The *Ordem dos Advogados do Brasil* and the politics of professional regulation in Brazil¹

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I Introduction

This chapter explores regulation of the legal profession by the Brazilian Bar Association (*Ordem dos Advogados do Brasil* – OAB) after the rise of the corporate law firm sector. We show how the OAB responded to several challenges created by the rise of new forms of organization and new styles of lawyering.

OAB regulations played an important role in the growth of the corporate law firm sector. As Brazilian lawyers began to adopt corporate law firm models from the US and other countries, the OAB was faced with a new entity that operated differently than the traditional Brazilian law offices. These “new model” firms were relatively large, highly specialized, organized in a hierarchical fashion, and profit seeking. Although there were concerns that this “commercialized” approach to law practice was at odds with principles of professionalism, the OAB created a regulatory framework that accommodated the new model allowing the corporate sector to grow substantially in the 1990s and early 2000s.²

The rise of the corporate sector created a new actor in OAB politics. The Association had been dominated by two groups: the traditional elite of prestigious lawyers who had dominated the profession since the beginning, and the OAB’s organizational elite who occupied important posts within the Association and were

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¹ We are very thankful for the comments presented by David Wilkins, David Trubek and other scholars at the *Globalization, Lawyers and Emerging Economies Conference* (São Paulo, Brazil, March, 2012); and the comments presented at the *Brazilian Political Science Association Meeting* (Gramado, Brazil, August, 2012), where partial versions of this chapter were presented; finally, we also thank Andrei Koerner and David Trubek for the comments on the final version of this chapter.

² For data on the growth of the sector, see Chapter 1, this volume.
responsive to the great mass of members. With the rise of the corporate law firms, third elite made up of large firm business lawyers entered the picture.

The chapter explores the interaction of these three elites as the OAB dealt with two issues that arose as a result of globalization and the rise of the corporate sector: (1) the rules governing pro bono practice and (2) the regulation of foreign law firms and their relationship with Brazilian firms. In the first case, business and traditional lawyers sought OAB approval for pro bono practice. In the second, the leading group of the business lawyers wanted the OAB to outlaw alliances between foreign law firms and local firms. We show how the struggles over these issues played out through interaction of these groups within the complex federal structure of the Association.

A. The OAB and the challenges of the 1990s

The OAB was created in the period of corporatism, a political system that brought many social groups under the control of the state. It was delegated exclusive authority to organize and control the practice of lawyers. Membership is mandatory for all lawyers. Although created by the state and originally part of a system of state control of civil society, over time the OAB achieved considerable autonomy and self-governance capacities. By the end of the 1970s, OAB was considered one of the most important Brazilian civil society organizations. This was in large part due to the central role it played in the struggle against the military regime (Bonelli, 2002; Taylor, 2008; Almeida, 2005, 2010). Today it still is one of the most prestigious and politically powerful organizations in Brazil.

By the 1990s, OAB was facing two major challenges. The first was a massive increase in the number of lawyers, an increase that started as early as the 1960s due to the expansion of legal education (Almeida, 2005). The second was the opening of the national market to the global economy and concomitant pressures for different kinds of legal services and new ways of conflict resolution.

The Bar, once an exclusive and small group of professionals, became a large group composed of lawyers from different social origins, headed by professional elites (Almeida, 2010). The “old style” lawyering, based on independent, solo professionals

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3 For a discussion on corporatism, see Phillippe C.Schmitter (1974). For an analysis of the creation of OAB under corporatism, see Maria da Glória Bonelli (2002)
or family firms specialized in litigation was being replaced by lawyers employed in big law firms that offered a diverse set of legal services, focused on business matters, and employed an advisory, preventive law approach (Cunha et al., 2007). Of course, the legal profession did not change completely nor did “old style” lawyers become extinct. Rather, newer professional patterns coexisted with traditional ways of lawyering.

Those changes in the social and economic profile of lawyers put new pressures on the regulatory capacities of OAB. Brazilian bar leaders faced a long list of challenges. They needed to oversee the working conditions of lawyers employed by the big law firms; ensure minimum conditions so independent professionals can survive in a competitive labor market; regulate foreign law firms acting in Brazil; preserve lawyers’ monopoly of the practice of law; regulate new practices and demands brought by a globalized economy; and preserve the idea that lawyers are not business professionals despite the existence of a competitive, money-intensive legal services market.

Can we find a pattern in the regulatory interventions of OAB? Who are the relevant political actors when the OAB seeks to control the major law firms and their practices in the market of legal services? How are professional rules enforced throughout the internal organization of OAB?

To identify and understand the politics of the professional regulation by OAB this chapter analyzes recent and controversial regulatory issues, focusing on their historical, economic and political aspects. We have chosen two main issues: the regulation of foreign firms and their relationship to Brazilian firms and the rules governing pro bono practice. These issues embody the main economic, political, and symbolic conflicts created by the internationalization of the Brazilian legal services market and generated by the arrival of the American law firm model, the increasing commercialization and sophistication of legal practices, the debate on the proper role of lawyers in a modern society, and differing opinions about the role of OAB itself as a professional regulatory authority. Because São Paulo is the major center for corporate law, these issues naturally involved the São Paulo State Bar. But because OAB is a national institution, the regulatory battles also involved the national level and were affected by the dynamic between local and national interests and local and national professional politics.

II Professionalism, political actors and formal institutions
The creation of a new model of the organization of legal services, based on specialization in large size profit-seeking firms, was the first step of an increasing process of commercialization\(^4\) of the legal profession in Brazil. Although this commercial aspect of the big law firm is well known (and also well accepted) in the United States and in England\(^5\), the main difference in Brazil is that all the professional regulation by OAB is still based, in theory at least, on the idea of the public role of lawyers and practice as a non-commercial activity, directly related to access to justice and enforcement of constitutional rights. As we will show below, this tension between a public role-based approach to regulation of the legal profession and an increasingly commercial activity in the corporate law sector explains many of the political aspects of the two controversial regulatory issues we studied.

