CHAPTER 13

THE FEE SYSTEM

Lord Bramwell once accused equity practitioners of complicating the law of mortgages through "love of fees". If he was right they were not true professional men, for these practise their profession "uninfluenced by motives of profit". (1) Laymen have not always found this sentiment convincing, as Hilaire Belloc showed with his physicians who "answered, as they took their fees, 'There is no cure for this disease.' ". The attitude is genuinely held however, at least by the majority of professional people, and stems from the fear that a relationship which is personal and often intimate may be vitiated by the passing of money. Barristers still call their remuneration an honorarium to which they can lay no legal claim, and wear on the backs of their gowns the vestigial remnants of the pocket into which golden guineas could be slipped unobserved. Fees then are only taken with reluctance, because everyone has to live. It follows that there can be no haggling, no taking a slice of the proceeds, no contingency arrangement of "no win no fee", and above all no unfraternal undercutting.

All kinds of reasons are advanced to justify rules against bargaining over fees. The true professional man is really only happy when doing the work of his profession;he dislikes wasting time arguing over money. Barristers leave such matters to their clerks. Most other professions get round the problem by laying down a scale of fees which provide a yardstick.

Some commentators ascribe dislike of bargaining to fears that dignity might be undermined. "For the consultant to descend to the market place," says Millerson, "might disturb the delicately-balanced superiority of his position". He goes on to give a more respectable reason: to quarrel over payment may destroy the ideal of public service. (2) The architects see a threat to trust, and they mean not only the client's trust in the competence and integrity of his adviser but the adviser's trust that the client will recognise his allegiance to high ideals and will pay fairly for his services. The R.I.B.A. describe how this trust would be eroded: "Bargaining seems bound to make each party look narrowly 171

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 to their own foreseeable interests, and make each doubt that the other can have more than his own interests in mind when the bargain is made and the work is in progress. Price competition seems bound to make the architect seek ways of reducing costs that cannot be noticed by the client as affecting his interests; and to make the client suspect that competing prices reflect differing standards of service, while hoping that somehow he can get a service adequate to his own interests cheaper than is usual." (3) It seems clear that bargaining with, say, architects would produce different levels of fees for the same work. Its effectiveness would of course depend on the relative strengths of the parties. Where the client was a powerful local authority or commercial corporation, whose connec- tion promised much, the architect would be in a weak position. With a private client whose future requirements were likely to be small the position would be reversed. This would inevitably produce varying standards for the same type of work and firms would be tempted to choose the most profitable level of operation. Institutes would tend to concentrate on advising their members how to be most profitable, instead of how to be most efficient. (4) The typical reaction of the professional man to this prospect was expressed by the R.I.C.S. President in 1968: "At a time when society is very consumer-conscious, the suggestion appears to be that the client should be able to 'shop around' for professional services in rather the same way as he shops around for groceries. I am afraid the professions are not susceptible to the '3d off treatment . . . " (5)

The professions feel that the only way to avoid the dangers inherent in the bargaining process is to insist on payment by fees arrived at in the traditional manner. As the Architects' Code has it, a professional man in private practice "is remunerated solely by his professional fees". He is debarred from any other source of remuneration, and must not allow his staff to receive such remuneration in his stead. (6)

The essence of the professional fee is that its amount, or at least the basis for its calculation, is determined before it is earned, and is so determined to the knowledge of the client; that it does not depend on any contingency in order to become payable; that it is based on the size of the task; and that it is not unfair to other members of the profession. The rules by which these principles are secured will be con- sidered in detail in the remainder of this chapter. Their essential basis is indicated by the practice of barristers. In general a barrister must not appear in court unless his fee has already been marked on his brief.

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173 Counsel must be separately instructed and separately remunerated for each piece of work done, and cannot accept a fixed fee which will be the same for all cases. He must not, when taking a brief, agree that pay- ment shall be postponed, or habitually accept a lower fee than would be allowed on taxation of costs. (7) Payment by Results

It might be thought that to pay a man according to the success of his efforts was sound and sensible. The professions do not think so. They feel this attaches the adviser too closely to the outcome of his advice, impairing his detachment and tempting him to devote more effort to causes likeliest to succeed. With lawyers it may encourage blackmailing actions in the name of men of straw. Most professions therefore have the rule laid down by the Chartered Surveyors: "No member shall offer to accept instructions on the basis that no charge will be made unless a successful result is attained." (8) Exceptions are occasionally allowed.

