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Icarus Falls: The Coal Health Scandal

Andrew Boon and Avis Whyte*

> I have noticed how many of my colleagues find these guys' behaviour reprihensible [*sic*]. However, they are happy to suck up to organisations that have indiscriminately ripped people off left right and centre, our banks primarily. Is there a sniff of swine envy in the air[?][1]

Introduction

The disciplinary processes governing lawyers have been a defining feature of self-regulation. In many jurisdictions, such processes are being re-shaped to conform to best practice in business regulation. The environment of practice for lawyers continues, however, to be quite different from that of other sectors. A major consideration is the fact that the practice environment is shaped by professionally focused rules and processes, as interpreted and enacted by the main actors: practitioners, organisations and regulators. The performance of these actors helps to determine the strength of the profession compared with other stakeholders, including government. Reform agendas reflect a profession's record on regulatory issues. Periods of crisis or moral panics sometimes lead to reform that is reactive rather than strategic.[2] This paper considers the impact of a major professional scandal. It examines how the key players interacted and how the ethical environment of practice might have affected an individual's propensity for transgression. It also considers how the perceived lessons of the crisis influenced reform in England and Wales.

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[1] Comment on Solicitor blog 'It's All Mine—£13m Compensation Lawyer Struck Off', www.solicitor.com/2009/05/01/its-all-mine-13m-compensation-lawyer-struck-off.

[2] Linda Haller, 'Professional Discipline for Incompetent Lawyers? Developments in the UK and Australia' (2010) 17(1) *International Journal Legal of the Legal Profession* 83, 84.

The professional scandal became known as the miners' costs (or fees) scandal. It led to the largest disciplinary investigation ever mounted in the jurisdiction. Eventually, over 100 lawyers from around 30 firms faced disciplinary charges, and most were sanctioned. The scale of the charges and the parliamentary furore that surrounded the case suggests that there was widespread and significant dishonesty among solicitors. The analysis in this paper suggests, however, that the affair had the ingredients of a 'moral panic'. This may have led to the high numbers of disciplinary cases and clouded perceptions of the issues. The notoriety of the scandal, and the condemnation of the legal profession it usually evokes, arguably rests on the 'striking off' or suspension of a relatively small number of solicitors. The charges against most of those not struck off arose, however, from misinterpretation of conduct rules that were widely misunderstood, even by the professional regulator. This account is not a defence of those disciplined, or indeed, the profession's handling of the matter, both of which deserve more extended examination. Rather, it is an attempt to put the miners' costs scandal in context.

The backdrop to the miners' costs scandal was the Coal Health Compensation Schemes, which were set up to compensate employees and former employees in the nationalised coal mining industry suffering from medical conditions arising from their work. This article sketches the wider context in which the scandal is set, but focuses on the record of the disciplinary proceedings against the solicitors charged with misconduct, other documents, including press reports, and a small number of interviews with those involved in the disciplinary process and the Coal Health Schemes. The case study, of Andrew Nulty, one of the solicitors struck off as a result of disciplinary proceedings, was chosen because the charges laid are extreme examples of the allegations faced by the other lawyers disciplined. Also, Nulty was interesting as an individual because he courted publicity, casting himself as a new breed of lawyer entrepreneur, eager to be released from professional shackles by consumerist policy. The article begins with an outline of the disciplinary system for solicitors in England and Wales and the Coal Health Schemes. It then plots the emergence of allegations against solicitors' firms representing claimants and the reaction of the regulator before focusing on the case study. The article concludes by placing the scandal and case study in a theoretical context.

Regulation of the legal services market in England and Wales

Solicitors constitute the largest legal profession in England and Wales, with around 160,000 members, over 121,000 holding practising certificates.[3] Despite attempts by government to harmonise the working practices of solicitors and barristers,[4] traditional roles have been resilient. In the prevailing division of labour, most solicitors retain day-to-day contact with clients and hold clients' money, while most barristers, numbering over 16,500,[5] still maintain a lofty detachment, acting as consultants and advocates. After hundreds of years in the shadow of barristers, the solicitors' model of practice is prevailing. The large corporate and commercial solicitors' firms in the City of London now dominate international practice.[6] Yet solicitors also service the opposite end of the client spectrum, with solo and small firm practitioners in provincial towns offering welfare advice to the disadvantaged.

Solicitors are subject to a range of controls. Courts have a summary jurisdiction to punish breach of the duty to the court.[7] Solicitors can also be subject to sanctions as a result of complaints. Between 2000 and 2005, complaints averaged nearly 17,000 per annum,[8] representing one complaint per annum for every five solicitors. Various organisations have handled complaints against solicitors over the years.[9] Their performance frequently attracted criticism, especially from the office of the Legal Services Ombudsman (LSO), set up in 1991 to review complaints handling by the professional bodies.[10] Complaints against solicitors or barristers to the LSO could also result in sanctions, including an order that the complaint be re-investigated or an order of compensation. Complaints revealing inadequate professional service and professional misconduct were referable to the Solicitors Disciplinary Tribunal (SDT).

The SDT is established under the Solicitors Act 1974 and is currently funded by, but independent of, the Law Society. Members—appointed by a senior judge and the Ministry of

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[3] Nina Fletcher, *Trends in the Solicitors' Profession: Annual Statistical Report 2011* (Law Society, 2012).
[4] Andrew Boon, 'Professionalism under the Legal Services Act 2007' (2011) 17(3) *International Journal of the Legal Profession* 195.
[5] As at December 2010, there were 16,784 practising barristers (12,420 self-employed, 2,967 employed and 1,397 QCs), *Bar Council statistics*, www.barcouncil.org.uk/assets/documents/Table_5_Annual%20Statistics%202010.pdf.
[6] JR Faulconbridge, JV Beaverstock, Daniel Muzio and PJ Taylor, 'Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work' (2008) 28(3) *Northwestern Journal of International Law and Business* 455.
[7] Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, 2nd edn 2008) 133–5.
[8] *Annual Reports of the Legal Services Ombudsman* 2000–1 to 2004–5.
[9] Until 2010, they were investigated by the Legal Complaints Service, a body funded by, but independent of, the solicitors' professional body, the Law Society. From 6 October 2010 complaints about different kinds of legal services providers were made to the Legal Ombudsman for England and Wales, set up by the Office for Legal Complaints under the Legal Services Act 2007 (see Boon and Levin (n 7) ch 7).
[10] Boon and Levin (n 7) 135.

Justice—sit in panels of three. The SDT has wide jurisdiction and powers.[11] In dealing with disciplinary cases it may 'make such order as it may think fit', which powers explicitly include imposing penalty and costs orders, striking off and suspension.[12] Between 2000 and 2009, the SDT heard an average of about 200 cases a year,[13] representing less than 0.25 per cent of solicitors holding practising certificates.[14] These cases resulted in annual averages of around 64 solicitors struck from the roll (disbarred), 38 suspended, 22 reprimanded, and about 10 cases annually where no sanction was imposed, apart, possibly, from a costs order. Appeals from SDT decisions went to the High Court.[15]

Since the 1990s the legal services market was in a process of liberalisation and a state of considerable flux. The Legal Services Act (2007)[16] represented an effort to harness the benefits of professionalism within a consumerist framework.[17] As part of this approach it provided for the introduction of Alternative Business Structures (ABSs), organisations allowing non-lawyer capital and management.[18] Since ABSs were predicted to reduce the cost of legal services lawyers by using more para-legal staff, many lawyers and their professional bodies anticipated these changes with ambivalence. It seemed that lawyers were being driven to be more competitive, that is, more innovative and entrepreneurial. The Law Society seemed concerned that it was out of step with a new regulatory philosophy and that its rules and approach were outdated.[19] This may explain why, during the coal health scandal, the Law Society seemed unsure of the appropriate response.

During most of the period under consideration here (1996 to the present), the Law Society maintained the SDT. Until recently, and for most of the period under discussion, it investigated code infractions and brought disciplinary cases to the tribunal. Forensic investigation of solicitors' firms was typically conducted by review of accounts and files and interviews of partners and employees. Such investigations tended to be 'triggered' by complaints or whistleblowers. On 29 January 2007, anticipating compulsion under the Legal Services Act, the Law Society hived off its disciplinary functions to the Solicitors Regulation

[11] Solicitors Act 1974, s 47 (as amended by the Administration of Justice Act 1985 and the Courts and Legal Services Act 1990).
[12] Solicitors Act 1974, s 47(2) (as amended by the Legal Services Act 2007).
[13] Data from *Solicitors Disciplinary Tribunal Annual Reports* between 2000 and 2009. The lowest was in 2004 (177) and the highest in 2009 (286).
[14] Based on data taken from *The Law Society Annual Statistical Reports* between 2001 and 2009. The number holding practising certificates rose from 82,769 in 2000 to 115,475 in 2009.
[15] *Ibid*, 144–7.
[16] The Legal Services Act (hereinafter LSA) came into effect on 30 October 2007; part 4 deals with the regulation of approved regulators. The text is available at www.legislation.gov.uk/ukpga/2007/29/contents.
[17] Boon (n 4).
[18] See LSA (n 16) Part 5, Alternative Business Structures.
[19] Boon (n 4).

Authority (SRA). The SRA concluded the investigations of solicitors charged in connection with the coal health scandal and presented cases to the SDT. The SRA is now an authorised regulator of ABSs[20] and has substantially revised the code of conduct for solicitors so that it can regulate the range of solicitor organisations and ABSs under one disciplinary regime.

The Coal Health Schemes

In 1993, miners suffering from work-related illnesses commenced actions for personal injury against the British Coal Corporation (BCC). One set of actions concerned vibration white finger (VWF), a condition caused by using vibrating tools. In 1994 the VWF cases were consolidated into a group action, and in 1996 judgment on a preliminary issue established grounds for BCC's liability for VWF.[21] In 1997 lead actions established the extent of injury loss and damage. In 1998 negotiations took place with the Department of Trade and Industry (DTI), successor to BCC, for managing the claims outside the court process. Meanwhile, in January 1998, the High Court found BCC negligent in relation to a second set of actions concerning respiratory disease resulting from work in the dusty environment of coal mines.[22] These conditions, including chronic bronchitis and emphysema, were known collectively as Chronic Obstructive Pulmonary Disease (COPD). Under court direction, two time-limited Claims Handling Agreements (CHAs), one for VWF and one for COPD, were created to dispose of the many outstanding claims and to deal with new claims presented under the schemes.

The Claims Handling Agreements were essentially contracts between the DTI and the miners' solicitors. The CHA for COPD was negotiated between the DTI and representatives of the large number of firms representing claimants, referred to as the Claimants' Solicitors Group (CSG).[23] Each CHA defined the role and responsibilities of claimants' solicitors, the DTI's claims handlers and medical assessors and others involved in the process. In most litigation, courts routinely assess the reasonableness of costs,[24] but it was thought that considerable time and expense would be saved if a tariff of scale fees payable by the DTI

[20] On 13 June 2011 the Legal Services Board approved the Solicitors Regulation Authority as a Licensing Authority for ABSs, which were to become operational before the end of 2011 (see www.sra.org.uk/abs).
[21] *Armstrong v BCC* [1996] EWCA Civ 1049.
[22] *Griffiths v British Coal Corporation* [1998] EWHC 2008 (QB) (Cardiff HC) (reported as *Rees v British Coal*).
[23] Claims Handling Agreement (England and Wales) between the Department of Trade and Industry and the British Coal Respiratory Disease Litigation Claimants Solicitors Group (CSG), 24 September 1999, www.decc.gov.uk/assets/decc/what%20we%20do/supporting%20consumers/coal_health/publications/file17630.pdf.
[24] In the High Court this is usually done after the event by a costs judge.

were set for the solicitors' costs of successful claimants. The CHAs were approved by the supervising judges. The DTI reported three to four times a year to the judge supervising each scheme, and there were further negotiations and agreements in the course of dealing with the claims. A steering group led by the firms of solicitors that had negotiated the CHA represented the collective interests of claimants in this process.