This tension is related to the very concept of profession: an economic and political group, representing a specialized occupation, with autonomy for the self-government of its own activities, justifying monopoly of the market by the expertise and the public function of professional work (Freidson, 1996; 1998; Rueschemeyer, 1964; 1977; 1986; Bonelli, 2002; Cummings, 2011; Mather; 2011). It relates to the core of what Scott L. Cummings (2011) calls “a fundamental paradox of the legal profession”. According to him,

As professionals, they [the lawyers] are accorded wide discretion to define their own standards for admission and rules of conduct in order to promote craft expertise and quality service. In exchange for this privilege, lawyers are expected to embrace a set of public values – a code of “professionalism” defined by a commitment to competence, independence, and public service – distinguishing them from mere commercial actors. They are asked, in short, to be “public citizens” with a special

\(^4\) We use the concept of commercialization in a scientific, sociological sense, according to the analysis of big law firms performed by Marc Galanter and Thomas Palay (1994), mentioned above. It is important to stress the difference between a sociological sense from a common sense of the idea of commercialization: in a common sense, the use of the term commercialization can be understood as a distortion of the profession and of the professional ideal of the public role of lawyers; however, as we will show below, commercialization (in a sociological approach) is an economic and organizational trend of the profession, and the political regulation of the professional practice is a process of accommodation of that trend, according to the power and interests of the different sectors of the professional community, which means the renovation of the professional ideal and its official discourses.

\(^5\) Although the conflict between the public role of lawyers and the commercial aspects of their services is also present in the United States and in Britain, we can say that the professional regulation in those countries admits, by different means, the commercial aspects as acceptable. More than that, we can say that lawyers in those countries “are permitted – and indeed encouraged – to make money, often lots of it” (Cummings, 2011, p.1). That is the case, for example, of advertising in the US legal marketing, and also the recent decision of allowing British law firms to search private, non-lawyer investors by IPO, such as industry and service companies do.
obligation to promote the “administration of justice”. This dual status – in the market, but above it; diligent servants of clients, but also special guardians of the “public interest” – raises our expectations of lawyer conduct (2011, p. 1)

Globalization and the rise of the corporate sector created a need for new regulations of these new organizational firms, especially the situation of lawyers hired under contract and the very specific structures created by the newest big law firms. Although the political processes that brought those new rules are described and analyzed in other works (Bonelli, 2002; Almeida, 2005), it is important to understand how the most recent regulatory issues were affected by the regulations that accompanied the growth of the modern Brazilian big law firm starting in the 1990s.

During the 1970s and the 1980s, OAB regulated the situation of lawyers working for the big firms on a contractual basis – a new form of employment relation for professionals brought about by the growth of the number of lawyers and the diversification of the structure of law firms. The idea of lawyers employed by firms under contract and subject to hierarchical control within the firms seemed at odds with the principle of professional autonomy. To protect their rights, Brazilian Bar leaders were asked to represent the concerns of employed lawyers, almost like union leaders (Bonelli, 2002; Almeida, 2005).

The rise of the contract lawyer is a phenomena directly connected to the rise of the modern Brazilian law firm (sociedade de advogados), characterized by the hierarchical relations between major partners and associated lawyers, and between those lawyers and those hired on contract. It also brings with it the idea of property of a law firm owned by the major partners. Those characteristics forced OAB to face new regulatory demands, very different form the well-known patterns of independent lawyer practice (advogado autônomo) and the traditional law office (escritório de advocacia) a horizontal, informal association between independent lawyers sharing the same office and its costs.

According to Marc Galanter and Thomas Palay (1994), the rise of the American big law firm is the result of the commercialization of legal practice, under pressures for standardization, continuity and specialization of legal services. This novel model of legal organization introduced a new division of labor between partners, associated lawyers and contracted lawyers, as well as leading to high levels of revenue and profit.
That is why Galanter and Palay use the idea of the big law firm as a “law factory”, when they analyze the impact of the rising of the American big law firm during the 1930s:

The “factory” metaphor caught not only the instrumentalism, but the systematization, the division of labor, and the coordination of effort introduced by the large firm. Commentators also felt that the metaphor expressed something about those firms that was profoundly at odds with professional traditions of autonomy and public service. What bothered critics was not efficiency, but what they viewed as the total commercialization associated with it. (1994, p. 907).

In this sense, the organizational pattern of law firms based on major (capitalist) partners and contracted (working) lawyers for a large scale production of legal services is the same as the modern capitalist production, as it was analyzed by Karl Marx (2013):

Capitalist production only then really begins, as we have already seen, when each individual capital employs simultaneously a comparatively large number of labourers; when consequently the labour-process is carried on on an extensive scale and yields, relatively, larger quantities of products. (p. 397).

As Yves Dezalay and Bryant Garth (2002) have shown, the model of the American large law firm had a strong influence in Latin-American countries starting in the 1970s. By the 1990s, major domestic firms had taken shape, and business lawyers had improved their practice, expertise and social networks. In Brazil and elsewhere in Latin America, these large domestic firms began to serve as key intermediaries between foreign capitalists and the business and political elites in national economies seeking legal solutions to the debt crisis, look toward the opening of national markets and favoring the privatization of public companies. According to Dezalay and Garth:

The business law firm is a key agent and product of the Americanization of the legal landscape. The proliferation and growth of business law firms appears to be the most successful or even the only successful legal transplant from the north into the south. This success is even more striking because of the strong European legal tradition – or legal culture – in Latin America, which assigned a marginal role to lawyers who were identified with business. The story of success goes even further, since it appears not only that these business law firms in the south have become the key agents for the entry of multinational conglomerates into their territory but also that business lawyers have become recognized as a legitimate part of the legal elite. (2002, p. 198)
The first Brazilian big law firms (such as Pinheiro Neto Advogados\textsuperscript{6}) were born before the 1970s, but the model spread, as a new pattern for law offices, during the 1990s. The modern Brazilian big law firms are not as big as their American equivalent, but they have many similarities to the original model: large organizations, rationalized on a large scale, offering full service or sets of highly specialized and sophisticated professional services.\textsuperscript{7}

In Brazil, the firm model (sociedade de advogados) was first regulated by the Statute of Lawyers in 1963. Some internal rules of OAB also ruled law firms until the new Statute of Lawyers (1994). Although that law brought few innovations (Ferraz, 2002; Giacomo, 2002), the role of the business lawyers as legal advisors and the traditional role of lawyers as litigators were successfully conciliated during the political process of making of the 1994 Statute. (Bonelli 2002) This was a real achievement, especially when we know that other national regulations – such as in France until the 1990s – were not able to maintain lawyers as a unified group or have a single regulation for litigators and advisors.

