

Bringing the Good News from Ghent to Aix
Avrom Sherr, Woolf Professor of Legal Education
at the Institute of Advanced Legal Studies, University of London

How They Brought the Good News from Ghent to Aix
[16--]
Robert Browning (1812–1889)

I sprang to the stirrup, and Joris and he;
I galloped, Dirck galloped, we galloped all three;
'Good speed!' cried the watch, as the gate-bolts undrew;
'Speed!' echoed the wall to us galloping through;
Behind shut the postern, the lights sank to rest
And into the midnight we galloped abreast.

Not a word to each other; we kept the great pace
Neck by neck, stride by stride, never changing our place;
I turned in my saddle and made its girths tight,
Then shortened each stirrup, and set the pique right
Rebuckled the cheek-strap, chained slacker the bit,
Nor galloped less steadily Roland a whit.

This paper considers what we know about clients' views of their lawyers from recent research work in Scotland and England and Wales. It also considers what we know of how clients view advice agency workers providing similar services. New forms of litigation, including conditional fee agreements, set up new areas of difficulty between lawyers and clients and there is a concern that current ethical rules may not cover the needs of the new forms of service agreement. The paper asks whether conduct rules are applicable to these issues. Finally it considers whether all of this is "good news" and whether Robert Browning's poem has any relevance.

What do we know about what clients think of their lawyers?

First, a hasty gallop through the recent literature. Two recent pieces of research from Scotland and from England and Wales each provide an updated view on what clients think of lawyers in criminal and civil cases.

In Scotland the new pilot system for a public defender was treated to independent evaluation research.¹ Earlier research noted the passivity of criminal clients with lawyers “processing hopeless, confused people through the system in a routine, ritualised way, often owing greater loyalty to the prosecution and the court than to their clients.” Criminal defence lawyers were involved in “a confidence game” which involved lowering clients’ expectations, making extravagant claims of inside knowledge and play acting in dramatic but superficial pleas in (Blumberg, 1967). Some research suggested that clients judge mainly on outcome (Ericson and Baranek, 1982 in Canada), whereas others feel that a sense of fairness (Caspar, Tyler and Fisher, 1988), or “being listened to and given voice”, (Tyler, 1990) are important. Sommerlad and Wall (1999) and Davies (1998) seem to suggest that a good rapport with clients is essential in order to elicit enough information to perform a technically competent service.

The Edinburgh study showed that many private practice solicitors had established long term relationships with their criminal clients.

“She’s my father’s lawyer as well. She’s like a family lawyer. It was my Dad who says to get in touch with her.” (Client interview – private solicitor client 2000).

“I’ve been practicing in Edinburgh for 27 years... it’s just by reputation...over the years...it’s the sons of fathers...I’m waiting for my first grandson...that’s how we get our business.” (Private solicitor interview, 1998).

Clients tended to speak of their solicitors as being an individual rather than a firm and it was mainly people from families who were used to the criminal process who had a longer term relationship with a solicitor. These relationships appeared beneficial to both solicitor and client and clients expressed that benefit.

From the ethical point of view lawyers in this position might find it difficult to differentiate between their clients’ interests, their duty to the court, duty to the profession and their own interests and there could be a temptation to work more for the client than for their sense of “social justice”. It is interesting to contemplate whether public defenders might differ from private practitioners.

¹ *The Public Defence Solicitors Office in Edinburgh: An Independent Evaluation*, Goriely, McCrone, Duff, Knapp, Henry, Tata, Lancaster and Sherr, (Scottish Executive Central Research Unit, 2001).

Contrary to Ericson and Baranek, clients in Edinburgh did not in general appear to make judgements on their lawyers based only on the outcome of their cases, but also on the process. This was helpful for public defenders since they pleaded their clients guilty earlier than their private practice counterparts and this led to a larger number of convictions. Perhaps this served the lawyers' duty to the court and to the public purse. But it did not help a small percentage of their clients (c.7%) whose cases might have been abandoned later by the prosecution.

Although the clients may not have been able to judge the professional proficiency of their lawyers, their interpersonal skills were closely watched and their mastery (or otherwise) of the details of their case were carefully considered. Treating clients as people, rather than "bill fodder" was important, so was giving robust advice, providing clients with a voice in court and the confidence with which the lawyer dealt in court.