The idea behind the Coal Health Schemes was that miners could submit details of their claims, which would be assessed using employment records and medical evidence, without each claim having to go before a court. Claimants retained the right to pursue a common law claim and could withdraw from the CHA and litigate. Entitlement to an award and its value were determined by the terms of the CHA. Compensation would be payable according to a tariff. To begin the claims process, each claimant completed an application. COPD claimants provided details of ill health, work history and smoking habits and took a Spirometry Test for lung function.[25] This record was lodged with a solicitor, who registered it with the claims handler. About 50 respiratory specialists were employed at assessment centres throughout the country to assess COPD claims.[26]

COPD claims were closed to new applications at the end of March 2004[27] with the intention that claims by live claimants would be processed by the end of 2007 and those by the estates of deceased miners by 2009. In 2005 the Parliamentary Select Committee on Trade and Industry noted that the volume of claims was higher than expected. At the time of judgment in the lead case there were 6,000 identified COPD cases, and this figure was expected to rise to a maximum of 70,000. The Department admitted, however, that it had no basis for estimating the total number of applicants. In fact, 172,000 COPD claims had been settled in full by January 2005, and final offers had been made in another 179,827 cases.[28] In all, £1.1 billion in compensation had been paid for VWF and £1.29 billion for COPD,[29] whereas British Coal originally had allowed only £50 million in their accounts to cover their liability. Worse, the settled claims were only part of a total of an estimated 576,000 COPD claims[30] for which the DTI expected to pay about £7.5 billion in compensation.[31] Members of Parliament were incandescent, demanding to know who was to blame.

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[25] Select Committee on Trade and Industry Fourteenth Report (2005), ch 2, www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/375/37505.htm.
[26] *Ibid*.
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid*.
[30] *Ibid*.
[31] *Ibid*.

On 21 July 2005, Malcolm Wicks, Minister for Energy at the DTI, announced an external review of the schemes to be undertaken by Stephen Boys Smith, a former Home Office official, and two others.[32] Suspicions regarding the operation of the scheme were reflected in the remit, which included reviewing 'the integrity of the administration of the scheme for dealing with coal health claims; to identify any specific measures needed to improve the administration of the scheme; to consider whether there are adequate safeguards in place to prevent, detect and pursue fraud …'[33] The Boys Smith report, released in December 2005, criticised the choice of such schemes to administer large numbers of cases and the cost involved.[34] While there was no evidence of fraud, the report intimated that anti-fraud measures that had been implemented later in the schemes would have reduced the possibility. Legal costs were identified as an area of potential saving. While the costs tariff negotiated with the Claimants' Solicitors Group appeared reasonable at the start of the scheme, it was arguably too generous for routine claims handling. Responding to the report, the Minister claimed that some £200 million could have been saved by reducing 'unnecessary' legal costs.[35]

A later report revised the various estimates of cost but also failed to find fault with the miners or their lawyers. In April 2007 a National Audit Office report estimated that when all claims were settled £4.1 billion would have been paid in compensation, with a further £2.3 billion spent on administration costs, payments to miners' legal representatives, contractors, and the Scheme's own legal costs.[36] The report identified 'significant weaknesses' in government handling of the Coal Health Scheme. For example, the costs agreement initially reached with solicitors had no mechanism for review, with the result that the COPD scheme alone paid £295 million more than necessary.[37] Moreover, whereas the median award under the COPD scheme was £1,500, the average solicitors' fees per case were £1,920.

The unexpectedly high cost of the Coal Health Scheme was caused by the explosion of claims, far more than budgeted for. As to costs, while the lawyers' rates of pay may have been over-generous for routine claims handling, it was hardly the CSG's fault if the government's agencies had negotiated a bad deal. Further, the accusations subsequently

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[32] Review of the Coal Health Compensation Schemes, November 2005, p 16, para 1.1, http://claimscouncil.org/system/files/24/original/Review_of_coal_miners__comp_schemes.pdf?1259166552.
[33] *Ibid*, p 16, para 2.
[34] *Ibid*, section 10.
[35] 'Firms Face Mining Probe' *Law Society Gazette*, 5 January 2006, www.lawgazette.co.uk/news/firms-face-mining-probe.
[36] Comptroller and Auditor General, *Coal Health Compensation Schemes* (HC 608, Session 2006–7, 18 July 2007) p 5, para 5, www.official-documents.gov.uk/document/hc0607/hc06/0608/0608.pdf.
[37] *Ibid*, p 6, para 15.

levelled against solicitors—that they overcharged the clients they represented under the Coal Health Scheme—did not add to the Scheme's cost to the public. These issues did not, however, lead solicitors to the SDT. What many people think was the core of the scandal was that the solicitors subsequently disciplined had charged their clients costs additional to the scale fees paid by the DTI under the Coal Health Scheme. Arguably, however, they had every right to make additional charges. It was how those charges were levied that led to disciplinary action and determined the different degrees of culpability found.

'Overcharging'

A popular misconception in the coal health scandal is that solicitors were found guilty of overcharging. In most cases, this was not so. The rule infractions tended to be more technical, concerning breaches of strict requirements for collecting costs from clients. There are broadly two ways in which successful litigants may be required to pay their own solicitor's costs in bringing a claim. The first way is when clients do not recover all their costs from the losing party and are then required to pay the solicitor for the extra work done on the case—so-called solicitor and own client costs.[38] The second way is when clients have entered a conditional fee agreement under which the other side is not required to pay the uplift on the fee permitted by such agreements.

Solicitor and own client costs arise in litigation because, under English law, the court has a wide discretion to order one of the parties to pay some or all litigation costs to one of the parties. The general rule is that the unsuccessful party pays the costs of the successful party.[39] These are usually standard costs, meaning the costs that have been reasonably incurred.[40] Individual items of costs may also be disallowed, and these costs may be recoverable from clients as solicitor and own client costs. This usually arises when costs were incurred as a result of the client's unreasonable behaviour or instructions.[41] Clients who are dissatisfied with the solicitor's bill can apply for detailed assessment by the court.[42] Although the principle of proportionality applies to costs, it is recognised that in small claims in particular,

[38] Solicitor and own client costs are costs that are recoverable from a client irrespective of whether a contribution to costs is recovered from the other side (SRA, *Solicitors' Costs Information and Client Care Code 1999*, para 5(b)). Costs recoverable from the other side (*inter partes* costs) are costs that have been 'reasonably incurred', known as standard costs, whereas solicitor and own client costs are payable unless 'unreasonably incurred', ie on the indemnity basis (see Civil Procedure Rules 44.4(1)–(3), www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/pdf/parts/part44.pdf.

[39] Civil Procedure Rules, Part 44.3 Rule 2(A).

[40] See Rule 44.3 generally.

[41] See, for example, *Noorani v Calver* [2009] EWHC 592 (QB).

[42] Civil Procedure Rules, Part 47.

costs may exceed awards.[43] There is no suggestion that, in the miners' cases, additional costs were recoverable from clients as costs unrecovered from the other side.

In addition to litigation costs incurred that are not the responsibility of the other side, solicitors can potentially charge their clients costs over and above those paid by the other side under conditional fee agreements (CFAs). From 1995 CFAs were permitted in, *inter alia*, personal injury actions,[44] thereby introducing a limited exception to Practice Rule 8, which prevented solicitors charging a contingency fee in litigation.[45] As with contingency fees, CFAs allowed solicitors to finance litigation in return for a success fee recoverable if the claimant won.[46] Unlike contingency arrangements, however, rather than calculate fees as a percentage of damages, the solicitor's success fee was calculated as an 'uplift' on costs, by as much as high 100 per cent in cases of high risk.[47] The form of CFA, or 'No Win No Fee' agreement, was usually a variant of a Law Society model precedent. Although claimants could cover the risk of paying the other side's costs with 'after the event' insurance,[48] they might still be liable for the insurance premium and, depending on the terms of the CFA, their solicitor's disbursements if they lost.[49] If they won, clients who signed CFAs were required to pay their own solicitor's success fee, which was not recoverable from the other party.

The terms of the Coal Health CHAs specified that panel solicitors would be paid fixed fees by the DTI for all successful claims. The scale of costs for the COPD scheme ranged from £1,700 to £2,300 depending on the value of the claim. The agreement with the DTI declared: 'these agreed fees will represent the total sums payable to the Claimant's representatives in relation to the claim. The DTI will not be liable for any additional fees or disbursements …'[50] The DTI scheme, therefore, did not explicitly provide that solicitors could not seek costs from miners in either successful or unsuccessful claims, only that the DTI would not be liable for additional costs. Construing the terms of the CHA in context, it did not address the possibility

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[43] *The Costs Practice Direction: Supplement to CPR Parts 43–48*, October 2011, para 11(2), www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_parts43-48#IDAAHUJC.

[44] CFAs were legalised by the Courts and Legal Services Act 1990, but did not come into force until 1995.

[45] For background and description see Boon and Levin (n 7) 246–51.

[46] 'A costs order made in any proceedings may, subject in the case of court proceedings to the Rules of Court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee' (Courts and Legal Services Act 1990, s 58A(6), as amended by the Access to Justice Act 1999 ss 27 and 28).

[47] Based on factors such as the merits and value of the claim, likelihood of settlement, estimated costs involved, and likelihood of recovery of costs from the other party.

[48] In such circumstances the claimant's liability for costs to the other side is insurable by 'after the event' insurance, ie insurance taken out after the accident in a personal injury claim but before the action is brought.

[49] Some solicitors cover disbursements and others require the client to pay them.

[50] *Beresford and Smith v Solicitors Regulation Authority* [2009] EWHC 3155 (Admin), para 11, www.bailii.org/ew/cases/EWHC/Admin/2009/3155.html.

of additional fees being chargeable by solicitors to clients.[51] None of the official reports argue that the DTI scale costs took account of the solicitor's risk in pursuing unsuccessful claims. There would, therefore, arguably be no impropriety in principle if success fees were charged to miners applying for damages under the Coal Health Schemes. The main argument that justified CFAs in ordinary litigation applied. Solicitors, particularly in the early days of the Coal Health Scheme, had no way of predicting the success rate of claims and therefore ran the risk of working for free in an unknown number of unsuccessful cases.

While there was some similarity between coal health claims and ordinary litigation, justifying the use of CFAs, the case for them was not watertight. While solicitors ran some risk in relation to unsuccessful coal health claims, this was not very substantial compared with the risk in ordinary litigation. For example, they probably did not undertake the volumes of work associated with most personal injury litigation. Further, they paid no disbursements, since all medical tests were arranged by the DTI. Even if it were accepted that they ran no very substantial risk, it would not mean that CFAs were unacceptable; the degree of risk could and should have been reflected in the percentage uplift on the success fee. So, as it became clear that the risk of failure was small in relation to the numbers of cases presented, the percentage of the success fee charged could have been reduced. In summary, there was no reason in principle why solicitors should not charge coal health applicants a modest success fee under a CFA, assuming that the CHA did not preclude this.

The conclusion that CFAs were not forbidden by the CHAs was confirmed on 27 July 2006. Mitting J, appointed by the Lord Chief Justice to supervise the VWF CHA, considered whether success fees were recoverable from the DTI. The question arose when the Access to Justice Act 1999 allowed solicitors' success fees, until then only recoverable from their own client, to be recovered from the other side as part of the successful litigant's costs,[52] together with basic charges, specific insurance premiums and the self-insurance costs of membership organisations.[53] Mitting J held that, in principle, the DTI could be liable for success fees, and the Court of Appeal agreed.[54] Such fees were recoverable in any sort of 'proceeding' for resolving disputes, not just proceedings commenced or contemplated in a court.[55] The Court of Appeal noted that, when negotiating the CHAs, '[t]he parties can be taken to have realised that Parliament could change the law. By providing that success fees were recoverable from

[51] Such a charge is not uncommon in ordinary litigation.
[52] Select Committee on Constitutional Affairs, *Third Report*, 14 February 2006, www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/754/75405.htm#n6.
[53] AJA 1999, s 29 (premiums), s 30 (self insurance costs).
[54] *AB v British Coal Corporation (Department of Trade and Industry)* [2006] EWCA Civ 1357.
[55] Courts and Legal Services Act 1990, s 8A(4).

unsuccessful respondents it has changed the law in a manner beneficial to claimants and their solicitors and detrimental to the DTI. The consequences of that change cannot be excluded simply by consideration of the circumstances in which the CHA was agreed.'[56]

As the subsequent disciplinary cases show, the approval by a senior court of the principle of claiming success fees in coal health cases was not the end of the matter. Even if entering into a CFA with Coal Health Scheme claimants was permitted in theory, in practice there was considerable scope for errors that could render such agreements unenforceable. Solicitors were required to observe a number of requirements imposed by the founding statutes[57] and by regulations made in 2000 covering the contents of the agreement[58] and the provision of information to clients.[59] One of the most significant requirements so far as the disciplinary charges were concerned was the requirement that legal representatives should inform clients, before the agreement was made, of the circumstances in which costs would be payable by the client to the representative, how those fees could be assessed, the relevance of any 'before the event'[60] insurance, and the availability and appropriateness of other methods of financing.[61] This information was required to be given orally, whether or not it was also given in writing.[62] Solicitors failing to observe these rules might also, in theory, face disciplinary charges if, for example, the circumstances caused a conflict of interest.