By the 1990s the business law firms were becoming important political actors. The role was aided by the Center for Studies on Law Firms (Centro de Estudos das Sociedades de Advogados – CESA), a civil association founded by the major law firms in Brazil in 1983. CESA is responsible for political representation and for dialogue between OAB and the major Brazilian law firms on regulatory issues. In 1992 CESA achieved an important goal when the São Paulo State Bar Association created a permanent commission on law firm issues (Giacomo, 2002). Some years later, the Federal Council of OAB also created a similar commission, in which the partners of large law firms found a formal space for political representation in OAB.

\textsuperscript{6} For an analysis of Pinheiro Neto’s trajectory, see Dezalay; Garth, 2002.

\textsuperscript{7} If we consider taxation regimes, it turns out that the practice of law in a law firm (sociedade de advogados) is more economical than as independent lawyer practice or in traditional law office. On one hand, Brazilian corporations pay two corporate income taxes: Imposto de Renda de Pessoa Jurídica (IRPJ) at 15\% over their incomes and Contribuição Social sobre Lucro Líquido (CSLL) at 9\% over the profits. On the other hand, individuals pay income tax at progressive rates up to 27.5\%. There is also a Service tax (Imposto Sobre Serviços – ISS) charged at a fixed rate based on the amount of practitioners associated at the firm. Since the ISS is a municipal tax, its rate varies in each city. In São Paulo, for example, law firms pay approximately R$800.00/year per lawyer. On the other hand, individual lawyers pay service tax (ISS) at 5\% over service value.
By making official and legitimate a new model for the organization of legal services based on large scale, profit-seeking organizations providing specialized and sophisticated services and operating on hierarchical lines, OAB regulation signaled institutional and regulatory acceptance of an increasing process of commercialization of the legal profession in Brazil. Regulatory acceptance of this model gave considerable economic advantages for law firm partners; it also produced new political actors – the big law firms themselves – who are strong economic players that can act to increase their power and block legal reforms which might restrict the range of their business. Thus the evolution of professional regulation by OAB is an example of path dependence: “social processes that exhibit positive feedback and thus generate branching patterns of historical development” (Pierson, 2004, p. 20-1). By recognizing the new model and empowering the new business law elite, the OAB guaranteed continued tension between a “public role-based” and “anti-commercial” approach to regulation of the legal profession and the increasingly commercial activity performed by the big law firms. As we will see, this played out in the two regulatory debates we examine.

A. Legal elites as political actors

Professional regulation by OAB is the result of silent struggles and public deals between the traditional elite of lawyers (traditional, prestigious lawyers), the internal OAB’s organizational elite of lawyers (Bar leaders) and the new elite of business lawyers and the major partners of the big law firms. Although so far deals between these different groups of lawyers have preserved professional unity within OAB and about its rules (Bonelli, 2002), the tension is getting intense as commercialization of the legal profession increases.

According to an extensive sociological literature, each group of lawyers carries their own professional ideology and their own professional identity, which are the results of their social trajectories and positions in the legal field (Bourdieu, 2007; Dezalay, 1991; Dezalay; Trubek, 1996; Dezalay; Garth, 2000; 2002; Engelmann, 2006a). Yves Dezalay and Bryant Garth (2002) show that the rise of the business lawyer as part of Latin American legal elites can be explained by two factors: (a) the influence of American business law which was transplanted though Law and Development
projects and local lawyers with contacts and personal experiences in the United States and (b) the opening of national economies to American companies and investors. According to the authors,

In Brazil those who occupied the most elite positions in law, politics, and business, especially those located in cosmopolitan Rio, typically spoke French, were not sympathetic to the United States, and had relatively little contact with the United States prior to the law and development initiatives in the 1960s. They served international interests, but their focus was much more on Europe. In the Brazilian context of law firms, therefore, which was consistent with what we have seen more generally in Brazil, this situation allowed the construction of new hybrids out of different sectors of the relatively diverse and competitive elite. (2002, p. 201).

Our research shows that there are, at least, three main political groups acting in OAB regulatory issues. The first are the traditional elites, represented by those lawyers from the “traditional field of law” (Engelmann, 2006a), with connections to the political field, substantial prestige because of their professional and academic capital and their family inheritance. The second are the OAB organizational elites, represented by OAB leadership; this elite builds organizational capital by assuming formal positions at bottom-level and middle-level OAB institutions. They are supported and responsive to the large constituency of lawyers that typically engage in less-sophisticated ways of lawyering than large firm lawyers. The third are the business law elites, represented by business lawyers from the internationalized field of the legal profession, characterized by substantial symbolic capital derived from international and business connections as well as substantial economic resources.

The table below compares different members of those three elite groups. The individuals selected were all involved with the regulatory conflicts, and their trajectories

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8 The Law and Development Movement exposed Brazilian lawyers to US legal ideas and practices through educational programs including the experimental CEPED project at FGV in the 1960s and 1970s (Lacerda, Rangel and Falcão 2012).
9 The data on the trajectories were collected from different sources, especially from the official biographies available at the websites of the law firms, and also from data that are public known (such as family connections and professional activities). We assume that both the absences of and the insistence on certain information in public, official biographies are important data themselves, because they show how life experiences are selected, informed and valued throughout the construction of the public images of the elites; that is why the absence of certain data does not necessarily mean the objective absence of that type of life experience, as it can mean that the experience itself is not important enough to distinguish that individual from others individuals from the same social field. For an analysis of public biographies and the sources for studying legal elites, see Almeida (2010, chapter 2).
show different structures of symbolic capital represented by their professional experiences, by their academic titles, and by their family and political connections.