Providing clients with a voice in court could conflict considerably with a lawyer's other obligations and may even be a conflict with the lawyer's duty to act in the interest of a client, rather than following their expressed desires.

In the Scottish study it was enormously important to clients to be able to choose their own lawyer. In the Scottish pilot clients had been for the first year directed to the pilot public defenders system and were not allowed to use a previous lawyer, or another lawyer of their own choice.

The Scottish clients of criminal lawyers were asked what they thought of their lawyers through a questionnaire study and also in private interview. In general the clients of private practitioners thought their lawyers had done a better job, told them what was happening more, "were there when I wanted them" and had "enough time for me" and "told me what would happen at the end". "Volunteer" clients who went to the pilot Public Defender Office without compulsion had slightly lower ratings for all of these than private practice lawyers. The clients of the Public Defender Office who had been directed to that office had the lowest ratings of their lawyers for all of these items. Broadly, the picture was the same in relation to "knew the right people to speak to", "told the court my side of the story", "treated me like I mattered" and "stood up for my rights". But, interestingly, it was the private practice lawyers who were thought to be "too friendly with the other side" more than either directed or

volunteer PDSO clients. Although there were clients who were very happy with their Public Defender lawyers, in general clients valued the ability to choose a lawyer and resented being directed towards one.

‘Twas moonset at starting; but while we drew near
Lokeren, the cocks crew and twilight dawned clear;
At Boom, a great yellow star came out to see;
At Düffeld, ’twas morning as plain as could be;
And from Mecheln church-steeple we heard the half-chime
So Joris broke silence with ‘Yet there is time!’

At Aerschot, up leaped of a sudden the sun,
And against him the cattle stood black every one,
To stare through the mist at us galloping past,
And I saw my stout galloper Roland at last,
With resolute shoulders, each butting away
The haze, as some bluff river headland its spray

And his low head and crest, just one sharp ear bent back
For my voice, and the other pricked out on his track;
And one eye’s black intelligence,—ever that glance
O’er its white edge at me, his own master, askance!
And the thick heavy spume-flakes which aye and anon
His fierce lips shook upwards in galloping on.

Quality and Cost in England and Wales²

Two approaches were used in the English and Welsh study to obtaining a “clients’ eye view” of their lawyers and legal work. The (more traditional) client survey approach was used with over three thousand clients of both private practice lawyers and not for profit advice agencies, all carrying out advice and assistance work under legal aid contracts. Additionally, for the first time in academic socio-legal research, “model clients” were sent out, posing as real clients, to both solicitor and NFP groups who were involved in the study. All the lawyers and advisers had previously been warned that they might be visited in this way. Amusingly, some advisers had already claimed they had noticed the “model clients”, long before any had been sent out.

² *Quality and Cost, Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot*, Moorhead R., Sherr A., Webley, S. Rogers, L. Sherr, A. Paterson and S. Domberger, (Stationery Office, London 2001).

Client survey results among professionals, unless there is a forced or persuasive return methodology, are normally affected by low response rate. In this case, since we could compare the responding sample with the non responding sample we are able to say that there are no major differences and therefore that their responses were not affected by sample bias, even though the response came from 28% of those surveyed. Overall the clients showed fairly high satisfaction with their lawyers with positive results for “listening to what they had to say”, “telling them what was happening”, “being there when I wanted them”, “having enough time for them”, “telling them what would happen at the end”, “knew the right people to speak to”, “really stood up for their rights”, “paid attention to their emotional concerns”, “did what they wanted” and “treated them like they mattered”, all ranging between 74% and 86% positive.

Clients seemed to prefer cases to be handled by one individual rather than more than one adviser and thought that cases were handled better when they were. There were also problems about not explaining properly to clients the need for the involvement of more than one adviser. In general the not for profit agencies satisfied their clients more than the solicitors in seven out of ten headings. There were also differences between different payment systems within the solicitors’ groupings. White clients rated their cases as “excellent” in 50% of matters compared with only 28% for clients who were not white. Many of the latter rated their advisers as “very good”. A similar proportion of white and non-white clients rated their advisers as poor or very poor.

One major difference in client satisfaction was the effect of a positive financial result. Where there had been a positive financial result, 59% of clients rated the case as excellent and 23% as very good, whereas the equivalent figures for no positive financial result were 43% and 28%. Recommendation was also an important element in satisfaction, and those who had been recommended to an adviser were more likely to be satisfied with them. On multiple regression the highest effect on satisfaction was having only one adviser handling the case. Failure to give advice on the likely length of the case also had a major effect.