One of the practices that caught out many solicitors was attempting to recover success fees calculated as a percentage of the claimant's compensation, rather than as a percentage of costs. This could result in disciplinary charges since solicitors were potentially in breach of Practice Rule 8, which provided:

> A solicitor who is retained or employed to prosecute or defend any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding, save one permitted under statute or by the common law.[63]

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[56] *AB v British Coal Corporation* (n 54) para 38.
[57] For example, the agreement had to state the percentage of uplift (CLSA 1990, s 58(4)b).
[58] Conditional Fee Agreements Regulations 2000, s 2, specifying content, including reasons for setting percentage of uplift (s 3(1)(a)).
[59] Courts and Legal Services Act 1990, s 58(3)(a).
[60] For example, household policies which cover the legal expenses of policyholders in the event of injury.
[61] Conditional Fee Agreements Regulations 2000, s 4(2).
[62] *Ibid*, s 4(5).
[63] *Solicitors' Practice Rules* 1990, Rule 8(1).

Some solicitors might have assumed that the Coal Health Schemes were not an 'action, suit or other contentious proceeding', since the cases were proceeding under CHAs, arguably a mere contractual arrangement, rather than through the courts. This assumption was proven false when, on the same occasion that he ruled that success fees were recoverable, Mitting J held that the VWF claims constituted 'litigation'. This meant that any deduction of a percentage of compensation was an illegal contingency fee and contrary to Rule 8.
By 2006, therefore, the right of solicitors to make additional charges to clients whose claims they presented under the Coal Health CHAs was reasonably well-established, provided they followed the statutory and regulatory rules for charging such fees. This involved using an agreement in which, *inter alia*, the success fee was calculated as a percentage of the costs, not the compensation, and that all other requirements were met, including the obligation to explain the agreement and its consequences to the client before it was entered into. For many solicitors, breaches of the requirements relating to CFAs were tied up with infringement of professional rules regulating payment for referrals. The issue of referrals was complicated by the profession's ambivalence about preventing members paying for cases, but also by confusion about what constituted a referral.

Payment for referrals

For much of the period of the Coal Health Schemes, payments for referrals were prohibited by the Solicitors Introduction and Referral Code 1990, which stated that '[s]olicitors must not reward [introducers of clients] by the payment of commission or otherwise'.[64] Solicitors were even to be wary of relying on limited sources of referral[65] and were required to conduct six-monthly reviews to ensure that the code had been complied with.[66] If they found that they received more than 20 per cent of their income from referrals from a single source, they had to consider whether that proportion should be reduced.[67] Solicitors were also obliged to draw these provisions to the attention of those introducing clients to them.[68] The Law Society was under pressure, including from some solicitors, to soften these requirements, or even to permit payment of referral fees. One advocate of a change in policy was the Office of Fair Trading (OFT), a government body, which, since 1973, had policed markets for anti-competitive practices. An OFT report in 2001 concluded that the ban on referral fees was

[64] *Solicitors Introduction and Referral Code 1990*, para 2(3) (see N Taylor (ed), *Guide to the Professional Conduct of Solicitors* (The Law Society, 1999) annex 11B, 238).
[65] *Ibid*, para 2(4).
[66] *Ibid*, para 2(10)(a).
[67] *Ibid*, para 2(11).
[68] *Ibid*, para 2(2).

obstructing the development of an online market for introductions, to the disadvantage of solicitors.[69] Noting that a Law Society Regulation Review Working Party was considering reforming restrictions on cold calling, the report welcomed 'indications that this restriction might soon be abolished'.[70] Yet, in 2002, two motions before the Law Society Council calling for the abolition of the Introduction and Referral Code were narrowly defeated.

The referral fee issue was brought to a head by litigation unconnected to the Coal Health Schemes. The Accident Group (TAG), a claims management company with around 15 per cent of the UK market, had passed personal injury claims from the public on a 'no win, no fee' basis to around 600 solicitors' firms.[71] Faced with larger than anticipated numbers of losing claims, insurance companies that had issued 'after the event' insurance to claimants were contesting liability to indemnify on a number of grounds.[72] One of the issues that arose in the litigation was payments by solicitors to TAG's sister company, Accident Investigations Limited (AIL), of £350 for each case. Although this payment was described as an investigations fee, the senior costs judge, Master Peter Hurst, suggested that it might violate Rule 2(3) of the Law Society's Introduction and Referral Code if payments to an online claims management company were not justified by the work done.[73] Hurst's decision that, in that situation, '[t]he solicitor cannot charge his client for it and the defendants do not have to pay it'[74] was upheld by the Court of Appeal in 2004. It appeared that many payments that solicitors had not thought of as referral fees would, in future, be treated as such.

As the implications of early decisions in the TAG litigation hit home, the Law Society's uncertainty over the Introduction and Referral Code was succinctly captured by an announcement in the *Law Society Gazette* in July 2003 that:

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[69] Director General of Fair Trading, *Competition in Professions* (2001), Report 328, p 14.

[70] See *Financial Times*, 2 January 2001, p 1.

[71] TAG went into liquidation in January 2004.

[72] In *Sharratt v London Central Bus Co and other Cases* [2003] EWHC 9020, for example, it was argued that the CFAs were unenforceable and insurance premiums paid irrecoverable because the information delivered to clients regarding the CFA was required by statute to be delivered by 'a legal representative', whereas it had typically been delivered by an unqualified TAG employee.

[73] 'Solicitors "Breached Code"' *Law Society Gazette*, 10 January 2003, www.lawgazette.co.uk/news/solicitors-039breached-code039.

[74] Hurst's decision was on tranche two of The Accident Group (TAG) test cases. In the test cases (*The Accident Group Test Cases Sharratt v London Central Bus Company*, Court of Appeal (Civil Division), 20 May 2004, [2004] EWCA Civ 575 (at www.bailii.org/ew/cases/EWCA/Civ/2004/575.html)) Lord Buxton ruled, upholding Hurst's May 2003 decision, that fees paid to Accident Investigation Ltd 'breached the then Introduction and Referral Code and so were irrecoverable' (www.lawgazette.co.uk/news/tag-firms-face-amppound43m-referral-fee-payout-0). See also www.lawgazette.co.uk/features/playing-tag and www.lawgazette.co.uk/news/tag-firms-face-amppound43m-referral-fee-payout-0.

The Law Society has received a number of queries, in light of recent case law, with regard to whether, and in what circumstances, payments made by solicitors to claims management companies amount to referral fees in breach of the current solicitors' introduction and referral code.[75]

The *Gazette* reported that the ethics committee was revising guidance on referral fees and that, while the Council 'would be interested in looking at draft rules which permit payments for referrals in certain circumstances that could not have a negative impact on the client's interests and the solicitor's independence', any changes would take time to draft and be approved. In the meantime, and '[d]espite efforts to abolish the introduction and referral code … [i]nstead, it is to be enforced properly'. A lengthy statement on what constituted referral fees followed:

> Turning now to the current position, the subject of payments for referrals is dealt with in section 2(3) of the code. This provides that 'solicitors must not reward introducers by the payment of commission or otherwise'. The problem with this provision has always been trying to interpret what constitutes a 'reward'. Obviously any payment which is a direct reward for the introduction of clients is not permitted, but many schemes now involve payments for a variety of services which can, or might, include a reward to the introducer.[76]

The *Gazette* then worked through a number of examples. One was charging the same fixed fees for each case, which was likely to be seen as a referral fee because the amount of work per case might vary. The second was solicitors paying sums as a condition of joining schemes, so they had no choice but to 'buy' the services. Because the 'reward' to the introducer was the agreement to buy the services, this also was likely to be seen as a referral fee. Both examples were directly relevant to the circumstances under which solicitors obtained Coal Health Scheme clients.

The Law Society's statement ended, however, with the following assurance:

> The Law Society's compliance board has, however, given careful consideration as to whether the regulation directorate of the Society should undertake a general

[75] 'Introductions and Referrals' *Law Society Gazette*, 18 July 2003, www.lawgazette.co.uk/news/title-19.
[76] *Ibid.*

> investigation into firms who were members of schemes, and who were, in the light of the judgments, paying referral fees in breach of the rule. On balance, the compliance board has concluded that little regulatory purpose would be served in pursuing such an investigation. This decision is limited in nature and does not affect existing investigations.[77]

The problem for many solicitors caught by this 'clarification' of the rules was that miners had already signed up to make payments to their unions or other introducers before the solicitors were instructed. Accepting the terms in those agreements was, in most cases, a condition of receiving the work. Solicitors had not queried the unions' right to charge the fee or their own obligation to collect it from the clients. They had certainly not thought to advise clients that it might not be in their interests to pay it or that they might avoid paying it by taking their business elsewhere.

In October 2004 the Introduction and Referral Code was amended by the addition of section 2A, containing seven paragraphs of additional rules. The amended Introduction and Referral Code qualified the previous blanket prohibition, stating that 'a solicitor must not make any payment to a third party in relation to the introduction of clients to the solicitor, except as permitted below'.[78] Payment was then allowed provided that 'immediately upon receiving the referral and before accepting instructions to act the solicitor provides the client with all relevant information concerning the referral and, in particular, the amount of any payment'.[79] Additionally, the solicitor had to be satisfied that the introducer had provided all relevant information to the client and had not acted in such a way that, if the introducer were a solicitor, the actions would breach the practice rules. This was intended, in particular, to cover restrictions on the content of advertising applying to solicitors.[80]

The amended Introduction and Referral Code did contain a provision that created some potential for confusion. It was stated that the prohibition on payments to third parties included 'any other consideration but does not include normal hospitality, proper disbursements or normal business expenses'.[81] This was intended to clear up doubt about the payment to third parties of their 'genuine expenses', but such a distinction was, in many cases, difficult to draw. Where, for example, the deduction was said to be for the union's

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[77] *Ibid*.
[78] *Solicitors Introduction and Referral Code 1990* (as amended 7 October 2004).
[79] *Ibid*, Rule 2A(3).
[80] *Ibid*, Rule 4(a) and (b).
[81] *Ibid*, Rule 2A(3).

administration, marketing or handling charges, solicitors tended not to investigate. An even more difficult example in the coal health cases arose when a miner's trade union membership had lapsed and he agreed with the union to pay a fee in lieu of membership dues in return for the union handling the claim. In these circumstances, miners then signed an agreement instructing the solicitors to pay this 'membership fee' if the claim was successful. It may not be surprising that solicitors did not foresee the possibility that this would be construed as a referral fee.

It is arguable that some solicitors receiving claims under the Coal Health Scheme were unlucky to be charged with making payments that were subsequently classified as referral fees. They may not have considered that miners' trade unions were 'introducers' covered by the code, or they may have considered the payment to be recompense for the introducer's genuine expenses. Nevertheless, they should all have realised that such payments potentially compromised their independence, a fundamental principle of Rule 1 of the Code of Conduct, by undermining the right of clients to make an unfettered decision about appointing the solicitor of their choice. Even had the 2004 amendment been in place at the relevant time, full disclosure would have been required to regularise such payments. Further, in those cases where solicitors were using a CFA to recover the expense of paying a referral fee to an introducer, they potentially broke Rule 3.03, which prohibited solicitors from sharing professional fees with any person who was not either a lawyer or employee.[82]

In most cases disciplinary charges relating to referral fees accompanied other charges. Nevertheless, the lack of clarity regarding what constituted a referral fee, and the profession's stance on referral fees, were raised by respondents before the SDT.[83] The fact that the issue of referral fees was raised in coal health cases, despite the 2003 decision of the Law Society not to launch new investigations of referral payments in panel schemes and 'without prejudice' to existing investigations, suggests either that such cases were ongoing at that time, that there were other charges besides the referral issue, or that there was some other reason for the prosecution. It seems that there was considerable political pressure on the Law Society to

[82] The 2007 Code of Conduct states that in claims resulting from death or personal injury, solicitors may not enter into an arrangement for the referral of clients with, or act in association with, 'any person whose business, or any part of whose business, is to make, support or prosecute (whether by action or otherwise, and whether by a solicitor or agent or otherwise) claims arising as a result of death or personal injury, and who, in the course of such business, solicits or receives contingency fees in respect of such claims' (Solicitors Code of Conduct 2007, Rule 9.01.4).

[83] See, for example, *In the matter of Glynn Frank Maddocks, solicitor* (SDT No 9536-2006), heard 26 June 2007, p 20, para 88 (at www.SRA.org.UK/SDT).

take action on the 'overcharging' issue and to bring disciplinary charges against coal health panel firms.