<table>
<thead>
<tr>
<th>Elite group</th>
<th>Elite member</th>
<th>Family symbolic inheritance</th>
<th>Professional trajectory</th>
<th>Academic trajectory</th>
<th>Political trajectory</th>
<th>Recent corporative trajectory at OAB</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td>Traditional elites</td>
<td>Miguel Reale J. (supporter of pro bono)</td>
<td>Son of Michel Reale, very important Brazilian philosopher and jurist of the XX century, former professor, dean and president at University of São Paulo.</td>
<td>Criminal lawyer; partner at Miguel Reale Junior Law Firm, a boutique law firm specialized in Criminal Law; defendant of political prisoners during the Military Regime.</td>
<td>Law degree, master and PhD in Law of University of São Paulo Law School, where he was also a professor of Criminal Law.</td>
<td>Former Minister of Justice (Federal Government); Secretary of Justice (São Paulo State Government); Secretary of Public Safety and Secretary of Public Administration (São Paulo State Government); member of several commissions and committees (Federal and State Government)</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Traditional elites</td>
<td>José Carlos Dias (supporter of pro bono)</td>
<td>Son of Theodotis Dias, former Chief Justice of São Paulo State Court of Justice.</td>
<td>Criminal lawyer, major partner at Dias e Carvalho Filho Lawyers, a boutique law firm, specialized in Criminal Law; defendant of political prisoners during the Military Regime</td>
<td>Law degree of University of São Paulo Law School</td>
<td>Former Minister of Justice (Federal Government) and Secretary of Justice (São Paulo State Government); member of several commissions and committees (Federal and State Government)</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Traditional elites</td>
<td>Oscar Vilhena Vieira (supporter of pro bono)</td>
<td>Son of Josias Oswaldo Pereira Vieira, former Chief General of Police (São Paulo State) and National Secretary of Public Safety (Federal Government).</td>
<td>Human rights and public interest lawyer, former Public Attorney (São Paulo State); founder of Comemé Human Rights (NGO)</td>
<td>Law degree of Catholic University of São Paulo, master in Law of Columbia University; master and PhD in Political Science of University of São Paulo; former professor of Constitutional Law at Catholic University of São Paulo; dean and professor of Constitutional Law at FGV Law School</td>
<td>None</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Organizational (corporate) elites</td>
<td>Carlos Miguel Castex, Adair (President of the São Paulo State Bar when the Pro Bono Institute was founded)</td>
<td>Son of Henrique Adair, lawyer, former Secretary of Staff at São Paulo State Government; President of São Paulo Energy Company (Public company); President of São Paulo Soccer Club (Soccer team)</td>
<td>Sport lawyer; partner at Adair SBZ Lawyers, a small-sized law firm; President of São Paulo Soccer Club</td>
<td>Law degree of Mackenzie Presbyterian University; specialist on Civil Procedural Law of Catholic University of São Paulo; professor at both universities.</td>
<td>Member of the Commission on Studies on Sport Law at the Ministry of Sports (Federal Government); former Legal Consultant of the Minister of Sports (Federal Government)</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Organization (corporate) elites</td>
<td>Luiz Flávio Borges D’Ursy (President of the São Paulo State Bar)</td>
<td>Son of Ubiratã Luiz D’Ursy, lawyer.</td>
<td>Criminal lawyer; partner at D’Ursy and Borges Associated Lawyers, a small-sized law firm.</td>
<td>Law degree of United Metropolitan Schools; master and PhD in Law of University of São Paulo; professor at United Metropolitan Schools</td>
<td>Former member of the National Council of Public Safety and the National Council of Criminal and Prison Policies</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Organization (corporate) elites</td>
<td>Marcos de Costa (president of the São Paulo State Bar, suspended all the restrictions to pro bono practices)</td>
<td>None</td>
<td>Business lawyer; partner at Costa e Diogo Bertase Associated Lawyers, a small-sized law firm.</td>
<td>Law degree of United Metropolitan Schools; specialist on Business Law of Mackenzie Presbyterian University</td>
<td>None</td>
<td>Several positions at the São Paulo State Bar; former Financial Director; member of the Sectional Council; member of the Commission on Professional Rights and Prerogatives; member of the Tribunal of Ethics and Discipline; member of Commissions on Institutional Relations with the Public Defense Office and the State Court of Justice; member</td>
<td></td>
</tr>
</tbody>
</table>
Traditional elites are characterized by their family status, professional trajectories relatively distant from business law, investments in an academic carrier and the achievement of high university positions, and low participation in the internal or corporative issues of OAB. Organizational elites have more internal OAB political capital, represented by the assumption of leading positions in the hierarchies of OAB, which confirms the hypothesis of a more endogenous selection of bar leaders, and the power of the constituency in the internal politics of OAB. Finally, the power of business Law elites can be explained specially by the power of their economic capital (i.e., the economic capital of their clients and their law firms), as they do not have any distinguished set of family, political, academic or corporative capital, but also by the symbolic capital brought from their international connections, foreign degrees and alliances with global actors. The trajectories represented in the table are obviously

<table>
<thead>
<tr>
<th>Business Law elites</th>
<th>None</th>
<th>Business lawyer; partner at Demarest &amp; Almeida Lawyers, one of the 20 major law firms in Brazil.</th>
<th>Law degree of Catholic University of São Paulo.</th>
<th>None</th>
<th>Member and president of the Commission on Law Firms; president of the Special Commissions on Legal Practice Defense Against Professional Interference, and on State Law Revision and Consolidation; member of the Commissions on Internal Elections, Judicial Modernization, Professional Prerogatives, and Professional Market Defense.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Orlando Di Giacomo</td>
<td>None</td>
<td>Business lawyer; partner at Demarest &amp; Almeida Lawyers, one of the 20 major law firms in Brazil.</td>
<td>Law degree of Catholic University of São Paulo.</td>
<td>None</td>
<td>Member and president of the Commission on Law Firms; president of the Special Commissions on Legal Practice Defense Against Professional Interference, and on State Law Revision and Consolidation; member of the Commissions on Internal Elections, Judicial Modernization, Professional Prerogatives, and Professional Market Defense.</td>
</tr>
<tr>
<td>Antonio Corrêa Meyer (objector of law firms)</td>
<td>None</td>
<td>Business lawyer; partner at Machado Meyer Sendacz Opice, one of the 10 major law firms in Brazil.</td>
<td>Law degree of University of São Paulo Law School.</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Luis Salles Freire (former president of CESA and objector of foreign law firms)</td>
<td>None</td>
<td>Business lawyer; partner at Tocznii Freire Lawyers, one of the 10 major law firms in Brazil.</td>
<td>Law degree of University of São Paulo Law School; master in Comparative Law of New York University; extension course on Business at FGV Business School.</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Ivan Tauil (supporter of foreign law firms)</td>
<td>None</td>
<td>Business lawyer; partner at Tauil &amp; Chequer Lawyers, a medium-sized law firm, associated with the British law firm Mayer Brown LLP</td>
<td>Law degree of Fluminense Federal University; master in Constitutional Law and Theory of State of Catholic University of Rio de Janeiro</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Eduardo Cesqueira Leite (supporter of foreign law firms)</td>
<td>None</td>
<td>Business lawyer; partner at Baker &amp; McKenzie, an American law firm that kept for decades a partnership with Trench Rossi Watanabe, one of the 20 major law firms in Brazil.</td>
<td>Law degree of University of São Paulo; master in Comparative Jurisprudence of New York University.</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>