Complaints were also an interesting issue. 10% of those clients who responded said they had complained. 76% of those remained unsatisfied with the outcome of their complaint. As might be expected there were strong relationships between dissatisfaction and whether a

complaint was made, and whether a complaint was adequately dealt with once made. It was clearly possible to regain some of the confidence of a client by reacting well to a complaint.

It is therefore possible for lawyers and advisers, through the management of their cases, and the ethical conduct of their work to control a number of the issues which cause satisfaction or dissatisfaction from clients. However, some of these may affect the costing and organisation of work.

45 model client visits were organised, divided as between the different sectors of the study. Model clients are only able to assess early aspects of service including access and quality of advice and immediate follow up at initial interview. However, these are crucial aspects of service. The methodology was enhanced by being able to send the model clients' notes of their interviews to peer reviewers for assessment. The model clients noted how difficult it was, especially with some of the not for profit agencies, to gain access to advice and make initial contact with advisers, getting them to make appointments and getting them actually to give advice. Additionally there were also other difficulties in the manner in which advice was given.

The model client system was a new form of methodology which provided a useful opportunity to give insight into service delivery at and before an initial interview. It also allowed a direct comparison between what a client (or model client) thought about a particular interview and what a peer reviewer might think. In one case, the model client said:

“The adviser showed an impressive level of concern for my job security, understanding that I could not afford to lose my job. Made a point of telling me that it can be quite common for part time women workers to encounter unfair bosses because they know how much they need the job and think that they will be able to get away with it (i.e. treating them unfairly). Overall he was very helpful, reassuring and personal and tried to think of as many other organisations I could turn to as he could. The people he suggested were a CAB, ACAS, a local law firm, a trade union”

The peer reviewers, however, were much more concerned about this visit and the following comment shows up the distinctions between what clients might think and how a lawyer might assess the same interaction:

“Although very clearly empathetic, this adviser does not really know enough about the law to be using legal aid money. A good example of touchy feely advice.”

The quality of the advice given as assessed by the peer reviewers was not very strong. In all personal injury cases correct advice was given, but in half or more of debt, housing and employment cases poor advice was given or the clients failed to access advice at all.

Summary

From these two pieces of research, looking at both criminal law and civil law subject areas and looking at both private practice and publicly employed lawyers and advisers, we have a fair idea of current views of lawyers and advisers from their clients. Although clients are pleased with the quality of the work carried out for them and in general are satisfied with their lawyers, there are a number of areas of dissatisfaction – some of which show up important issues of competence, ethics and management of legal professionals.

Explaining to clients who will actually be carrying out the work is an important element of the English and Welsh Law Society Solicitors' Conduct Code Rule 15. Also included in Rule 15 is the need to explain to clients how long their cases will take and what is happening on them. Complaints handling is also a conduct issue which comes under that rule. Clearly, not all lawyers and advisers are able to satisfy clients' complaints quickly and reasonably.³

By Hasselt, Dirck groaned; and cried Joris, 'Stay spur!
Your Roos galloped bravely, the fault's not in her,
We'll remember at Aix'—for one heard the quick wheeze
Of her chest, saw the stretched neck and staggering knees,
And sunk tail, and horrible heave of the flank
As down on her haunches she shuddered and sank.

New, or developing forms of practice – the ethics of conditional fee arrangements⁴

The development of new forms of legal service or conditions for legal practice also produces new ethical dilemmas. In England and Wales conditional fee arrangements have been legislated as a new means of funding certain types of litigation.⁵ Previously, these areas of litigation, including particularly personal injury litigation, could be funded initially under the

³ See also, Moorhead, R., Rogers, S., Sherr, A., *Willing Blindness? OSS Complaints Handling Procedures*, (2000) Law Society, London.

⁴ *The Ethics of Conditional Fee Arrangements*, January 2001, The Society of Advanced Legal Studies – Ethics and Lawyer Fee Arrangements Working Group, Chairman, Richard Southwell QC, Convenor and Author, Richard Moorhead.

⁵ Courts and Legal Services Act 1990 and Access to Justice Act 1999.

legal aid scheme, although most cases settled and funds were paid back into the scheme when the defendants accepted the claimants' costs.