The role of the regulator

The attitude of the Law Society to costs for Coal Health Scheme cases changed considerably over time. In 2001, the Law Society opined that solicitors were entitled to charge above the DTI scale costs, provided the amounts were not unreasonable and the client had been properly informed about the charging arrangements.[84] Initially, the main pressure to change that view came from Parliament, where reports of the general profligacy of the Coal Health Schemes caused controversy. It did not take long for politicians' irritation to focus on the miners' costs issue. In December 2003 Nigel Griffiths MP, Parliamentary Under-Secretary for Coal Health, wrote to panel firms asking for confirmation that they were not charging clients additional fees. If they were, he said, he requested repayment. Solicitors who did not respond or refused to give the undertaking were removed from the list of solicitors provided to potential claimants. This did not, however, preclude claimants using these solicitors.

In January 2004 the Law Society's Compliance Board warned that solicitors making an additional charge to clients might be subject to a finding of providing inadequate professional services.[85] To rebut such an allegation, solicitors would have to show that they had fully informed clients at the start of the matter and the additional charge was reasonable in the circumstances. Sufficient information (for cases started after April 2000) would have to include advice that many other solicitors did not make any additional charge. The Law Society subsequently wrote to all solicitors handling COPD and VWF claims, reminding them to review all cases handled to ensure that they complied with this guidance.[86]

In 2005 the circumstances surrounding the Boys Smith report suggested that the Law Society had been under pressure from government for some time. The minister commissioning the report, Malcolm Wicks, noted that some solicitors had double-charged clients or 'invited' them to pay extra fees while making them feel obliged to pay. 'These are essentially matters about conduct within the legal profession and the DTI has no direct role,' he said. 'We have, however, raised the issues with the Law Society in the past, and I will continue to make clear

[84] See Comptroller and Auditor General, *Coal Health Compensation Schemes* (n 36) para 3.30.
[85] See *ibid*, para 3.32.
[86] *Ibid*, paras 3.30–3.32.

to them the importance of taking these issues forward rigorously and proactively.'[87] Boys Smith's report endorsed the Law Society's new, hard line approach,[88] noting:

> The schemes did not explicitly rule out solicitors charging fees of successful claimants … Neither the DTI nor the solicitors anticipated this as a problem at the time the schemes were negotiated, though in the case of the solicitors there was a potential conflict in that their interests and those of the claimants they represented were not necessarily at one on this matter.[89]

The report itself also argued that the legal profession rather than the government should take action.

In January 2006 the Law Society had established an independent complaint-handling arm, the Legal Complaints Service (LCS). In the same month the *Law Society Gazette* announced that the Law Society had responded to the government's call 'to clamp down on solicitors dealing with mining claims' by looking into more than 30 firms about which it had received 829 complaints.[90] The Law Society concluded 511 of the complaints received, and £150,000 in compensation was paid to complainants following conciliation. In March 2006 the Law Society again urged any of the 515 firms that had 'overcharged' miners to repay costs.[91]

In April 2006 a special report by the Legal Services Ombudsman criticised the Law Society for failing to investigate miners' complaints properly.[92] The Ombudsman concluded that the Law Society had let complainants down.[93] The Law Society responded that criticism of its handling of miners' complaints was misplaced; it had received 1,000 complaints and investigated 700 at that point, referring only 12 to the Legal Services Ombudsman, 'an extremely low referral rate'.[94] Peter Williamson, Chair of the Law Society Regulation Board, added:

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[87] 'Firms Face Mining Probe' *Law Society Gazette*, 5 January 2006, www.lawgazette.co.uk/news/firms-face-mining-probe.
[88] Comptroller and Auditor General, *Coal Health Compensation Schemes* (n 36) s 19 and Recommendation 8.
[89] *Review of the Coal Health Compensation Schemes, November 2005*, p 9, and see s 20 at http://claimscouncil.org/system/files/24/original/Review_of_coal_miners__comp_schemes.pdf?1259166552.
[90] 'Firms Face Mining Probe' (n 87).
[91] 'Repay Miners, Urges Law Society' *Law Society Gazette*, 2 March 2006, www.lawgazette.co.uk/news/repay-miners-urges-law-society.
[92] See Comptroller and Auditor General, *Coal Health Compensation Scheme* (n 36) para 3.33.
[93] *Ibid.*
[94] 'Law Society Hits Back at Watchdog' *Legal Day*, 4 April 2006, www.legalday.com/pressreleases/Law_Society/Law-Society-Hits-Back-At-Watchdog.html.

> 45 solicitors have now been referred to the Solicitors Disciplinary Tribunal. This has been the largest series of investigations we have ever undertaken into a single issue.[95]

The pressure did not abate. On 11 July 2006 Lord Lofthouse of Pontefract, a former miner, castigated the solicitors involved in 'double charging', accusing the Law Society of being 'in a coma' until 2004 and waking up only 'because of intense parliamentary pressure'.[96] Lofthouse promised to 'use my remaining time on this earth to try and ensure that every last penny is paid back, with interest and compensation on top'.[97] In the same debate life peer Lord Sawyer, a leading trade unionist and labour politician, declared an interest as the non-executive chair of the supervisory board for Thompsons Solicitors, the trade union firm which, as personal injury specialists, had handled many coal health claims. His perspective on the problem was that, 'on the introduction of the coal health scheme, more than 700 law firms, many of which had no experience of trade union work, let alone miners' work, became involved in what can only be described as a feeding frenzy to make money from the scheme', but he agreed with Lofthouse that, on the evidence, the performance of the Law Society had been poor. [98]

In 2007 the Audit Office reported that the LCS had received 1,671 service complaints relating to the Coal Health Compensation Schemes up to 31 March 2007, 183 of which had been lodged since January 2007.[99] The LCS had recovered some £570,000 in deductions from 15 law firms and had referred three firms, representing around 130 claims, to the Solicitors Regulatory Authority for refusing to make redress.[100] The SRA was established in January 2007 as the independent regulator of solicitors and took over responsibility for bringing cases to the SDT. At the point of handover only one case arising out of the investigations of firms connected with the scandal had been heard. By April 2007, when Lord Lofthouse presented a report on the debacle to the minister, the SRA had conceded that the principle of 'double charging' was wrong, irrespective of what the charges were or how they were made. Peter Williamson, now chair of the SRA, told the BBC:

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[95] *Ibid*.
[96] *Hansard* HL, 11 July 2006, col 660, www.publications.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds06/text/60711-0012.htm.
[97] *Ibid*, col 661.
[98] *Ibid*, cols 662–3.
[99] Comptroller and Auditor General, *Coal Health Compensation Schemes* (n 36) para 3.33.
[100] *Ibid*, para 3.34.

> I'm ashamed that solicitors whose costs are being met by the Government should do such a thing. Solicitors are supposed to put their clients' interests first, and that is a fundamental, professional principle.[101]

This was the contextual and legal backdrop to proceedings before the Solicitors Disciplinary Tribunal.

The Disciplinary Context

The ethical principle underpinning most of the charges in the SDT was breach of fiduciary duty to clients. At the start of the period covered by the CHAs, conduct was governed by the Solicitors Practice Rules.[102] Rule 1 outlined the basic ethical principles applicable to solicitors as follows:

> A solicitor shall not do anything in the course of practising as a solicitor, or permit another person to do anything on his behalf, which compromises or impairs or is likely to compromise or impair any of the following:
> (a) The solicitor's independence or integrity;
> (b) A person's freedom to instruct a solicitor of his or her choice;
> (c) The solicitor's duty to act in the best interests of the client;
> (d) The good repute of the solicitor or of the solicitor's profession;
> (e) A solicitor's proper standard of work;
> (f) The solicitor's duty to the court; [103]

The allegation in many cases was that one or more of the first four of these principles had been infringed. The main charges were often that the solicitors, in the course of practice, did, or permitted others to do on their behalf, things that compromised or impaired their independence or integrity, a person's freedom to instruct the solicitor of their choice, their duty to act in the best interests of clients, and the good repute of the solicitors' profession. The essence of nearly all the charges was that solicitors improperly deducted monies from client damages. Some did so because they thought they were entitled to take cases on a contingency, or 'no win, no fee', basis and deduct a fee from clients' damages. Others did so

[101] 'Miners' Compensation "Exploited"', BBC News, http://news.bbc.co.uk/1/hi/uk/6590461.stm.
[102] These were overhauled and reissued as the Solicitors Code of Conduct 2007.
[103] See *Guide to the Professional Conduct of Solicitors* (n 64).

in order to recoup charges that miners had paid to an intermediary, like a trade union, which had processed the case.

While many solicitors did not follow the detailed rules that would have rendered deductions from damages acceptable, the SDT concluded that most of the cases did not involve dishonesty. According to information provided by the SRA to the Ministry of Justice for written answer in the House of Commons, 115 solicitors in 25 firms were referred to the SDT in connection with the miners' costs scandal,[104] but these figures will need revision.[105] Hearings before the SDT began in 2006 and ended in 2010. Three solicitors were struck off and three suspended for periods of between six months and four years. A further 47 solicitors were fined[106] and six were reprimanded. A handful of those mentioned in the parliamentary reply were not pursued or the allegations were withdrawn. Of the solicitors charged, regulatory settlement agreements,[107] covering three firms and 16 solicitors in these firms, were approved by the SDT.

Solicitors receiving the more serious sanctions of striking off or suspension were prohibited from holding themselves out as solicitors or undertaking 'reserved activities', like litigation and advocacy. These individuals attracted nearly all the attention of the national press and vindicated the charge that solicitors were unfairly profiting from the suffering of miners dying from illnesses the Coal Health Schemes had been established to compensate. In the most serious cases, common failings were accompanied by findings of dishonesty. In these cases the SDT applied what the House of Lords, in *Twinsectra v Yardley*, had called the combined test: (i) was the defendant's conduct dishonest by the ordinary standards of reasonable and honest people? and (ii) did the person realise that by those standards his conduct was dishonest?[108]

Andrew Joseph Nulty, Avalon, solicitors

Some solicitors became poster boys for the scandal because of the astonishing wealth they amassed. One of these—Andrew Joseph Nulty of Avalon, solicitors, from Warrington in Cheshire—was the third solicitor struck off in the miners' compensation scandal.[109] Nulty

[104] *Hansard* HC, col ???, 19 May 2009.
[105] We have managed to trace 110 solicitors from 31 firms against whom proceedings were considered.
[106] The largest fine was £25,000, with most fines being £10,000 or under.
[107] These are agreements between the SRA and individuals accepting charges and sanctions such as reprimand and payment of costs. The scope of these agreements were recently extended to cover payments to clients and fines (www.sra.org.uk/consumers/solicitor-check/agreements.page).
[108] See further Lord Hutton in *Twinsectra v Yardley* [2002] UKHL 2002, para 27.
[109] The other two were from Beresfords, solicitors, Doncaster (N Goswami, 'Firms Net More than £1bn from Sick Miners' Claims' *The Lawyer*, 9 April 2007).

was born in 1966 and grew up on a council estate in Liverpool, the second youngest of five children. He claimed in an interview that his father and grandfather were coal miners, but other sources claimed his father was a used car salesman.[110] Nulty was admitted as a solicitor in 1996, at the age of 30, somewhat later than the norm. A Liverpool newspaper qualified rumours of a glittering media career. It suggested that he had not spent the period before qualification presenting a late-night 1990s pop show, *The Hitman and Her*, although it seemed that he had presented a BBC children's programme, *Move It*, and held an Equity card.[111] He was also said to be a keen rugby player, turning out regularly as flanker for Orrell Rugby Union Football Club.[112]

Nulty joined the Manchester-based firm Mainman Partnership, where he specialised in personal injury. By 2001 he had risen to partnership. A section in the *Law Society Gazette* reporting on solicitors transferring between firms noted:

> In Manchester, Andrew Nulty has left the Mainman Partnership to set up specialist personal injury law firm Avalon. He is joined in partnership by Ike Ibeto, also from Mainmans, and Malcolm Trotter, who departs Poole & Partners. Mr Nulty's younger brother Martin, who has a law degree but is not qualified, has joined as a consultant and marketing director.[113]

While Avalon, solicitors was indeed established in Warrington in 2001, later reports described Nulty as a sole practitioner.[114]

Nulty started Avalon with 200 personal injury cases brought from Mainman, including some under the CHAs. He rapidly built on this legacy, in the early 2000s running an advertisement in the national press:

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[110] www.chambersstudent.co.uk/pdf/CR28_McNulty.pdf.
[111] 'Richest Lawyer in Court on Police Assault Charge' *Liverpool Daily Post*, 5 September 2006, www.liverpooldailypost.co.uk/liverpool-news/regional-news/2006/09/05/richest-lawyer-in-court-on-police-assault-charge-64375-17684161/#ixzz1Ql92ASQ1.
[112] *Ibid.*
[113] 'Moving On' *Law Society Gazette*, 28 September 2001, www.lawgazette.co.uk/news/moving-on-34.
[114] See, for example, 'A Norfolk "Miners" Solicitor who Boasted £13m Success Now Keeps his Own Counsel' *The Times*, 7 October 2006; D Robertson, 'Andrew Nulty: "A Disgrace to the Profession"', www.chambersstudent.co.uk/pdf/CR28_McNulty.pdf.