Table 1. Illustrative trajectories of life of members of elites.
illustrative, and the examples of Carlos Miguel Aidar and Orlando Giacomo show how an individual member of a group of elites can circulate between different elites.

B. Formal institutions as points of interaction

In order fully to understand the regulatory struggles and outcomes, it is necessary to understand the institutional organization of OAB. Institutions like OAB can be considered points of interaction in which actors, values and interests are confronted and defined. According to Ellen Immergut:

Constitutions and political institutions, state structures, state interest group relations, and policy networks all structure the political process. Consequently, political demands and public policies are not shaped by the neutral and convergent exigencies of modernization. Rather, political economies – like political systems – are structured by dense interactions among economic, social, and political actors that work according to different logics in different contexts. (1998, p. 17).

The OAB is a national organization legally responsible for controlling the profession in Brazil. It has a federal structure, with 27 sectional councils (and sectional presidencies), one for each Brazilian state or territory, and a Federal Council (with a national presidency). In each state, lawyers elect the sectional President, the sectional Council and three federal councilors. The Federal Council is made up of the national President, 81 federal councilors – three from each sectional council – and the former presidents of the Federal Council. The latter do not have right to vote on the Council. An electoral college formed by the 81 federal councilors elects the National President. In each federative unit, the sectional council also includes subsections (city sections), with their own presidents. The Statute of Lawyers is a federal law that organizes the profession, but is enforced by the sectional councils of OAB – especially by the Sectional Commissions on Ethics. The Federal Council can review sectional decisions and carries out federal regulation of the legal profession by internal administrative rules (provimentos, resoluções, portarias and instruções normativas).

Every sectional council has a Tribunal of Ethics and Discipline (Tribunal de Ética e Disciplina – TED). The TEDs have jurisdiction over ethical issues and disciplinary misconduct, through administrative disciplinary processes. If a lawyer is found guilty of misconduct, the TED can apply the following penalties: censure, suspension, disbarment, and fine. Each sectional council defines the composition and
the form of appointment to the TED. In order to serve as judge on the TED, a lawyer has to have a reputation for exceptional ethical conduct. Lawyers appointed to the TED serve a three-year term.

OAB’s organization can be divided between bottom-level institutions (the constituency and the subsectional Commission of the Presidents), middle-level institutions (the sectionals and Federal Councils, and thematic commissions) and high-level institutions (the sectional presidencies and the National Presidency). The bottom-level institutions are the locus of representation of basic professional interests and demands, usually related to the labor market, material conditions of work, and other economic issues (Almeida, 2005). They usually represent the interests of the great majority of lawyers who are not part of the high-powered, competitive world of the elite business law firms. The high-level institutions are responsible for the standardization of professional rules and regulatory decisions through the Federal Council but also for the political representation of professional interests and ideology (by the National President) (Taylor, 2008); these high-level institutions are the arenas where professional elites act and interact nationally. The middle-level institutions (the sectional councils of OAB) are responsible for the effective enforcement of national rules and decisions (by the Sectional Council and by the Sectional Commissions on Ethics) but also for political representation of professional interests and ideology (the sectional President). They represent the local professional elites. In their formal role, the middle-level institutions are pressured by bottom-level interests on the one hand and affected by the power high level review of local decisions on the other.

III The struggle over regulation of foreign law firms

If the opening of the national economy during the ‘90s was a trigger to the rise of the modern, large, hierarchical Brazilian law firm (Cunha et al., 2007), it also attracted foreign lawyers and law firms to Brazil and led to regulatory debates about their role.

The OAB’s Federal Council enacted an internal rule (Provimento n. 91/2000) that states that foreign lawyers can act in Brazil only in very restricted ways. Basically,
OAB allows foreign lawyers to act as advisors on foreign law (not on Brazilian law, just on their "native" law). That rule also allows these lawyers to associate among themselves and create law firms to provide that type of restricted legal service. That rule does not say anything explicit about association between Brazilian and foreign lawyers or law firms.

Since the late 1990s many foreign law firms came to Brazil to work alone or in association with Brazilian law firms, despite the restrictions imposed by federal law and the internal regulations of OAB. These firms tend to concentrate on “new” legal areas. Instead of the traditional litigation path which is outlawed, foreigners act mainly in arbitration, antitrust, capital markets, energy, oil & gas, M&A, project finance, infrastructure and intellectual property. The following chart shows the increasing number of foreign law firms with branch offices in Brazil since 1997 and its subtle decrease after 2011.

![Foreign Law firms in Brazil](image)

Figure 1. Foreign Law firms in Brazil. Source: ANÁLISE EDITORIAL, 2011, 2013. Graph by the authors.

All of these law firms are based in the Southeast of Brazil, primarily in São Paulo with a few in Rio de Janeiro. Looking at the origin of these firms, the most frequent countries are United States of America and United Kingdom. Figure 2 and Figure 3 show the distributions of foreign firms in Brazil and their native country.
In a survey reported in Análise Advocacia 500 of the 224 firms ranked most admired (a specialized annual review that ranks Brazilian law firms in terms of size, incomes and prestige), 70% reported that they have searched for, or at least analyzed, the possibility of a “partnership” of some kind with a foreign law firm (Secco, 2012, p. 8).