Conditional fee arrangements (CFAs) set up a rather new set of conditions between lawyers and clients. The lawyer will assess the likelihood of success of the case and may include, as part of the contract, an uplift in the lawyer's fees of up to 100%, if the case is particularly risky. The lawyers, in general, fund their own work and sometimes disbursements, from their own funds, until the case is settled or won.

The Report suggests that opponents of this approach will see it as inevitable that the direct financial interest of the lawyers in their clients' success or failure will involve:

- A conflict between the lawyers' own interest and the lawyers' duty to their clients.
- A conflict with the over-riding duty owed by lawyers to the court, i.e. to the public interest and the administration of justice, and to their professions.
- A marked decline in the ethical standards of lawyers in England and Wales (by reference to the worst practices of contingency fee lawyers in the United States).
- The shifting of financial risk or compromise access for expensive or risky (but worthy) cases, difficult clients or cases where a client might withdraw. Therefore there would be more "cherry picking" of easy cases.
- And therefore reduced access to lawyers.

The working group found that there were some real problems remaining in the new conditional fee arrangement system. There was some real concern about the role of insurance companies in the litigation process, who would be involved partly as insurers of the litigation on the claimant's side and might also be involved as defendants. The Report suggested that a compulsory "period of contemplation" should be required between the explanation of a draft CFA and the client being asked to sign, except in cases of urgency. The CFA was a fairly complicated agreement and it could well be that a client might have a better deal from one lawyer than another. The Report suggested that an explanatory video might be prepared so that clients could see this and understand more clearly what they were involved in. The Report also said:

- That success and win should be defined in terms of damages actually recovered.
- That there should be rules about how and when lawyers can recover costs from clients
- That the Law Society's practice rules should make clear that the solicitor's duty to a client under Practice Rule 1 puts the solicitor in a situation of conflict with their client if the solicitor is aware that litigation insurance they advise the client to take out is unnecessary or unnecessarily expensive.
- That the Bar's Code of Conduct should include stronger provisions requiring barristers to act in accordance with their clients' interest rather than the personal interest of the barristers.

So we were left galloping, Joris and I,
 Past Looz and past Tongres, no cloud in the sky;
 The broad sun above laughed a pitiless laugh,
 'Neath our feet broke the brittle bright stubble like chaff;
 Till over by Dalhem a dome-spire sprang white,
 And 'Gallop,' gasped Joris, 'for Aix is in sight!'

'How they'll greet us!'—and all in a moment his roan
 Rolled neck and croup over, lay dead as a stone;
 And there was my Roland to bear the whole weight
 Of the news which alone could save Aix from her fate,
 With his nostrils like pits full of blood to the brim,
 And with circles of red for his eye-sockets' rim.

WLF Felstiner's "tour d'horizon" on lawyer client relations research

A recent talk⁶ provides a highly developed picture of the current research together with some different focus and two points of analysis. Felstiner first suggests that "justice" may be defined in lawyer-client relations in both substantive and procedural terms. "Substantive justice" is that lawyers counsel clients to do "the right thing". "Procedural justice" is that lawyers treat their clients properly.

Many ethical codes set up the *substantive justice* position by privileging the lawyer's duty to the court, duty to the profession or duty to society above the lawyer's duty to the client or the lawyer's own interests. There is usually some form of regulation to this effect, which tends to

⁶ *Synthesizing Research on Lawyer-Client Relations*, Plenary by Professor WLF Felstiner at the W.G. Hart Workshop, June 2001, Institute of Advanced Legal Studies.

differ between jurisdictions but, in general, supposes that it is possible for the lawyer to identify “the right thing” and that a lawyer may counsel clients to do it. This is a fundamental assumption of the ideology of professionalism which transcends changes in patterns, procedures and management of legal work.

Procedural justice, in Felstiner’s terms suggests that “lawyers treat clients well – that lawyers are accessible, responsive, empathetic, communicate effectively, pay prompt attention to their clients’ affairs, and are motivated by professional values rather than financial returns.” These elements of legal conduct are quite different from the elements of **substantive justice** conduct which were more frequently found in early versions of the English and Welsh Solicitors’ Code of Conduct. Those precepts dealt primarily with “professional issues” – how the lawyer reacted to other lawyers, how the lawyer had a duty to the court and a duty to justice, including the **substantive justice** approach referred to above.