> Are you a coal miner who has suffered from chest disease or breathing problems? The government is urging miners and families of deceased miners to come forward. PLEASE DO NOT LEAVE IT UNTIL IT IS TOO LATE!

The advertisement was placed in the name of The Miners & General Workers Compensation Recovery Unit, suggesting perhaps a government or trade union body. There was no direct connection between Avalon and any such body. As a result of such marketing over 30,000 claimants were attracted to Avalon in three years. The 2007 National Audit Office report listed Avalon among the firms receiving the highest fees from coal health. Thompsons, a leading national firm, had earned £123.6 million. In seventh place was Andrew Nulty's firm, Avalon, which had been paid £35.1 million 'by taxpayers' for handling COPD claims. Unlike lawyers at Thompsons, however, Nulty shared profits with only one other equity partner. Although by 2004 Avalon was employing about 70 staff, they were mainly unqualified. The exception was John Trotter, who was hired as a salaried partner for one year from the firm's inception in 2001 and became an equity partner before leaving in 2004.

In 2005–6 Avalon grossed £21.2 million in fees, with a net profit of £15.5 million, making it the 88th highest earning firm by turnover. Because Nulty's sole partner at this time was Anthony Chorlton (who was not subject to disciplinary proceedings), Avalon's profit per equity partner was £7.75 million, considerably larger than the earnings of equity partners in the large corporate commercial firms, which were news if they topped £1 million.[115] In fact, Nulty took the lion's share: £13 million in 2006 compared with Chorlton's £2.5 million.[116] This probably made Andrew Nulty the highest earning lawyer in Britain.[117]

Early in summer 2006 Chorlton contacted *The Lawyer*, a magazine typically devoted to the activities of large firms.[118] He suggested that Avalon might make that year's UK 100 Annual Report rankings.[119] On 21 August *The Lawyer* trailed the firm's appearance in the rankings with an article on Avalon.[120] Nulty said he felt that:

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[115] David Middleton, 'BLP Property Head One of City's Highest Earners' *The Lawyer*, 21 August 2006, www.thelawyer.com/blp-property-head-one-of-citys-highest-earners/121536.article (the article recorded that a property partner in a leading firm with a list of stellar clients would earn £1.3 million in 2005–6 while partners in several 'magic circle' firms would earn considerably less than £1 million).

[116] Joanne Harris and Matt Byrne, 'UK's Richest Lawyer Faces Law Society Ban' *The Lawyer*, 21 August 2006, www.thelawyer.com/uks-richest-lawyer-faces-law-society-ban/121530.article.

[117] Matt Byrne, 'Mine Yield' *The Lawyer*, 4 September 2006, www.thelawyer.com/mine-yield/121699.article (and see Robertson (n 114)).

[118] Byrne, *ibid*.

[119] *Ibid*.

[120] Harris and Byrne (n 116).

… law firms have been held back not only by the Law Society, but the profession and lawyers themselves. We don't use the nomenclature of lawyer in this practice. We feel [legally] unqualified people are better managers.[121]

The Lawyer reporter asked Nulty how a solicitor could make £13m in a single year.[122] He replied that the most important part of Avalon's practice was its Research and Development department. 'We spend a fortune on this,' he said. 'We have a meeting every Sunday morning to discuss ideas … We're now moving on to endowment mis-selling, which will be massive.'[123] Nulty claimed that Avalon had already spotted its next three business lines, although he would not identify them.[124]

The story of the 'rags to riches' lawyer was picked up by national media, but was not reported in the positive way that Nulty presumably anticipated. On Tuesday 22 August 2006 Avalon cancelled a face-to-face interview and photo session with *The Lawyer*. Later that day Chorlton called to say that, on the advice of Avalon's solicitors, Radcliffes Le Brasseur, there would be no further comment, specifically on the Law Society investigation. Since then, *The Lawyer* suggested, 'Nulty has been permanently "unavailable"'.[125] By this time *The Lawyer* had detected a good, albeit negative, story. It reported that Nulty had been charged with assaulting a policeman the week before[126] although the case was dropped.[127] The investigation of Avalon and other panel firms was underway by this time, although the initial hearing in relation to Avalon did not take place until 2008. In the meantime, Nulty left Avalon. In 2007 he took a personal fortune estimated at about £17 million to Spain, where he was said to keep a villa and a yacht.

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[121] Byrne (n 117).
[122] *Ibid*.
[123] *Ibid*. In the UK, many mortgagees took out endowment policies to pay the capital element of their mortgage. If they were not warned that the endowment policy might not cover their mortgage at full term they were 'mis-sold' and had a right to claim compensation for any shortfall; see eg *House of Commons Treasury Select Committee Fifth Report*, www.publications.parliament.uk/pa/cm200304/cmselect/cmtreasy/394/39402.htm and *Endowment Mortgage Claims Factsheet*, www.fscs.org.uk/uploaded_files/Publications/unknown/Factsheet_-_Endowment_Mortgage_Claims.pdf (accessed 24 October 2011).
[124] *Ibid*.
[125] *Ibid*.
[126] This charge arose out of an alleged attack on 1 May 2006 on High Street, Newton-le-Willows. Nulty was charged with his brother Martin Nulty.
[127] The case, which was due to be heard at St Helens magistrates' court on 26 October 2006, was subsequently dismissed for lack of evidence. A spokesman for the Crown Prosecution Service (CPS), said: 'We keep all cases under a constant review and after receiving additional evidence it was clear that there were substantial problems with both identification and the consistency of the evidence' ('Millionaire Solicitor is Cleared in Assault Case' *St Helens Reporter*, 2 November 2006).

SDT hearing: 27–29 April 2009

The cases of Andrew Nulty and John Trotter were eventually heard by the SDT in April 2009.[128] The applicant, the Solicitors Regulation Authority, was represented by Timothy Dutton QC. The respondents were separately represented, Nulty by Gregory Treverton-Jones QC. An application to have the proceedings struck out or stayed had failed on 1 July 2008. The tribunal had also declined to hear the case *in camera*, on the grounds that there was no exceptional hardship or prejudice to either respondent to justify such a move. At the April hearing Treverton-Jones again applied to have the proceedings adjourned or stayed *sine die*, but the tribunal refused to reconsider unless there was fresh evidence.

Treverton-Jones then produced a medical report stating that Nulty was so distressed he could not cope with the paperwork required for the hearing and did not want to attend for fear he might feel aggressive and behave inappropriately. The tribunal heard detailed medical testimony confirming Nulty's distress. A doctor told the SDT that, although Nulty was 'a very wealthy man and was now a tax exile', he had lost 'everything else such as his career, his marriage and his life, which were more important things'.[129] When she interviewed him in June 2008 he had seemed pleasant but anxious, but by September he was tearful and entertaining suicidal thoughts. He had found the press very intrusive and had felt unsafe in his own home.

Treverton-Jones said Nulty had inexplicably driven his motorcycle off a 50-metre cliff the previous November. He suggested that there might be no public interest in pursuing Nulty. Although the miners' cases had excited great interest in 2006, he said, the press were not even there to hear the present proceedings; interest had 'evaporated'.[130] If any case ever illustrated that money could not buy happiness, he said, this was it. Citing authority that it was not in the public interest to pursue proceedings when there was unchallenged medical evidence of a lack of fitness to appear,[131] counsel again applied for adjournment *sine die*.

For the applicant, Dutton objected to the medical evidence on the ground that Nulty had refused to attend a meeting with a psychiatrist nominated by the SRA, although he had attended his own doctor twice, once before the application to stay the proceeding in June and once after, in anticipation of the present hearing. He submitted that the evidence showed that Nulty could attend the SDT hearing. There was no corroborative evidence of a suicidal risk

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[128] *In the matter of Andrew Joseph Nulty and Malcolm John Trotter, solicitors* (SDT No 9871-2008), heard 27–29 April 2009, www.sra.org.uk/SDT.
[129] *Ibid*, 4.
[130] *Ibid*.
[131] *Brabazon-Drenning v UK Central Council for Nursing, Midwifery and Health Visiting* [2001] HRLR 6.

apart from the motorcycle accident, 'which had been presented extremely thinly'.[132] The SDT noted that the respondent apparently visited his children in the UK regularly, no GP records were presented to support the submission, and there was no suggestion that Nulty wished to appear at a later date. The SDT therefore declined Nulty's request to adjourn the case *sine die*, stating that it must be heard to 'ensure the proper protection of the reputation of the profession'.[133]

Presenting the applicant's case, Dutton told the SDT that a Forensic Investigation Officer (FIO) of the Law Society had initiated an inspection of Avalon's books on 11 October 2004 and completed a Forensic Investigation Report on 9 June 2005. This established that Avalon had created a department dealing with the DTI scheme claims in 2003 and that 99 per cent of the firm's work was British Coal related. This investigation supported several charges against Nulty and Trotter. The first charge comprised allegations regarding breaches of the overarching principles of Rule 1 of the Solicitors Practice Rules 1990, actions that compromised or impaired Nulty's and Trotter's independence or integrity, their clients' freedom to instruct a solicitor of their own choice, their duty to act in the best interests of clients, and their own good repute and the good of the solicitors' profession.

These general allegations were evidenced by breaches of specific rules of the Solicitors Practice Rules, which governed conduct occurring before 1 July 2007,[134] and the Introduction and Referral Code 1990. In a written response to the Law Society dated 25 August 2005 the respondents denied all breaches 'save only the very trivial breach in relation to Practice rule 15', an admission that referred to the charge of sending client care letters without details of costs. The sending of client care letters was, however, linked to a more serious allegation regarding costs and the levying of contingency fee payments. Before dealing with that allegation the applicant presented evidence on the allegation that, contrary to Conduct Rule 3, the respondents had accepted instructions and referrals of business in contravention of the Solicitors Introduction and Referral Code 1990 both before and after March 2004, when the Code was amended. There were two main sets of circumstances in which additional sums had been charged: first, where no conditional fee agreement was signed, and second, where there was a conditional fee agreement.

The second charge related to the first set of circumstances, but where there was no CFA. In these cases the Law Society's Forensic Investigation Officer (FIO) found payments to a

[132] Transcript, p 6.
[133] *Ibid*, 8.
[134] On that date the Solicitors Code of Conduct 2007 came in to operation.

number of companies in Avalon's records, all from profit costs and recorded as disbursements. It was contended that such payments were a breach of the Introduction and Referral Code unless they were genuinely for work done. Additionally, it was alleged that there was an aggravating feature: Nulty, or his nominees, had an interest in the introducing firms. There were payments to the Miners & General Workers Compensation Recovery Unit, the name that appeared on the original advertisement calling for miners to come forward. Although Miners & General Workers Compensation Recovery Unit sounded like a trade union body and advertised that it acted on behalf of miners' unions, it was also a commercial company, incorporated in November 2001. Nulty's brother and both Nulty and his brother's future wives were officers and shareholders. The other companies to which payments for referrals were made were called Sureclaim Ltd and Miners Welfare & Compensation Recovery Limited. It was alleged that Nulty was a shareholder and Director of Sureclaim and his brother and both wives also held an interest. It was a clear conflict of interest for a solicitor to make payments to a company referring claims to his own firm. [135]

Nulty denied any interest in Miners Welfare & Compensation Recovery Limited, or any link between the companies. The SDT was told, however, that an Advertising Standards adjudication in February 2004 had found that Miners and General was a subsidiary of Sureclaim. In most of Avalon's case files where CFAs had not been agreed, there were signed agreements with Sureclaim, stating that the claim would be handled by nominated solicitors and that a fee based on a percentage of damages was payable for the company's role in handling the claim. Since there was no evidence that clients were informed that referral fees were payable, they could not have been told that Nulty had an interest in the companies receiving such a fee.

The second set of circumstances, giving rise to the third charge, concerned situations in which conditional fee agreements were issued. The way in which the charge was framed in relation to this situation was complex. The specific breach alleged related to Practice Rule 9, which prohibited solicitors from entering arrangements with firms charging contingency fees in personal injury cases.[136] This provision was concerned with preserving the solicitor's independence and ability to act in the best interests of clients when making or receiving

[135] It is not clear why holding an interest in referral companies did not constitute a separate allegation of conflict of interest.