The legal profession in Brazil is regulated both by federal legislation (a federal Law called The Lawyers and Bar Association Statute), and internal rules created by the Federal Council of the OAB. Each Sectional Council has autonomy to enforce federal rules (by their Commission on Ethics) and to create new rules – but those rules cannot conflict with the national ones. A national Commission on Ethics, at the Federal Council of OAB, is responsible for national guidelines for the enforcement of federal rules by Sectional Councils.

In 2011, the Tribunal of Ethics and Discipline of the São Paulo Sectional Council stated that the association between Brazilian and foreign law firms is not allowed by the OAB’s national rules and imposed a penalty of censure on a Brazilian
The Brazilian firm appealed before the Federal Council, which raised the penalty to suspension.

The statement of the São Paulo Sectional Council on foreign law firms was approved by the XXI Brazilian Conference of Lawyers, an official meeting organized by the Federal Council of OAB. The Commission on Ethics of the Federal Council also punished some law firms that maintained various kinds of alliance with foreign firms. After that, both the Commission on Foreign Affairs of OAB and the Federal Council stated that the association between Brazilian and foreign law firms is prohibited by Provimento 91/2000.

In early 2011, the Centro de Estudos das Sociedades de Advogados – CESA – made a formal request to the São Paulo Sectional Council for a ruling on the legality of the associations between Brazilian lawyers or law firms and foreign lawyers or law firms set pursuant to Provimento 91/2000. The São Paulo Sectional Council reaffirmed its opinion on the unlawfulness of any type of association between foreign and Brazilian lawyers. Since Provimento 91/2000 is a federal rule, the inquiry was submitted to the Federal Council by request of the National President of OAB. At this point, a new question emerged: because the Provimento does not explicitly address the issue, some saw the need for a specific rule to regulate this issue.

The National Commission for International Affairs requested Carlos Roberto Siqueira Castro to propose a draft of an administrative rule (Provimento) to regulate the associations between Brazilian lawyers or law firms and foreign lawyers or law firms. This draft was expected to state very clearly the restriction for foreigners in Brazil. Siqueira Castro is a federal councilor from Rio de Janeiro and partner of a large law firm founded in 1948.

The draft of the Provimento explicitly forbade any type of association between Brazilian lawyers or law firms and foreign lawyers or law firms. This rule would cover foreign law firms established in Brazil and allowed to provide legal service as “advisors on foreign law” under Provimento 91/2000 as well as all other foreign firms. The draft was accompanied by an extensive report about the Brazilian market of legal services including a comparative overview of regulation for foreign lawyers in different countries.
The report contended that all the following were would be a violation of the Statutes of Lawyers: (a) use of the same building or address in Brazil, even in different floors of the same building; (b) misusage of logos, brandings, social name or any type of visual identity; (c) usage of terms such as: “in cooperation with” or “associated with”; (d) usage of same pattern of commercial cards, papers, portfolios, e-mails, website, software, marketing material and all other types of cross-references; (e) hosting of events, even about foreign law or foreign investments in Brazil; (f) sharing of database, IT, clients lists, management, invoicing, HR policy.

The report claimed that restrictions on foreign lawyers was necessary to avoid the commodification of legal practice, already far along in other countries. The Siqueira Castro report explicitly says:

These tremendous transformations in international lawyering and the structuring of law firms, in the wake of corporate and market models already taken over by England and Australia, tend to put into practice an authentic process of "marketization without borders" of the legal profession. The legal services are transformed into "commodities", freely traded and perhaps securitized as future receivables subject to the risk of the business. Even rights and subjective interests, individual and collective interests, filled by the lawyers of those countries and the lawsuits in which they are channeled, eventually could be transformed into mere assets of these law firms tuned into publicly traded company subject, and as such appropriable and subject to financial and commercial exploitation for all types of investors. (Castro, 2012, p. 45, translated)

In the opposite sense, Ivan Tauil, partner of a Brazilian law firm associated with the second largest law firm (by revenue) in the world (Mayer Brown), says that the dispute is really about market share of legal services in Brazil.

The real threat is the unregulated expansion of southeastern law firms that still establish hierarchical relationships with the rest of the Brazilian lawyers (center-periphery, metropolis-colony, developed-undeveloped), expanding to other regions of the country as if lawyers from there did not know or could not operate the corporate law and serve corporate clients. […] Those who are against international associations (held by less than half a dozen of Brazilian law firms) are law firms seeking to change the "Cause of National Lawyers” which is nothing but a fight for customers, which, far from threatening the foreigners involved, is fought exclusively by Brazilian lawyers who have different views regarding the development of the professional activity. (Tauil, 2012, translated).
Under the same inquiry, on May 2012, federal councilor Welber Barral submitted another draft of the *Provimento* to the Federal Council. This draft differs considerably from the proposal of Siqueira Castro since it allows association between Brazilian and any foreign law firm when its purpose is (a) to provide a joint service to a common client, (b) related to organizational aspects, or (c) to represent common clients on third-party jurisdictions (Ordem dos Advogados do Brasil, 2012).

By a majority decision, led by federal councilor Marcelo Zarif, from Bahia, the Federal Council found that there was no need for a new *Provimento* and concluded that the association between foreign law firms and Brazilian lawyers are lawful under *Provimento 91/2000 but* only if they are temporary and restricted to consultancy on foreign law. Any type of litigation by foreign lawyers or law firms is forbidden. Infringements by Brazilian lawyers and foreigners admitted as “consultant on foreign law” are subject to the administrative jurisdiction of OAB; foreigners operating in Brazil and not admitted through OAB procedures can be criminally prosecuted for “illegal practice of lawyering” (Ordem dos Advogados do Brasil, 2012).

Some *obiter dicta* in the opinion about the essence of lawyering say a lot about the self-perception of lawyers. Lawyering is said to be “a public activity”, and that it is “very especial […] in Brazil because of its constitutional status”, and that “it is not only inconvenient, but also constitutionally impossible to make any concession to the practice of foreign lawyering on the national ground.”