One consequence of the rule is that work made abortive by the abandonment of a project should be paid for in full. If this is not done the adviser is accepting some of the risk that the project will go off: in other words participating in a speculation. In condemning this practice the R.I.B.A. point out that it is likely to be an unwise course for an architect anyway. His work is seldom a major factor in determining whether a building project goes through, and the architect may in effect be dependent on financial and property management expertise outside his control. (9)

Impeccable though this reasoning may be, clients often want to pay by results, and object to paying for abortive work. The professions are not always able to resist this pressure. The ancient medical codes, embodied in the laws of the Visigoths or the Babylonian Code of Hammurabi, provided that the doctor whose "cures" led to the death of the patient should forfeit his fee. Today, the chartered accountants permit payment by results in the case of bankruptcies, liquidations and receiverships. (10) Chartered surveyors engaged in sales and lettings are permitted to charge a contingency fee, and this is the normal practice for all estate agents. The professional societies concerned with estate agency consider it to be of fundamental importance to the public that an agent unsuccessful in securing a sale or letting should not be entitled to a fee. In a submission to the Monopolies Commission on an enquiry into house agents' fees, these societies commented: "To most people the sale of a house is the biggest kind of

 transaction to which they are ever a party, and one in which the average person is not involved more than two or three times during his whole life. It is a serious step for the person affected to take; it often involves a good deal of personal upheaval and unforeseen expense; and it can in many respects be a worrying time for the person concerned. There is one substantial consolation to him during the whole period when he is arranging to move. He is not charged for the house agents' services unless the house is sold. He does not receive a bill in respect of services carried out on his behalf unless he has actually received a propor- tionately larger sum in respect of the house itself." (11) Suing for Fees

As mentioned above, barristers cannot as a matter of law sue for their fees. The weight of this limitation is effectively borne by the solicitors who instruct them however. It is a rule of etiquette of the solicitors' profession that the solicitor is personally liable for payment of Counsel's proper fees whether or not he has received money from the lay client with which to pay them. (12)

The only other restriction of this kind applies to doctors who are Fellows of the Royal Colliege of Physicians. Here the limitation arises under a bye-law of the College, which provides that no Fellow shall be entitled to sue for professional aid rendered by him. The bye-law has statutory force.

Reader regards these rules as a "curious quirk" and seems puzzled by them. (13) They are merely a reflection however of the general reluctance of professional people to embark upon lawsuits with their clients. Nothing more destructive of the true professional relationship can be imagined, and such litigation is very rare. Most professionals would rather forego their fees than sue, even where it is clear that their relationship with the client in question is over in any case. Other clients and potential clients might well be put off by the spectacle of a public wrangle over fees, or indeed any other aspect of professional services.

An instance of the working of the "no suing" rule, and one which illustrates incidentally the comity of the professions, was mentioned in the 1967 report of the Medical Defence Union. An anonymous barrister was alleged to have consulted a doctor and then declined to pay his fees, relying on the rule mentioned above. The Chairman of the Bar Council protested that such conduct was most unlikely in a practising member of the Bar, and would be regarded by the

 Bar Council as most unbecoming. (14) Overcharging

Some professions, though not all, regard overcharging as in itself reprehensible. Solicitors have been held guilty of professional mis- conduct in charging "grossly excessive" fees, but for this charge to stick there must be something more than a mere agreement to charge fees higher than those which would be allowed on taxation of costs. (15) If the client thinks the bill he has received from his solicitor is too high he can apply to have the bill "taxed" by the court. This is a process whereby a Master of the Supreme Court goes through the items in the bill to see that the charges conform to the scale. A similar procedure applies in the County Court. Without prejudice to this right of taxation the client may require his solicitor to obtain a certificate from the Law Society, certifying that the sum charged is fair and reasonable or, if it is not, what would be a fair and reasonable sum. This latter procedure is entirely free to the client, and he can be com- pelled to pay no more than the amount certified by the Law Society.