[136] That is 'an arrangement for the introduction of clients with or act in association with any person (not being a solicitor) whose business or any part of whose business is to make, support or prosecute (whether by action or otherwise, and whether by a solicitor or agent or otherwise) claims arising as a result of death or personal injury and who in the course of such business solicits or receives contingency fees in respect of such claims' (*Solicitors' Practice Rules*, Rule 9.1).

referrals. The applicant's case was that Sureclaim Ltd was clearly a business which supported or prosecuted claims arising as a result of death or personal injury and, it was contended, it solicited and received contingency fees in respect of such claims from Avalon. Indeed, Mr Dutton suggested that while Avalon had received over £40 million from coal mining cases, Sureclaim had received another £25 million.

The fourth charge was that Nulty and Trotter had entered into arrangements to receive contingency fees not permitted under statute or by common law on their own account, contrary to Rule 8 of the Conduct Rules. The SDT accepted that claims under the CHAs were contentious litigation. It heard that Avalon had issued documents described as a conditional fee agreement (CFA) under which they agreed to pay a 'success fee' of 15 per cent plus VAT from payments recovered under the scheme. The fundamental problem was that a success fee based on a percentage of damages was a contingency fee. Dutton provided examples of how the deductions had affected claimants. In the case of Mrs D, a widow, a claim in respect of her deceased husband was settled for £13,068.64 with costs of £3,285.73 paid by the DTI. A 'success fee' of £2,303.35 was transferred to the office account. There was no evidence that a bill had been rendered, a requirement of the Solicitors' Account Rules for transferring money from client account to the solicitor's office account.

The SDT heard that nearly £265,000 in 'success fees' had been deducted from miners' compensation before the adverse publicity in 2003. Nevertheless, even though the firm wrote to clients in January 2004 stating that they would receive 100 per cent of their damages, the firm deducted a further £43,258.12 as success fees after that date. A schedule produced for the FIO showed that only £30,495.90 had been repaid, and only after clients complained.

Nulty's defence to the charge that Avalon had charged contingency fees was that other solicitors and referrers had claimed that charging success fees under the CHAs was 'the done thing'. It was not, however, the principle of success fees that was the problem but the method of calculation.

The fifth charge was that the respondents had failed to give adequate information to clients in accordance with the Solicitors Costs Information and Client Care Code ('Client Care Code'), contrary to Rule 1(a), (c) and (d) and/or 15 of the Conduct Rules. The tribunal heard that although contingency fees were illegal, additional charges would have been allowed had Avalon disclosed the true position on costs to clients in advance. In a majority of cases, however, the client care letter required to be sent out at the beginning of the case did not even state that the DTI would be paying Avalon's costs on successful claims. Indeed, it appeared that Avalon attempted to conceal rather than disclose the circumstances under which they

made extra charges. This conclusion was supported by a practice, described as a pattern, whereby Avalon obtained signed CFAs from miners. Avalon would typically send a client care letter, as required by the conduct rules, ignoring the need to explain the basis on which charges would be made. Avalon's letter did, however, enclose a form confirming instructions to act for clients to sign. On receipt of the signed instructions to act, Avalon sent the CFA with a covering letter saying it had been 'mistakenly omitted' from the first letter.[137] Of the 19 files inspected from just one of Avalon's teams, this 'mistake' occurred 17 times.

The sixth charge was pursued against Nulty alone. On the face of it the allegation was technical, although it may be indicative of Nulty's disregard for the both letter of the law and the rules.[138] During correspondence with the Law Society it was noted that a non-solicitor was described on Avalon's letterhead as 'managing partner'. This was contrary to the Solicitors Publicity Code 1990, which prohibited holding out non-solicitors as solicitors[139] and non-partners as partners.[140] This person then wrote to the Law Society saying that he had resigned and his name would be removed from the letterhead. This was confirmed by a letter from Nulty on which the same person's name appeared as 'consultant', a designation that also offended the code by implying that the person held a current practising certificate.[141]

The seventh charge was also laid only against Nulty. It alleged that he had acted in breach of Conduct Rules 1(a) (independence and integrity) and 1(d) (good repute of solicitor or profession)[142] in writing a letter to the DTI dated 3 March 2004 which was misleading, dishonest and sent with intent to mislead the recipient of the letter. At a meeting in October 2004 Avalon had claimed not to have received a letter from Nigel Griffiths MP in December 2003 but acknowledged receiving a follow up letter sent in February 2004. This later letter asked the firm to confirm that it had not taken a fee in addition to that paid by the DTI but, if it had, to remit any non-DTI fee to clients. The firm replied:

> … we can confirm that our British Coal scheme was instigated in August 2003 and confirm that no monies whatsoever are to be deducted from the client and as a practice we rely solely upon receiving fees set by the DTI.[143]

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[137] *In the matter of Andrew Joseph Nulty and Malcolm John Trotter, solicitors* (n 128) p 15, para 25, www.sra.org.uk/SDT.
[138] This charge was not pursued against Trotter.
[139] Solicitors Publicity Code 1990, s 7(a)(i).
[140] *Ibid*, s 7(a)(iii).
[141] *Ibid*, s 7(a)(iv).
[142] The transcript states that this was also contrary to rule 17.01, but this rule relates to waivers, which are not relevant.
[143] *Ibid*, 16, para 31.

In fact, as previous evidence established, Avalon continued to collect 'success fees' for at least another four months. Nulty claimed that he did not recall sending the letter, but the signature appeared to be his.

In delivering its judgment the SDT found many ordinary breaches of the Solicitors Practice Rules, but in almost all of these there were additional and unusual factors. The payments to the claims management companies introducing miners' cases violated the referral code, and advertising by the companies contravened the Solicitors Publicity Code. The fact that Nulty or his relatives had an interest in these companies, a clear and undisclosed conflict of interest, was an exacerbating feature. This was 'a network of companies which was designed to confuse with regard to the payment of referral fees'.[144] Similarly, the SDT found that the coal health cases were contentious business, despite the CHA, and that the success fee deductions were therefore illegal contingency fees. To add to this breach, however, there was the confusing sequence of client care letters, which seemed to serve no purpose but to hook clients before springing the CFA on them. The SDT found that Nulty had designed the three-letter system to confuse clients regarding the payment of referral fees. The tribunal noted that, by the time Avalon repaid deductions from damages to miners, the damage to the reputation of the profession had been done.

The SDT also accepted that Nulty had sent the letter to the Secretary of State. Any honest and reasonable member of the public would have regarded the reply, particularly the assertion that no money was deducted from clients, as dishonest under the *Twinsectra* test.[145] The SDT therefore found that Nulty had been dishonest in his reply. According to the transcript, however, while his conduct in relation to the referral fee and contingency fee charges was described as a 'calculated deception' and 'a disgrace to the profession',[146] an explicit finding of dishonesty was not applied to either. Nevertheless, the tribunal 'had no hesitation in concluding that the public needed to be protected from [Nulty]'.[147] In addition to being struck from the roll of solicitors, he was ordered to pay 90 per cent of the Applicant's costs, estimated at £180,000. The SDT found that Trotter, the second respondent, had not directly benefited from the referral fee arrangement but had overseen some of the activity and had received complaints as Complaints Partner. He must have been aware that what was going on at Avalon was wrong. He was fined £15,000 and ordered to pay £10,000 towards costs.

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[144] Transcript, para 110.
[145] *Twinsectra Ltd v Yardley* [2002] UKHL 12.
[146] Transcript, para 109.
[147] Transcript, para 111.

In most of the cases before the SDT involving coal health firms the implication of the decision is that there was not merely a technical breach of the rules, but such breaches constituted cheating of clients. Cheating is the violation of rules in order to take advantage of someone with whom one is in a cooperative relationship[148] and therefore a betrayal of trust. 'Cheating' is not of itself a disciplinary offence, just as it is not a crime,[149] but a component of offences. Striking off a lawyer usually requires a finding of clear moral wrongdoing[150] so, for example, in a recent case, it was held that all but trivial cases involving dishonesty should result in striking off.[151] In this case study, the transcript implies that the dishonesty lay in the response to the letter to the DTI denying that Avalon was deducting money from miners' damages. As regards the deductions from damages, therefore, it is not immediately obvious where the line between 'mere cheating' and dishonesty lies.

Aftermath

The Coal Health Scheme continued to be controversial. In July 2009 a report in the *Law Society Gazette* suggested that solicitors may have been insufficiently diligent in pursuing compensation.[152] A medical professor explained that COPD was easy to diagnose but it was difficult to separate work related causes from others, like smoking. Damages were reduced when non-work related causes were implicated in an individual's condition. A few points either way on a causal spectrum could make a big difference to damages. Yet, the CHA fixed costs regime provided no incentive to challenge the initial diagnosis. Under the COPD scheme solicitors collected the basic costs, £1,920, for merely accepting the first offer. If they challenged the inital diagnosis they only got an additional £298 if successful and nothing if unsuccessful.

The *Law Society Gazette* article suggested that solicitors could maximise their incomes by processing large numbers of claims rather than fighting the marginal ones.[153] A table, showing the average settlements achieved by the firms submitting the most claims under the COPD scheme, revealed widely different average levels of compensation. Thompsons, the national, specialist personal injury firm, had the best average, £9,202 per claim, while Avalon

[148] Stuart Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 57.
[149] Richard P Appelbaum and William J Chambliss, *Sociology: A Brief Introduction* (Longman, 1997) 117.
[150] *Ibid*, 39–40.
[151] *Solicitors Regulation Authority v Anthony Lawrence Clarke Dennison* [2012] EWCA Civ 421.
[152] James Dean, 'Controversy Continues over Miners' Claims' *Law Society Gazette*, 30 July 2009, www.lawgazette.co.uk/news/news-focus-miners-compensation.
[153] *Ibid*.

achieved only £2,375 per claim,[154] the lowest average settlement of the ten firms. While different rates of settlement may be explained by the types of claims that came to different firms, 'under-settlement' could not be ruled out. Indeed, this possibility threatens a new wave of coal health litigation in relation to the VWF scheme.

In January 2011 Judge Hawkesworth ordered that a number of actions alleging losses arising out of solicitors' failure to diligently pursue aspects of claims under the VWF scheme be stayed pending hearing of test cases between 11 and 13 April in Leeds County Court.[155] At the hearing (which took place on 3 May 2011) the judge found that just over half of the 107,065 claimants who might have secured 'services awards' under the VWF scheme had not received such payments. He noted that solicitors were already advertising for claimants with 'under settled' claims.[156] Judge Hawkesworth ordered that all such cases should be defined as part of the 'VWF Professional Negligence Litigation'.[157] At the time of writing there is no indication of similar actions by COPD claimants, possibly because of evidential problems.

In 2011 there was another twist when a Nottinghamshire miner sued for recovery of the scale fee charged by a claims company created by one of the miners' unions. The miner, a former union member whose subscription had lapsed, had signed an agreement to pay a fee that varied according to the compensation recovered. He had recovered £10,545 and paid £352.50 to the claims company on settlement. He objected that he had not been told that the costs would be paid by the DTI if he succeeded or that he could go to a solicitor, avoiding the fee. He was not the only miner in this situation. The court heard that the claims company's assets had rocketed from virtually nothing to £8 million by dint of the schemes.

The case was appealed to the High Court,[158] which assiduously explored grounds on which it might find against the claims management company and for the miner. It proved difficult, however, to find a legal principle to support a decision in his favour. It was not argued on appeal that the union's duty was the same as a solicitor's or that there was any duty to advise on conflict of interest. In the absence of such a duty there was no legal principle on which to hang a remedy: no misrepresentation, no implied term that was necessary to give the contract business efficacy, and no unconscionable bargain. The claimant therefore failed, illustrating

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[154] The next lowest was Beresfords with £2,559. Even the fifth worst, Raleys, achieved £5,990.

[155] James Dean, 'Coalminer Court Actions Set for "Special Hearing"' *Law Society Gazette*, 27 January 2011, www.lawgazette.co.uk/news/coalminer-court-actions-set-039special-hearing.

[156] *VWF Professional Negligence Litigation (Various) v Raleys* (Claim No 00L00654), 3 May 2011, para 17 (approved judgment supplied to the author by Leeds County Court).

[157] Concerning the admissibility of medical evidence and expert witnesses by application for a Practice Direction from the Master of the Rolls (*ibid*, para 27).

[158] *Brian Strydom v Vendside Ltd* [2009] EWHC 2130 (QB).

the key role played by technical, professional rules in compensating miners and punishing solicitors.