In this respect **procedural justice** is only a recent input into ethical and conduct rules and appears to be the result of consumerism, growing democracy between professionals and lay clients, class and education standardisation etc.

Felstiner then goes on to show that the research on lawyer client relations paints a poor picture of both **substantive** and **procedural** justice. The socio-legal research suggests that corporate lawyers in general follow what their clients want, or what they assume their clients to want and Galanter suggests that there is not even any “angst” about this in Britain as compared with the United States where at least the lawyers often confess that they shirk this responsibility. Lawyers have become “dehumanised, unable to relate to clients with compassion”.

Lawyers working in the “personal services hemisphere” of the profession have more problems regarding the **procedural** side of justice. Felstiner says that the **substantive** side has never been high on their “agenda”. The question is whether criminal and indigent civil law clients experience “neglect, rejection and disrespect” from overloaded and harassed lawyers who are “impatient, highly focused on the instrumental dimensions of their work and little inclined toward caring, empathy, responsiveness, co-operation, sharing and patience.”

Felstiner then goes on to query how reliable the socio-legal literature is in painting such a depressing picture of the profession and suggests that his own recent research leaves the profession looking a little better than previously thought. However, what is most important for this paper is the question whether different, or differently policed, conduct rules would make any difference to the ways in which lawyers behaved.

Then I cast loose my buffcoat, each holster let fall,
Shook off both my jack-boots, let go belt and all,
Stood up in the stirrup, leaned, patted his ear,
Called my Roland his pet-name, my horse without peer;
Clapped my hands, laughed and sang, any noise, bad or good,
Till at length into Aix Roland galloped and stood.

The conference theme

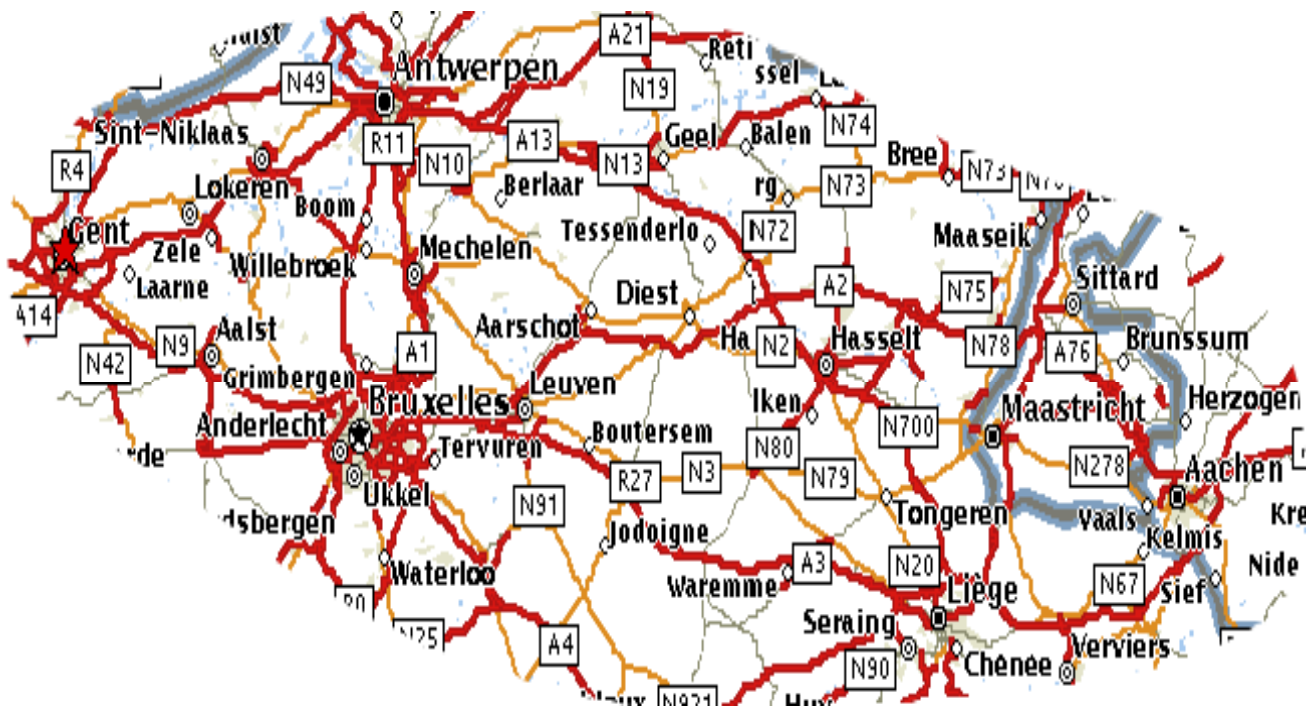
The conference theme suggests three levels of approach to ethical behaviour: the professional association, the firm and the individual lawyer. This paper has shown that the needs of clients might be addressed at all three levels.