The Institute of Chartered Accountants does not take any discip- linary action on complaints of overcharging. Their reason is that it is open to an aggrieved client to challenge the fee charged by refusing to pay it and submitting the issue to examination by the court. (16) This overlooks the possibility that the fee might be fixed by a con- tractual agreement, which would necessarily have to be enforced by the court.

One argument in favour of fee scales is that by laying down a fixed rate they make overcharging more difficult. This depends on the type of scale however: a scale which determines fees according to the time spent on the work may in effect facilitate overcharging. The client may well have no means of knowing whether the time spent was reasonable, or was inflated by laziness or inefficiency.

It is not usually regarded as overcharging for a fee to be increased because of the greater experience and skill of the practitioner. Very great variations of fee are recognised at the Bar, and among consultant physicians, on this score. It is one of the criticisms of ad valorem fee scales that they disregard this factor. Minimum Fees

Few professions prescribe minimum fees, and only the architects do so through the whole range of their work. The R.I.B.A. maintains that the distinction between its own mandatory scales and the "recommended" scales of other professions is "a distinction without a

 difference", since all scales are treated in much the same way in practice. The Institute firmly believes that: "An explicitly negotiable fee system such as would result from a "recommended" scale would not work successfully; and the negotiable elements in the fee system have not worked well in the past. All the disadvantages in permitting price-bargaining and competition apply. If the obligation to [conform to the scale] were explicitly abandoned, it would have the effect of serving notice on clients that they could seek to negotiate fees with their architects with some hope of success, and the architect is ill-placed to negotiate fair terms with many of his clients." (17)

The minimum fee requirements of the Bar are in a different category. Whereas architects' fees are nearly always charged at the "minimum" rate laid down by the scale, the barristers' figures are a true minimum. They are inadequate for all except the most inexperienced counsel, and are usually exceeded in practice. The minimum fees are £3 5s 6d for a Q.C. and £2 4s 6d for a junior barrister. These figures were fixed in 1951. They were then intended to be the amount which inexperienced counsel could reasonably ask for the smallest item of work. (18) For many years it was a rule: of the . Bar that where a junior counsel appeared with a Q.C. he could not be paid less than two-thirds of the Q.C.'s fee, unless the latter amounted to more than 150 guineas. The rule was abolished in 1966.

The National Board for Prices and Incomes rejected the R.I.B.A. contention that there is no distinction between architecture and the other professions over fee scales. The Board attached importance to the fact that two of the other professions submitting evidence to them had made it clear that while their recommended scales were broadly followed in practice, they recognised that the parties in any individual case must have freedom of action. (19) The Role of the Institute

The present position under which most professional institutes regard it as part of their function to advise members generally as to the fees they should charge is of fairly recent origin. Moreover where such advice is given, as by the creation of a fee scale, it does not come out of the blue but is derived from the practice prevailing among individual firms before any general advice was laid down. In the case of the. chartered surveyors, for instance, the professional institution refused to lay down any fee scale until as late as 1914. Until then it took the

 view that fees were the concern of individual surveyors, and that it would risk being confused with a trade union if it gave general advice to its members. Thompson, the historian of the surveyors' profession, holds that it was Lloyd George's land taxes which led the Institute to abandon its attitude of allowing members to charge what they liked. "Regarding the land taxes as revolutionary, the Institution itself took the revolutionary step of beginning to draw up a scale of fees to be charged under the land clauses of the Budget . . . "(20)

The Institution of Civil Engineers shared the surveyors' original views, and did not change its mind. It was on this ground that the civil engineers opposed attempts to obtain a statutory registration system for architects in the l920. The R.I.B.A. first issued a scale of fees in 1862.