It is worth noting that for the first time the number of foreign lawyers in Brazil declined in 2012 after five years of rapid increase. While we cannot say this was the result of the Federal Council ruling it is clear that it was a sign of growing resistance to foreign presence. The ruling was followed by the dissolution of some formal alliances. In early 2013, Lefosse Advogados formally announced the end of a long-term partnership with Linklaters, started in 1997. Lefosse refers to the decision as the decisive reason for the breakup, given that OAB explicit forbids permanent association between Brazilian and foreign lawyers, and thus it decided to terminate the joint operations with its British partner (Vasconcellos, 2013). Since then, Linklaters operates
alone in Brazil as “consultants on foreign law”\textsuperscript{10}. However, other alliances were maintained.

**IV Pro bono practice\textsuperscript{11}**

Globalization can be understood as cultural and symbolic as well as economic and political. The diffusion of the American model law firm in Latin America includes features that may be adopted for reasons that are as much cultural and symbolic as economic (Dezalay; Garth, 2000, 2002). This occurred in Brazil in what would seem like the secondary issue of pro bono practice.

Pro bono is a tradition of the legal profession in the United States strongly encouraged by law schools, law firms, and bar associations. But pro bono practice as an organized activity for lawyers was only introduced in Brazil in the 1990s by the same major law firms that founded CESA, the political organization of big law firms (Almeida, 2005). In this sense, the Brazilian Pro Bono Institute (*Instituto Pro Bono – IPB*) founded to promote this idea can be considered as the “social” arm of CESA.

While business law elites pushed for pro bono, development of the field and the creation of IPB was also supported by traditional elite lawyers and human rights lawyers from different generations, such as Miguel Reale Jr., Belisário dos Santos Jr. and Oscar Vilhena Vieira\textsuperscript{12}. The alliance between business lawyers and the traditional elite human rights lawyers, is a key factor to explain the outcome of the struggle over regulation of pro bono practice by OAB\textsuperscript{13}.

It is no accident that pro bono practice grew fastest in São Paulo state where most business lawyers and big law firms are located. The growth of pro bono in the large law firms became a major issue because it was seen as a threat to the livelihood of low level, generalist, and relatively poor lawyers. To understand this issue, you have to understand the status of public defenders in São Paulo. The Brazilian Constitution

\textsuperscript{10} It is important to note that while permanent and visible alliances are now threatened, most Brazilian corporate firms retain close relations with international firms and engage in ad hoc alliances. See Chapters 1 and 4, this volume.

\textsuperscript{11} This issue is discussed at length in Chapter 7, this volume.

\textsuperscript{12} For an analysis of the life trajectories of some of those traditional elite lawyers, see Table 1, above.

\textsuperscript{13} It is important to understand the introduction of the pro bono practice in Brazil in a historical perspective which considers other ways of similar practices in Brazil, such as popular lawyers, cause lawyers and public interest lawyers, most of them kept by traditional lawyers, public institutions or lawyers of social movements. To understand these Brazilian experiences, see Fabiano Engelmann (2006b), Oscar Vilhena Vieira (2008) and Fábio Sá e Silva (2012).
guarantees free legal aid for the poor. While some states met this obligation by creating state public defender offices, São Paulo initially chose a different route. Rather than create a state agency, São Paulo relied on a judicare approach in which the Legal Aid unit of OAB coordinated the work of individual lawyers who were paid by the state government. Even after the creation of the São Paulo’s Public Defense Office, in 2006, OAB kept offering alternative legal aid in order to guarantee assistance to people that was not covered by the state agency’s services.

The money paid by the São Paulo state government for this service was responsible for the professional survival of a large number of poor lawyers in a saturated market of legal professionals (Almeida, 2005). In this sense, OAB considered pro bono practice as a threat: bar leaders were afraid of unfair competition between the free legal services that might be offered by specialized big law firms and the services provided by generalist, poor lawyers and paid for by the state government.

After the creation of IPB, the Commission on Ethics of the São Paulo State Bar started prosecuting a number of lawyers that were practicing pro bono assistance. The Commission on Ethics argued that pro bono practice represents unfair competition between lawyers. The major law firms, some traditional elite lawyers and IPB fought back, seeking to protect this practice. As a result of these negotiations, in 2002 the State Bar issued a new internal rule which allows the pro bono practice but only for advisory services, offered for free to non-governmental organizations (NGO) with no resources to pay a lawyer (Almeida, 2005). Free work for individuals was banned.

The struggle inside the São Paulo State Bar over pro bono practice did not attract national attentions as it was seen as a local problem both by the leaders of other State Bars and the Federal Council. With that compromise solution in 2002, the issue lost most of its explosive potential, and pro bono lawyers could act, in a relatively free way, protected both by the indifference of the Federal Council and by type of “gentlemen’s agreement” that allowed the pro bono in limited situations.

However, in 2012 an “external” actor, the Federal Public Prosecutor’s Office in São Paulo, started an extra-judicial proceeding to investigate regulation of the practice by the São Paulo State Bar, after a representation made by anonymous citizens. Issues were raised concerning the possibility that the limitations imposed on pro bono violated both the constitutional right of citizens to legal assistance and the constitutional freedom

The Federal Public Prosecution Office in São Paulo organized a public hearing on the issue, to which the IPB, the State Council of OAB and many lawyers and legal scholars were invited. The sectional president of OAB did not attend and no one represented OAB at the hearing; in his response to the invitation, the sectional president argued that regulatory issues should be treated by the Federal Council (despite the fact that there was no regulation on that issue at the national level, and only the São Paulo and the Alagoas State Bars had regulations on pro bono practice).