Lawyer competence in producing effective quality can be dealt with by encouraging more effective modes of qualification and more effective monitoring or policing by the professional association. It can also be achieved with better training and experience in-house in firms and encouraging the individual professional responsibility to ensure that lawyers work only on cases in which they are competent, or they make themselves competent to do so.

Some other issues might be dealt with at each of the three levels. Management issues such as organising that only one adviser deals with one case, where possible, are clearly to be organised at the firm level, although there may be questions which arise for individual lawyers as well. It is clearly for individual lawyers to provide proper information on how long a case is going to take and what is happening in it. Systems for handling complaints are designed and policed at the professional association level, but it is at the firm and individual level that the problems associated with complaints and handling these properly all occur.

And all I remember is, friends flocking round
As I sat with his head 'twixt my knees on the ground;
And no voice but was praising this Roland of mine,
As I poured down his throat our last measure of wine,
Which (the burgesses voted by common consent)
Was no more than his due who brought good news from Ghent.

Denouement
Ghent to Aix



A brief look at the modern map shows a fair distance between Ghent and Aachen in Germany, which was known as Aix La Chappelle in the seventeenth century. Even as the crow flies it is a long distance, about 120 kilometers or more. Travelling as Browning's riders did from Ghent to Lokeren to Boom to Mechelen to Aarschot to Hasselt to Tongeren and then Aachen, would have been even longer. Almost certainly this is a journey that no horses could make in one night and without stopping. It is beyond possibility. Indeed, according to the critics and to Browning himself, there was no such ride, no such horses, no such riders, no such good news and no event in history which this represents. For English school students of a certain generation this wonderful narrative poem with its incredible rhythm may be etched in our memories but all that it is is a story, with rhythm, by Browning, with rhymes. All then that is left at the end of the poem is the memory, the recitation, the feeling engendered by the poem and the performance of it.

Unfortunately, the effect of legal ethics is rather similar. There are no real "ethics", just a set of conduct rules. Sometimes these rules are obeyed and sometimes they are not obeyed. When large commercial firms decide that the conflict of interest rules are unimportant or not for

them, they create “Chinese walls” or “cones of silence” without any clear authority or regulatory backing.⁷