The Institute of Chartered Accountants takes the view that fees are in general a matter for negotiation with the client. The Institute does not prescribe any fee scale, though this is mainly because it believes the nature of accountants' services does not lend itself to such treatment. The Institute has nevertheless become anxious, following an extensive enquiry, that "despite the pressure, engendered by competition, to improve efficiency and keep costs down, fees charged are often inade- quate to make the rewards of professional practice . . . sufficiently attractive in competition with other occupations". (21)

Where members of a profession frequently carry out work for particular types of clients their professional institute will often negotiate a special scale of fees. The British Medical Association negotiates national

agreements with life assurance companies in relation to medical examinations. The Bar Council similarly makes representation to the authorities concerned with the level of barristers' fees, for example in relation to criminal prosecutions. The Institute of Chartered Accountants negotiates with the Treasury on fees to be paid for government work.

What institutes are chary of doing is intervening where an actual dispute between client and practitioner has arisen. Since such a dispute could end in litigation it is obviously necessary to avoid seeming to predjudice the legal proceedings. Nevertheless informal advice is not infrequently given, and the availability of this can be a source of comfort to practitioners. One solicitor records how his client, the novelist Ursula Bloom, frequently sent him instructions in verse. He felt obliged to respond in the same manner, and included in his bill an item "to mental strain replying to your letters in verse". He adds "I have often meant to ask the Law Society what one could rightly charge in such abnormal cases. If it would sanction three shillings and sixpence or even one shilling a rhyme, I would turn poet and compose all my letters in verse." (22) 178

PROFESSIONAL ETHICS Fee Scales

There are various types of fee scales, using the term in the broad sense as including not only "price lists" or percentage rates but any formula by which the amount to be charged can be calculated. The "price list" is a primitive form of scale. The Code of King Hammurabi, around 1700 B.C., laid down a fee scale of this kind which varied according to whether the patient was of high rank, a freeman or a slave. For opening with a bronze lancet an abcess in a freeman's eye, and healing it, the surgeon was entitled to five shekels of silver. For curing the broken bone of a slave, or a sickness of his bowels, a doctor was entitled to two shekels of silver. The hazards of medical practice in those times are indicated by the fact that a surgeon who treated an abcess in the eye of one of high rank and caused the loss of the eye was liable to have his hands cut off. If this mishap occurred with a freeman the surgeon had to forego his fee and give a slave to the patient. If the sufferer were a slave a penalty of half the fee was exacted. (23) In our own times the method of charging is usually based either on the value of the subject matter (ad valorem) or on the amount of time and trouble taken (quantum meruit). These are discussed in more detail below.

Whatever the mechanics of the scale, it will normally be designed to produce a certain level of income. When the surveyors adopted their scale in 1914 it was partly based on an unofficial scale for surveying work in compensation cases first produced over half a century earlier by the distinguished surveyor Edward Ryde. At a time when there was no means of distinguishing qualified and unqualified surveyors, Ryde's scale served to mark those who adopted it as "competent surveyors whose services were available at a stated tariff, men who would not exploit a particular situation by charging more, and men who sought employment for the quality of the service they offered rather than for its cheapness". Those who did not adopt the scale were thought of as men who depended on their cheapness for securing work, rather than a high level of skill. (24)

Factors governing the level of remuneration produced by a recom- mended scale include "what the market will bear", what is necessary to. produce an economic return covering costs with a reasonable margin for profit, and the competitiveness of substitute providers of the service. The solicitors regard their scale, which is fixed by a statutory committee, as indicating "the proper economic level" for their charges. (25) The Bar Council, while not laying down a scale as such, pitch their recommenda- tions at a level designed to produce a "fair" return. (26) The Prices and Incomes Board noted that a feature which occurs with some regularity

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179 in all forms of charging is that the charge is higher if the value of the work increases, even though no extra effort may be involved. This is of course a typical feature of the ad valorem scale. The Board con- sidered that it could be explained by the fact that higher-value work involves greater responsibility and demands a higher level of insurance cover. (27)

There are a number of cases where certain items in fee scales are governed by statutory provisions, though the only cases where this applies widely are those of the solicitors and the medical profession.

