible to know if the professional has acted in the client's best interest.[1] Trust (by clients to lawyers) therefore plays a major role which distinguishes our profession form many other activities, and ethics become a nurturing factor for maintaining this trust.

A potentially disturbing factor of this trust is the conflict of interest situation (or, as Geoffrey Hazard puts it, 'the adversity of interests' situation).[2] Consequently, the way we regulate and deal with conflicts will ultimately affect the perception of our profession by society.

Definition of conflict of interest

A conflict of interest arises[3] when a primary interest is conditioned ('unduly influenced', says Dennis Thomson) by the emergence of a secondary interest, being the primary interest the one from the client. This secondary interest may affect the decisions of the lawyer in the defence of the primary interest. It is not necessary to produce a prejudice to the client in order to speak about conflict of interest; it is sufficient that there is a zone of influence in which the decision on the primary interest may be affected, even if the conflict is finally avoided.[4]

The inherent conflict of interest in our profession is the conflict of interest between the lawyer (or the firm) and the client. This conflict of interest arises because the lawyer can offer the client different options or recommend different courses of action, but some of these courses of action will be more in favour of the client and some more in favour of the lawyer (for example, reaching or not reaching a settlement agreement, starting or not starting court proceedings).

But it also embodies the conflicts which arise by representing different clients with adverse interests.

How situations for lawyers with parties with adverse interests have to be regulated in our profession, however, it has to take into account a number of factors as the variety of situations, markets, etc may not call initially to a blank prohibition or sanction wherever the possibility of conflict arises, even if, ultimately, the interests of clients and society should be the overriding consideration. The following factors may be considered in the analysis for defining conflicts of interest regulation (which, for some, may justify a different approach between common law and civil law systems):

- How adverse are the interests, currently or in the future, of the clients (factual analysis);
- How often these situations may arise (business analysis);

- What the market is currently asking for (economic analysis);
- How specialised an area is allow for discussion for possible exceptions to the rule (professional analysis);
- How big or diverse or separated partners are within a firm to claim sufficient separation for credible Chinese walls (firm organisation analysis);
- How big are law firms in a given jurisdiction (or its need to have big firms), as well as how oligopolistic they can be, for the purposes of having a realistic approach to conflicts rulings (economic analysis based on the structure of the offer, particularly from a competition point of view; for Nicolson and Webb,[5] 'substantial segmentation', as well as specialisation, are certainly factors that make rules on conflicts a complex exercise);
- What will be the impact of any given behaviour and rulings of certain players coming from different jurisdictions, in jurisdictions with different economic and business structures, and therefore the impact on the perception of the profession in their local jurisdiction (professional ethics analysis); and
- What is the impact of globalisation on the approach to this problem, whether one set of rules should be applied, or we may fall into a dualistic approach (international business versus local professional activity) (political analysis).

How can we regulate conflicts in our profession?

The way to regulate conflict of interests may vary according to what our ultimate objectives should be. It can be regulated on broad terms, appealing to lofty principles, or stating the main aims and prohibitions.[6] Or it can be regulated in more detail, in what Nicolson and Webb define as a formalistic and liberal approach to regulation,[7] for whom the risk is losing focus on preserving situations of conflict of interests, as abiding strictly to the rules and exceptions may result in legally departing from an ethical behaviour on a particular case.

Conflicts can be regulated by self-regulatory bodies, by the public authorities or directly by the courts. Conflicts could even be left to be assessed by the market. But, as Nanda correctly points out, clients may want or expect a different approach at the beginning, when hiring a lawyer, such as a broad approach to judging conflict situations where their intended lawyer would be generous in taking them on board, and upon completion, once the relationship has ended, where clients would rather expect the law firm to take a narrow or strict approach in deciding whether or not to take on board mandates from future clients.[8] This different approach by clients depending on the moment where potential conflicts have to be taken into consideration (ex-ante or ex-post) is clearly a call for regulation.

It is obvious that the bigger the provider of legal services, the more interested it will be in having a broader approach to conflicts. Hence, regulating conflicts may have a political and economic dimension: the broader the approach, the better for the creation of oligopolistic markets in legal services. On the contrary, the stricter the interpretation, the narrower the rules are which may promote a more diversified market. Therefore, the definition of the conflict norms as 'narrow' or 'broad' will influence the structure of the profession and the size of the firms practicing it.

Despite the fact that a balance should be achieved by taking into account the different factors that have been mentioned above, the legal profession is still seen as the typical example of narrow conflict norms, as loyalty should be a primordial goal for these professionals, and consequently the choice of new clients should be thought through carefully.

As mentioned at the beginning of this article, if we are to promote trust from clients as the main driver in our profession, then we will need to be very careful in regulating possible exceptions or means to avoid the infringement of the no conflicts duty.

Notes

* This note is a summary of the author's intervention during the last IBA Annual Conference in Tokyo in the session 'Eat, Pray, Represent Me: Are you my client and do I owe you a duty?', which took place on 22 October 2014, organised by the IBA's Closely Held and Growing Business Enterprises Committee, Insurance Committee, Law Firm Management Committee and the Professional Ethics Committee (Lead). The author wants to thank Maria Muro, also from Fornesa Abogados, for her help in the final elaboration of this note.

1 The main thesis of this note is based on Ashish Nanda, *The Essence of Professionalism: Managing Conflict of Interest* (Boston: Harvard Business School Publishing, Paper 9-903-120, 2003) and Ashish Nanda, *Managing Client Conflict* (Boston: Harvard Business School Publishing, Paper 9-904-059, 2005).

2 Geoffrey Hazard and Angelo Dondi, *Legal Ethics. A comparative Study* (Stanford (CA): Stanford University Press, 2004) 186 and following.
3 The definition is taken from Dennis Thomson, 'Understanding Financial Conflicts of Interest' (August 1993) 3(29) The New England Journal of Medicine 573–576, quoted by Ashish Nanda, in n1 above. Nanda considers this definition as 'definitive'.
4 The definition comes from the medical sector, which traditionally has studied this ethical issue in greater depth.
5 Donald Nicolson and Julian Webb, *Professional legal ethics* (Oxford: Oxford University Press, 1999) 71.
6 In Spain, both the state and the autonomous communities have defined what must be interpreted as a conflict of interest. In general terms, national and regional authorities have defined it in a similar way, pointing out that in any case a lawyer cannot defend an interest when it is or it can be in conflict with another's interest (self-interest or another client's interest). Furthermore, this broad prohibition is extended to the firm where the professional works as a whole and to all the lawyers working in it ('imputation'): Article 52 of the Estatuto General de la Abogacía and Article 22 of the Normativa Catalana de l'Advocacia.
7 See n5 above, 2.
8 See n1 above, Nanda, *Managing Client Conflict.*

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