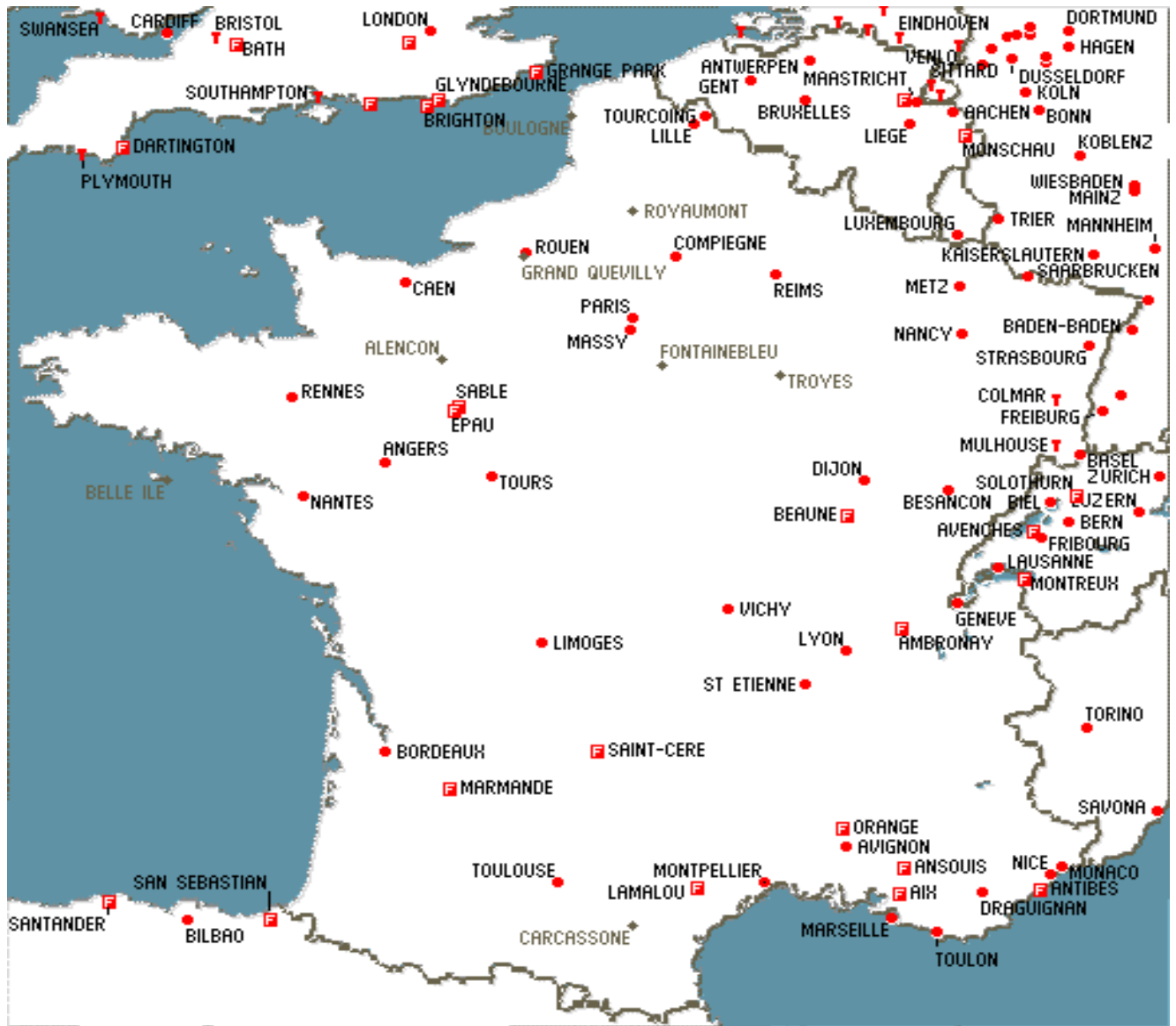
For most law firms there is very little policing of misconduct. Across the world, conduct cases against lawyers are very low in number. They tend to rely either on angry clients, or “the other side” to report any misconduct. Where misconduct is reported only small proportions are found to be correct and even in these cases only small numbers of such cases are punished. Where punishment exists it is usually at the lower end of the spectrum rather than at the higher end.⁸ Therefore, what does occur really only amounts to a few attempts at conduct policing for show, or “for the books”. The conduct rules read well, they are well drafted, idealistic assertions of exhortation to good behaviour, and they feel good to have around. But obedience to such conduct rules does not really occur.

We need something rather different in order to make a difference. We have not sufficiently identified the distinctions between ethical failure and incompetence, service complaints, lawyer management and lawyer negligence. Even in this conference we have skated over some of these issues and talked about each as if it were the same as the others.

In order to make our analysis more useful we need to take into account, apart from conduct rules, issues of management, monitoring, negligence actions against professionals, and client service complaints. And we need to reconsider the map of these issues of client lawyer dissatisfaction in ways which will make more of a difference.

⁷ *Guide to the Professional Conduct of Solicitors*, 8th Edition, The Law Society, pps 316 and 322 – Chinese walls being used in far more situations than merged firms.

⁸ See Abel, R. *Why Does the ABA Have Conduct Rules?*, and the ABA Special Committee on Evaluation of Disciplinary Enforcement, 1970, *Problems and Recommendations in Disciplinary Enforcement*, Chicago and Sherr, A., *Legal Ethics in Europe*, Chapter 17 in Economides *Ethical Challenges to Legal Education and Conduct*, (Hart Publishing, 1998, p. 351).



The International Sociological Association or Sociology of the Professions, Subgroup on the Legal Professions will meet again in June 2002. Its meeting takes place not at Aix La Chappelle but at Aix en Provence. We need to take these issues and this analysis further, there. In this way, we may be able in Browning's terms to bring more good news from Ghent to Aix.

Avrom Sherr