The experience of the use of claims management companies is cautionary. These companies have been touted by proponents of reform as supporting access to justice, but they depend on referral fees for profits. In his report on the cost of civil litigation, Lord Justice Jackson stated:

> It is a regrettably common feature of civil litigation, in particular personal injuries litigation, that solicitors pay referral fees to claims management companies, before-the-event ('BTE') insurers and other organisations to 'buy' cases. Referral fees add to the costs of litigation, without adding any real value to it. I recommend that lawyers should not be permitted to pay referral fees in respect of personal injury cases.[159]

Apparently as a result of its experience in the coal health scandal, the Law Society called for a ban on referral fees,[160] as did the Bar.[161] In May 2011 the LSB decision paper on referral fees stated:

The Board continues to hold the view that the *purely regulatory* case for a general ban in the legal services market has not been made out. This is because sufficient evidence of consumer detriment, which would have been needed to merit a ban, has not been found.[162]

In September 2011, despite probable incompatibility with UK and EU competition law,[163] the government issued a press release announcing that it would adopt Jackson LJ's recommendation.[164] At the same time, however, as legal aid cuts bite deeper there is increasing pressure to legalise contingency fees.[165]

The press continued to pursue Andrew Nulty after the case ended, rehashing the story with pictures of his villa and accounts of his lavish Spanish lifestyle. The web page of a barristers'

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[159] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (Ministry of Justice, 2009), Executive Summary, para 2.5.

[160] Rachel Rothwell, 'Society Formally Urges Clarke to Ban Referral Fees' *Law Gazette*, 4 July 2011, www.lawgazette.co.uk/news/society-formally-urges-clarke-ban-referral-fees.

[161] 'Bar Council Urges LSB to Look Again at Referral Fees' *Counsel*, July 2011, www.counselmagazine.co.uk/counsel-news/bar-council-urges-lsb-to-look-again-at-referral-fees.html.

[162] LSB *Referral Fees, Referral Arrangements and Fee Sharing: Decision Document*, May 2011, 2.

[163] A Higgins, 'Referral Fees: The Business of Access to Justice' (2012) 32 *Legal Studies* 109.

[164] Ministry of Justice, 'Curbing Compensation Culture: Government to Ban Referral Fees', Press Release, 9 September 2011.

[165] These are now permitted in employment tribunals, and the Jackson Review has recommended permitting contingency fees more generally (see Jackson LJ, *Review of Civil Litigation Costs* (The Stationery Office, 2010) ch 12).

set, Falcon Chambers, suggested that one of their barristers was briefed to obtain a freezing injunction over property belonging to Nulty in the UK in order to prevent removal of assets overseas pending recovery of the costs of disciplinary proceedings.[166] The proceedings were apparently settled before a full hearing.[167] In 2010 a polo team based in Gibraltar reported Andrew Nulty as a player in a local match, describing him as follows:

> Formerly of Knutsford Cheshire who now resides in Gibraltar a lawyer by trade but prior to this worked as a television presenter with the BBC. Andrew has always been a keen and competitive sportsman having played rugby for Orrell RFU and represented his country in Athletics. A proud father of his two boys Ashton and Thatcher he now enjoys his hobbies of Motor sport, MX and endure [*sic*] together with his new found passion for Polo. Having broke his hand less than a month ago in a riding accident he is determined to play today against doctors orders and he is looking forward to continuing his passion for Polo next season and travels to Argentina and Dubai this winter to hone his skills.[168]

Some of the other *dramatis personae* also found new fields of endeavour. In May 2011 BBC Business News reported that the banking industry had abandoned a legal fight over the mis-selling of payment protection insurance (PPI), which covers loan repayments in the event of the insured's illness or loss of job. In the wake of a finding of mis-selling, the Financial Services Authority, the 'City watchdog', ordered banks to re-examine previous sales, even where complaints had not been lodged or had been rejected. Banks set aside large sums to pay compensation; Lloyds Banking Group £3.2bn, Barclays £1bn, and HSBC £269m, while RBS added £850m to £200m already set aside. Banks had teams working around the clock identifying potential claimants and refunding PPI payments.

On 6 May 2011 a 'worldwide consumer complaint reporting website' focused on a company called Gladstone Brookes Ltd. In extensive TV advertising and on its website, a goldmine of consumer oriented information and rhetoric, Gladstone Brooks Ltd claimed to be 'the UK's leading PPI claims company', informing consumers that:

> Banks are businesses, they exist to look after your money and turn a profit. However, making huge profits by mis selling PPI on loans, credit cards & mortgages which their customers sign up for is unethical. In April 2010, the same banks that have been fined millions for mis selling were fighting tooth and nail to keep on selling it. Thankfully,

[166] See Falcon Chambers, Tamsin Cox members page, recent cases (*The Law Society v Andrew Nulty* (EWHC, Ch Div, June 2010)), www.falcon-chambers.com/members/member.cfm?id=299.
[167] We are grateful to the clerk at Falcon Chambers for this information.
[168] www.santamariapoloclub.com/en/proamteams.pdf.

> Point of Sale (POS)—selling PPI at the same time as a selling a loan or credit card—has now been banned, demonstrating how much of an issue PPI mis selling from the banks really is. The PPI mis selling scandal is thought to affect up to **twenty million people.** If you have taken out a loan, credit card or mortgage in the last ten years then contact Gladstone Brookes today and **claim back PPI** from lenders and credit card providers. Fill in our **online claim form** or ring us …[169]

Gladstone Brooks charged a £50 refundable registration fee plus 25 per cent of sums recovered for claiming repayment of PPI payments. An online enquiry to *Moneysavingexpert.com*[170] asked whether this was good value. Other contributors to the website were incredulous. All that was required to reclaim PPI was to post one letter and there was even a good chance that the bank would find you first. The website claimed that Gladstone Brooks was managed by Anthony Chorlton, formerly of Avalon solicitors, that one of two women company directors was Chorlton's wife,[171] and that Andrew Nulty was connected to the company.

Discussion

The purpose of this discussion is to throw light on the question of why lawyers break their code of ethics, exploring the inter-relation of three factors: the propensity of the individual for transgression, the nature of the organisation they belong to, and the regulatory environment. As Abel discovered, the relatively light literature on theories of professional discipline invites consideration of the more extensive literature on 'white-collar crime',[172] a term coined by Sutherland in 1939,[173] in exploring some of these issues. The criminological literature on personal motivation is relevant because, although professional infractions are rarely prosecuted as criminal acts, the circumstances and psychology of perpetrators are similar.[174] Work on white-collar crime offers useful insights into the way organisations might affect people's behaviour, but little consideration of how this applies to business oriented

[169] www.gladstonebrookes.co.uk/ppi/why-claim-ppi.
[170] http://forums.moneysavingexpert.com/showthread.php?t=2359825.
[171] http://badbiz.co.uk/2010/11/gladstone-brookes-scam.
[172] Possibly due to the aura of secrecy formally surrounding disciplinary processes; see Richard L Abel, *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings* (Oxford University Press, 2008) 37.
[173] EH Sutherland, *White Collar Crime: The Uncut Version* (Yale University Press, 1983).
[174] See further Leslie C Levin, 'Bad Apples, Bad Lawyers and Bad Decisionmaking: Lessons from Psychology and from *Lawyers in the Dock*' (2009) 22 *Georgetown Journal of Legal Ethics* 1549.

professions like Law. There is even less in this literature on the impact of regulators on transgression.

Theorists after Sutherland assert that deviance results from a coincidence of motivation and opportunity, the attractiveness of the latter being determined by prospective gains, potential risks, compatibility with ideas, beliefs and rationalisations, and any other available opportunities (the actor's opportunity structure).[175] This does not explain why some succumb to temptation and others do not. As seems obvious, delinquency is probably the result of individual propensity for transgression; one of the few commonplaces of criminology is that those involved in one type of illegitimate activity are more likely to be involved in others.[176] Abel concludes that the attorneys in his case studies involved in financial impropriety were driven by 'need or greed'.[177] Although this is a deliberate simplification, Nulty's behaviour justifies a little deeper examination against this generalisation.

Acquisitiveness is a common motive for deviance, but it is not always driven by greed. Coleman suggests that we need only acknowledge that wealth and success are the central goals of human endeavour to understand this.[178] The 'culture of competition' fuelled by capitalism causes blurry lines between entrepreneurship, commercial innovation and deviant economic activity. Social inequality causes crime at both ends of the social scale because the wealthy come to feel that their power is legitimate and their exploitation of others justified.[179] For some, the outcome is its own justification; only 'the most capable and the hardest-working individuals emerge victorious'.[180] More strange, however, was the fact that the wealth accrued by these means did not seem to constitute a particularly significant part of Nulty's fortune. The SDT noted that improper deductions had eventually been repaid, so given his reported fortune and Spanish property, the conclusion must be that Nulty had become a very rich solicitor by legitimate means. If Avalon's success meant that need was not a factor, why did Nulty need referral companies, the 'two-letter system' and flawed conditional fee agreements to generate relatively small sums?

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[175] JW Coleman, 'Competition and Motivation to White-Collar Crime' in N Shover and JP Wright (eds), *Crimes of Privilege: Readings in White Collar Crime* (Oxford University Press, 2001) 341.

[176] Those convicted of white-collar crime often have previous arrests. K Schlegel and D Weisburd, Introduction to *White Collar Crime Reconsidered* (Northeastern University Press, 1992) 362 and D Weisburd, E Chayet and E Waring, 'White Collar Crime and Criminal Careers: Some Preliminary Findings' (1990) 36(3) *Crime and Delinquency* 342. See also DJ Newman, 'White-Collar Crime: An Overview and Analysis' (1958) 23 *Law and Contemporary Problems* 737; T Hirschi and M Gottfredson, 'Causes of White Collar Crime' (1987) 25 *Criminology* 957.

[177] Abel (n 172) 492.

[178] Coleman (n 175).

[179] J Braithwaite, *Inequality, Crime and Public Policy* (Routledge and Kegan Paul, 1979) ch 10.

[180] Coleman (n 175) 348.

One explanation for the acts that brought Nulty before the SDT is that his schemes were implemented while Avalon was struggling to establish itself and before coal health proved such a goldmine. Wheeler, however, suggests a theory explaining acquisitiveness that derives from neither need nor simple greed which appears persuasive. He argues that some people stop acquiring wealth at a certain level, whereas, for others, utility grows at higher levels of wealth acquisition.[181] Among this latter group, actors operating in high risk taking are more likely to see themselves 'as pitting their wits against those of the system in some very high stakes games'.[182] Acquisition of wealth at these higher levels may 'take the form of a true pathology of personality—a person oblivious of the pattern though engaged in it'.[183] This may explain why, despite the notoriety of the miners' cases, Nulty drew attention to Avalon's profits with the claim to inclusion in *The Lawyer* listing. The observation that such a person is totally unprepared for being caught and 'treated like a criminal'[184] appears to capture Nulty's reaction to disciplinary charges.

In Nulty, we see a competitive individual keen to play the 'game' of acquiring wealth. He is dismissive of 'petty regulation'. He is surprised to be challenged. He does not see that the issue is as serious as the authorities make out. He thinks that medical reports may dispose of the SDT hearing. He is like Abel's attorneys in *Lawyers in the Dock*, who seem to believe that they are above the law.[185] Nulty's behaviour is consistent with the use of 'neutralisation strategies' to rationalise and limit symbolic constraints on behaviour.[186] One of six strategies Coleman says are used by individuals charged with white-collar offences to justify their actions[187] is arguing that rules are an unjust or unwarranted interference in a free market.[188] Objection to the Law Society's role in regulating solicitors' engagement with the legal market was expressly referred to in Nulty's exchange with *The Lawyer*. Nor has experience of discipline apparently changed Nulty's mind about the irrelevance of professional control. Otherwise, how could his polo club biography proudly refer to his previous career as a lawyer?

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[181] S Wheeler, 'The Problem of White-Collar Crime Motivation' in Schlegel and Weisburd (n 176) 108.
[182] *Ibid*, 113.
[183] *Ibid*.
[184] *Ibid*.
[185] Abel (n 172) 495.
[186] This work is based on symbolic interactionism, which explores how reality is defined by patterns of communication, interpretation and adjustment between individuals.
[187] They may claim positive motives, for example, paying their employees, or deny harm to individuals, or suggest that everyone else was doing the same thing, in order.
[188] *Ibid* what?, 344–6.