All lawyers and law scholars at the hearing – including Gilmar Mendes, justice of the Brazilian Supreme Court, and Flávio Croce Caetano, Secretary of Judicial Reform, of the Ministry of Justice – defended pro bono practice with no restrictions, as was intended since the beginning by IPB, i.e. the complete legal assistance both to poor individuals and NGOs (Canário, 2013). In a very emotive statement, criminal lawyer and former Minister of Justice José Carlos Dias said:

I feel shame about the position of OAB/SP [São Paulo State Bar] against the pro bono practice. At the same time, I feel myself very emotive, because after 50 years of lawyering, I can ask for the blessing of the Public Prosecution Office, because of the shame I feel today as a lawyer. I cannot believe that it is forbidden to the lawyer the exercise of freedom (quoted by Procuradoria da República no Estado de São Paulo, 2013)

After the hearing, the Federal Public Prosecution Office in São Paulo made an official statement, recommending that the Federal Council of OAB cancel any existing restrictive regulations and to allow the complete freedom of the pro bono practice by lawyers; the Federal Public Prosecution Office also stated that, if OAB should not accept that recommendation, it would initiate a judicial proceeding to enforce the constitutional rights to legal assistance and freedom of professional practice. On June 17th, 2013, after the Public Prosecutor Office repeated that recommendation, the Federal Council finally informed all the sectional councils that all the restrictions on pro bono practice were suspended pending further regulation (Procuradoria da República no Estado de São Paulo, 2013).
Initial response to the suspension was varied. Some firms kept doing pro bono as they usually did before; others firms think this new situation is more uncertain.\textsuperscript{14} However, on June 2015 the Federal Council of OAB finally approved pro bono practice including individual representation and with no restrictions, and indicated that formal regulation of the matter will be included the new Code of Ethics which is being prepared by the OAB (Ordem dos Advogados do Brasil, 2015).

V Conclusions

Our research sought to understand the political context in which new rules of professional regulation were created and identify the political actors who influenced the final result. We also sought to show how those rules and political processes can be understood in relation to globalization, the growth of the Brazilian market for legal services, and other regulatory interventions of OAB. Finally, we were concerned with the interaction between actors, institutions and interests in different regulatory issues and contexts.

The negotiation between the Pro Bono Institute and OAB in the regulation of the pro bono practice created an alliance between the Traditional and Business Law elites with both supporting free legal aid for both groups and individuals as a social responsibility of the legal profession. They were opposed by the OAB organizational elites and the majority of lawyers the Bar leaders represented who were concerned that free legal services would undermine the lucrative legal aid market.

The issue of foreign firms created a different set of alliances. The business law elite split on the issue. Some business law firms, probably seeing benefits for themselves, favored formal relationships between foreign and Brazilian firms while the majority of the business law elite were opposed. Traditional elite lawyers who weighed in on the issue offered mixed opinions. Representatives of the traditional elite – such as Sepulveda Pertence (former justice of the Brazilian Supreme Court), Adilson Abreu Dallari (professor at the Catholic University of São Paulo) and Carlos Ari Sundfeld (former Public Attorney of the São Paulo State, professor at the Catholic University of São Paulo) – offered both support for and opposition to the pro bono practice.

\textsuperscript{14} These data can be found at the Chapter 7, this volume, which presents a more detailed analysis of the pro bono practice in Brazil.
São Paulo and at FGV Law School) issued formal opinions that opposed some of the proposed restrictions but accepted others.

In both cases, the institutional design of OAB helps explain the political processes and results described above. The conflicts generated by tension between the traditional model of lawyering and the model developed by the large, internationalized law firms tended to be more intensive in São Paulo because of its immense and dynamic market for legal services. So it is no surprise that the regulatory issues first surfaced in the São Paulo State Bar, including its Tribunal of Ethics and Discipline and Sectional Council.

Because state level regulation is subject to scrutiny at the federal level, however, it was always possible for parties to try to move the conflict to the Federal Council. The decision to try to move to a higher level, and the responses at that level, vary with the nature of the rule in question and the interests of officials at the federal level in the issues that are raised.

In the case of pro bono, the power of the coalition composed by traditional elites and law firm elites in defense of that practice was strong enough to create a solution at the local level that both sides accepted. So the issue remained within São Paulo and the Federal Council did not take note of the matter until 2013 when an external actor – the Federal Public Prosecution Office – forced the Federal Council to look at the issue. Once the Council was seized of the matter, under threat of judicial action and with constitutional issues on the table, it responded quickly by suspending restrictions followed by the recent announcement that all types of pro bono would be allowed and a new Code of Ethics prepared to regulate the matter. Although through external intervention the issue finally reached the Federal level, the long period in which pro bono remained a local matter shows that issues can remain at that level unless and until there are strong political interests in moving them to the Federal Council.

In the case of the foreign law firms, there were such interests. The move to the federal level in this case was a strategy of Brazilian law firms already associated with foreign law firms. They sought to move the conflict to an arena where decision-makers were less directly interested in the outcome. The fight over these alliances was highly localized in São Paulo (and to a lesser degree in Rio de Janeiro) and meant little to the
bar in other states and territories. That made the federal level look attractive to the groups seeking to legitimate the alliances. Another reason why the issue could not be contained at the state level was that, unlike the pro bono case, no agreement could be reached at the local level that left everybody happy. In this case, the strongest political actors in São Paulo (traditional elites and big law firm elites) were divided internally on the issue.

The final Federal ruling on foreign firms, which stated that a new regulation was not necessary, can be considered as the way the Federal Council found to decide the conflict by not deciding it in a decisive and specific manner. The ruling left substantial ambiguity about what was OK and not OK. While some Brazilian law firms ended their association with foreign law firms after the statement of the Federal Council, other partnerships were kept, probably under the understanding that there was no significant regulatory change that explicitly prohibited the existing partnerships.

In conclusion, we have tried to show that the politics of professional regulation in Brazil can be explained by the interaction of several factors. The first is the power of the main political actors, who have their respective resources of economic and symbolic power. The second is the institutional design of OAB, which tends to let intensive conflicts stay at the local level as far as possible while at the same time reducing the relative power of certain local actors when issues do reach the national level. The third is path dependence, the inheritance of previous choices, as in the case of the regulatory acceptance of the capitalist law firm which injected a powerful new actor into the system and influenced the outcome of subsequent efforts to preserve traditional models and markets.

VI References


15 Similar issues in which local struggles were met with indifference at the national level occurred during the 1980s when the São Paulo State Bar tried several times to take to the national level its resistance against the creation of a Public Defense Office in São Paulo, but it faced the indifference from the leaders of other State Bars, who argued that it was a local problem (Almeida, 2005).


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