The role of organisations in professional deviance is somewhat underplayed, partly because those prosecuted are often not controlling significant operations.[189] The same has been the case in professional practice in relation to discipline: the focus of attention, certainly before the SDT, has tended to be the individual rather than the organisation. One issue that is identified in both the criminological literature and the literature on professional discipline is the prevalence of those with low social standing before courts and tribunals. Indeed, Sutherland's original purpose in focusing on white-collar crime was to challenge the myth that deviance was the preserve of the lower classes. He argued that the statistics could be explained by the fact that prosecutions might not be brought against those from elite groups, or that they failed when they were.[190] Abel's review of the literature on the professional sphere also found that sole practitioners and small firm lawyers are disproportionately represented in disciplinary cases.[191] This means that examples are often small-scale, repeated infractions, frequently resulting from ignorance, indifference or inattention[192] and tending to be seen as individual, 'unique and unrepeated'.[193] How far does the pattern of discipline in the coal health scandal confirm that serious sanctions fall on solicitors from smaller units? The solicitors that were struck off as a result of the coal health scandal were not from small organisations, but neither were they elite. For example, despite an impressive turnover and large workforce, Avalon was not a typical medium to large law firm. It only had the same number of partners or, indeed, qualified staff, as a small law firm. These key personnel, usually only two partners, operated with minimal peer constraints. As in small firms, there was nobody to question the propriety of the firm's routines. Avalon's business model was also unusual for a law firm. It had large numbers of one kind of client suffering one kind of harm and even seeking redress from one entity. Having adopted this modus operandi to deal with the coal health claims, Avalon had limited expertise to deal with other kinds of work. The way it intended to deal with this problem in the future was possibly glimpsed in the unfinished interview with *The Lawyer*. The plan was to identify an area where compensation claims could be made routine, to focus all attention on it until that seam of work was exhausted and to then move on to another such area. As the coal health cases illustrate,

[189] Sutherland's deliberately vague definition of 'white collar crime' was 'crime committed by a person of respectability and high social status in the course of his occupation', but his original text often describes the acts of relatively lowly employees (n 173).
[190] For these reasons, but also because some disciplinary infractions are not crimes, we use 'deviance', a more neutral term.
[191] Abel (n 172) 54–55.
[192] *Ibid.*
[193] *Ibid*, 32.

organisations are important in understanding opportunity structures for linking with consumers using, and misusing, legitimate business techniques.[194]

This other issue relating to the size of organisation is whether small units are especially vulnerable to corruption. Sutherland originally proposed that it is the power of elites to evade sanctions, not purity, that explains their relative absence before courts.[195] The limited evidence from this case study suggests that the truth may sometimes lie between these possibilities. Elite organisations may be treated differently by regulators, but they also respond swiftly and positively to threat, doing more to stave off the threat of discipline. The handling of Thompsons, solicitors, in the coal health scandal illustrates this. Thompsons was alleged to have paid over £10 million to miners' unions as 'administrative charges',[196] yet it was one of the firms that entered a regulatory settlement agreement with the SRA.[197] The charges listed in the agreement include paying referral payments for miners' cases, the deduction of contingency success fees and failure to provide adequate information. The fact that Thompsons was offered such a compromise is noteworthy in itself. Unlike Avalon, Thompsons reacted quickly when the storm over deductions from miners' damages broke, refunding £3.6 million to 6,304 clients. The regulatory settlement agreement cites as mitigation the firm's swiftness and proactivity in remedying infractions, concluding that it 'is not in the public interest for the matter to be brought to the SDT'.[198] Further, however, unlike the process where similar regulatory settlements were agreed, we found no record of the Thompsons agreement ever being approved by the SDT.

The third actor influencing the environment of practice is the regulator. As to the Law Society's role during the coal health scandal, if it was not 'in a coma' during the crisis, as Lord Lofthouse alleged, it did not act decisively. A consideration that may have stayed the Law Society's hand was the fact that doubt and ambiguity surrounded almost every issue, including the profession's right to regulate. In addition to threatening self-regulation, the government was intent on removing all barriers to competition and access, including restrictive ethical rules, and on encouraging the legal profession to be more business oriented and entrepreneurial. A limited form of contingency fee was introduced, while rules against referrals were cast as anti-competitive, out-of-date and unenforceable. It is arguable that this

[194] RF Sparks, '"Crime as Business" and the Female Offender' in F Adler and RJ Simon (eds), *The Criminology of Deviant Women* (Houghton Mifflin, 1979) 171.

[195] Levin (n 174) 1578–9.

[196] K Dowell, 'Thompsons Escapes SDT Rap in Miner Claims Scandal' *The Lawyer*, 25 October 2010.

[197] On 30 September 2010, covering six partners, including the chief executive (Cavalier, Stephen – 134289, www.sra.org.uk).

[198] *Ibid*, para 10.

market-driven philosophy, which implicitly espoused an entrepreneurial spirit over a public service ethos,[199] caused moral ambiguity and confusion. It may be charitable to suggest that this contributed to delay in getting to grips with the scandal. It seems likely, however, that the uncertainty surrounding referral fees and, to some extent, conditional fee arrangements, exacerbated the crisis, especially since unclear boundaries between legitimate and illegitimate money-making activity is one of the six neutralisation strategies identified by Coleman.[200]

In the event, the regulator charged a large number of coal health panel solicitors with offences connected with the schemes. This apparently included some charged with referral fee offences, despite the moratorium announced when the rules were 'clarified' in 2003. This raises the issue of whether they were pursued because of pressure to discipline solicitors. It is clear that, even before the House of Lords weighed in, coal health solicitors, and the Law Society, were being pursued by ministers. As can be seen from the brief extracts cited, the House of Lords managed to raise the moral stakes. In many respects, therefore, the miners' costs scandal resembles a 'moral panic',[201] a term coined by Stanley Cohen to describe an episode or group posing a threat to societal values and interests.[202] In the classic scenario the negative impact of behaviour is identified by 'moral entrepreneurs', generating hostility towards a group, the 'folk devils'. A widely supported consensus develops and the 'folk devils', often weak and disorganised, are unable to resist disproportionate opprobrium and action. To some extent, the literature may also throw some light on the significance of the group identity of the victims of the scandal in creating this dynamic.

The literature on white-collar crime suggests that there are 'unapproved victims', [203] meaning those not considered fair game, even by perpetrators. The miners, despite early suspicion that some might have brought fraudulent claims, eventually fitted this bill. They were portrayed by Lord Lofthouse as admirable, even heroic, yet vulnerable to exploitation. In addition to establishing the moral dimension of the panic their Lordships may also have helped to generate the volume of complaints needed to build a profile of cases and convince the

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[199] The proposition that the commercialisation of practice weakens professional ethics has frequently been argued by academics; see literature cited in Boon and Levin (n 7) 37–40, 81–85; MA Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (Farrar, Straus and Giroux, 1994) and AT Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (The Belknap Press of Harvard University Press, 1993).

[200] Coleman (n 175).

[201] This would not be the first time professional rules and disciplinary processes have been affected in this way. Pue suggests that around 1860, five cases of barristers' misconduct laid the foundation for a relatively rule-bound regime of professional regulation: WW Pue, 'Moral Panic at the English Bar: Paternal vs Commercial Ideologies of Legal Practice in the 1860s' (1990) 15(1) *Law and Social Inquiry* 49.

[202] S Cohen, *Folk Devils and Moral Panics* (Routledge, 3rd edn 1972).

[203] Abel (n 172) 32.

authorities to prosecute.[204] In Cohen's theory, while the typical moral panic passes, the volatile political situation it causes often leads to disproportionate action. In considering the consequences attributable to the miners' costs scandal, it is debateable where they begin and end. It has apparently informed the risk-based regulation policies being developed by the SRA.[205] It was expressly cited by the SRA and LSB[206] as justification for the massive fines brought in to punish breaches of licence by ABAs.[207] Less tangible, but perhaps more significant, however, has been the loss of the legal profession's claim to the 'moral high ground' in ethical matters.[208] This may contribute to the professional body's contribution on regulatory issues being much less authoritative than it once was.

Conclusion

One of the questions posed by analysis of disciplinary cases is whether anything useful can be learned in terms of regulatory policy. It is arguable that analysis of the coal health scandal contains some lessons for the future as well as judgement on the past. It illustrates, for example, the difficulty inherent in regulating situations where clients have only superficial relationships with their lawyers. Large numbers of cases processed by unqualified staff can generate huge profits yet constitute a significant risk to the reputation of the legal profession. This obviously poses significant risks in a market moving towards greater reliance on internet communication, where a high premium will be placed on the trustworthiness of legal providers. In the introduction to *Lawyers in the Dock*, Abel quotes Barber's observation that 'trust is ideally the primary mode of control in the relations between professionals and their clients'.[209] Trust is particularly important in relationships between lawyer and client that are 'one off', like the firms' relationship with individual miner clients. The scandal demonstrated not only the potential for large-scale exploitation but also the difficulty of detection. In the event, the miners found champions, but there will inevitably be situations where consumers

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[204] P Jesilow, E Klempner and V Chiao, 'Reporting Consumer and Major Fraud: A Survey of Complainants' in Schlegel and Weisburd (n 176) 149.
[205] Interview with SRA official on 27 June 2012.
[206] Legal Services Board, *Setting the Maximum Financial Penalty for ABS Licensing* (response to a consultation closing on 24 January 2011) para 19, www.legalservicesboard.org.uk/news_publications/latest_news/pdf/setting_the_maximum_financial_penalty_for_abs_licensing.pdf.
[207] The Legal Services Act 2007 (Licensing Authorities) (Maximum Penalty) Rules 2011 (SI 2011, 1659), which came into force on 1 August 2011, set fines at £250 million for organisations and £50 million for individuals.
[208] N Rose, 'Changing Commercial Climate Puts Lawyers' Ethics Under Microscope' *The Guardian*, 9 February 2011.
[209] Abel (n 172) 3 and see B Barber, 'Control and Responsibility in the Powerful Professions' (1978) 93 *Political Science Quarterly* 599.

are unaware that they have been scammed, unsure of their rights, or disinclined to take trouble for the sum involved. This is therefore a challenge for regulatory policy.

In professional relationships, Abel wrote, trust is underwritten by institutions that 'sanction betrayal',[210] but the current thrust of regulatory policy in England Wales is informed by risk analysis and focused on firms.[211] This emphasis recognises the fact that organisations can drive 'good people to do dirty work', but also that the opposite could be true.[212] Risk-based regulatory policy may assume that small firms are responsible for disproportionate numbers of complaints and disciplinary infractions because they lack the infrastructure essential for quality performance, increasing the risk of poor work, financial impropriety and under-capacity.[213] The impact of infractions is generally assumed to be low, including the effect on the profession's reputation. The Avalon case study demonstrates that this is not so. It suggests that regulation should focus on the risk posed by an entity, in terms not only of the likelihood of deviance but also of the consequences in the event of deviance.

A final question posed by the case study is whether the culture of practice can be changed and, if so, how. A specific issue is whether it is sufficient to have a few people responsible for ethical compliance, in charge of large numbers with little or no ethical awareness or responsibility. An alternative or complementary strategy is to have communities of practice where large numbers actively participate. The advantage of this approach is that it acknowledges that the ethicality of practices often depends on context; in some jurisdictions, for example, referral and contingency fee arrangements may be criticised[214] but do not fall foul of conduct rules. This links to the point that where there is doubt there is scope to come to a self-serving conclusion; but for the stringency of professional rules, it might have been difficult to discipline many of the lawyers involved. It is a rich irony that, during the coal health scandal, politicians were calling for fewer ethical restrictions on lawyers. As the referral fee episode illustrates, professional bodies like the Law Society need to resist such calls when they judge it right to do so. Such bodies could continue to have an important role in the formation of professional ethics, despite the severance of their responsibility for

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[210] Abel (n 172) 5.

[211] That is 'the relationship between the corporation's environment (customers, competitors, suppliers and regulations, structure, operating policies, goals and objectives, and so on …)'. Schlegel and Weisburd (n 176) 9.

[212] D Vaughan, 'The Macro/Micro Connection in "White Collar Crime" Theory' in Schlegel and Weisburd (n 176) 124.

[213] N Smedley, *Review of the Regulation of Corporate Legal Work* (2009) para 3.33, www.lawcentres.org.uk/uploads/Review_of_the_Regulation_of_Corporate_Legal_Work_03.09_.pdf.

[214] In the summary chapter of *Lawyers in the Dock*, Abel criticises US lawyers for routinely paying and receiving referral fees and disregarding the inherent conflict of interest inherent in contingency fees (Abel (n 172) 498).

regulation. In that role, they should not abandon principles because there is competitive and governmental pressure to do so. Discourses of professionalism, consumerism and competition need to engage and complement each other in the new order so as to enhance prospects for the ethical delivery of legal services.[215]

[215] See generally Boon (n 4).