According to the Prices and Incomes Board, solicitors are in a unique position in that their's is the only profession whose charges are subject to the control of an outside body. (28) This overlooks the extensive statutory controls on the remuneration of medical and dental practitioners. At least two-thirds of the total income of solicitors is determined by statutory bodies. In contentious matters, where litiga- tion is involved, the scales of charges are regulated by Rule Committees. The system of charging in non-contentious business provides for remun- eration in relation to sales and purchases of property, mortgages, leases, settlements and similar matters to be fixed by a committee consisting of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls and the President of the Law Society and one other solicitor. The main reason for this close control is that ever since the Statute of Gloucester 1278 there has been a rule in litigation that the unsuccessful party has to pay the reasonable legal costs of the successful litigant. This differs from most other legal systems, and the courts have always felt it a duty to ensure that the heavy burdens thus thrown on unsuccessful parties should not be greater than reasonable. Although nominally independent in the scales they fix, these committees are at the time of writing subject to political pressures. The Lord Chancellor indicated in 1968, for instance, that the advisory committee would not have a free hand in assessing fees but would be meeting to give effect to the recom- mendations made by the Prices and Incomes Board in its report on solicitors' remuneration. (29)

The statutory controls applying to medical and dental practitioners operate (with insignificant exceptions) only in the field of the National Health Service. They do not therefore govern fees paid by the patient. They are nevertheless framed in an attempt to reproduce so far as practicable conditions of private practice. Medical consultants in private practice can vary their fees to accord with their professional standing. In relation to Health Service work, where the remuneration comes from public funds, this is scarcely possible. By a system of "distinction awards" or "merit awards" an attempt has been made to bring the N

 cases into line. An almost entirely medical committee determines the amount of these awards and the persons to whom they should go. The Pilkington Commission, while finding it unusual for large sums of public money to be distributed to members of a profession on the advice of their colleagues, nevertheless approved the system. (30)

When the National Health Service was introduced in 1948 the Government imposed a scale of fees to be charged to private patients using Health Service hospitals. Like the Code of King Hammurabi this gave an exhaustive list of types of operation and the fee to be charged for each (though there were no "reverse" fees such as loss of the surgeon's hand). The scale was disliked by the profession, and was not rigorously enforced. (31) Ad Valorem Scales

Whenever the subject-matter of professional advice is a piece of property whose cost or value is readily ascertainablen the almost invari- able practice both here and throughout the world is to base the fee for the advice on that cost or value. On the sale of a house, the price is of course a known figure and it is convenient to base the fee of the agent who sells it and of the solicitor who executes the conveyance on that figure. Other charges will also be based on the same figure — for example the fees of the Land Registry and the amount of stamp duty. If an architect designs a factory or cathedral the ultimate cost of con- struction will be a known figure, and again it is convenient to relate the architect's charges to this. The same applies to the charges of other professional people involved in the project, for example structural engineers and quantity surveyors. If an insurance broker arranges a policy, his fee will be related to the amount of the premiums or the value of the capital sum payable (though in practice it will usually be borne by the insurance company itself). If a literary agent negotiates a publishing agreement, his fee will be related to the amount of the royalties. Valuers, stockbrokers, mortgage brokers and many others proceed similarly. In all such cases it is generally accepted that the value of the property or rights involved is "the major factor in assessing fair remuneration for work and responsibility involved". (32)

Although the value of the subject matter is thus taken to be the determining factor in charges, it is usually recognised that the amount of effort, skill and time devoted to a transaction cannot be assumed to vary directly with the value of the subject matter. Many a solicitor has spent more trouble over the conveyancing

of a small cottage with a troublesome root of title than he does over a dozen run-of-the mill conveyances of modern, semi-detached houses. An architect will not

181 usually spend four times as much time, effort and skill in designing a £200,000 factory as he spends in designing one costing £50,000, though, for special reasons, he may do so where the subject matter is not a factory but a hospital. (33) Because costs do not normally increase in the same proportion as value, most professions include in their "ad valorem" scale differential rates which produce a tapering effect. The estate agent's scale, for example, provides for a fee of 5% on the first £500 of the sale price, 2½% on the next £4,500 and 1½% on the residue. So on the sale of a cottage fetching £1,500 the fee would be £50, but where a property fetched ten times as much the fee would be £287.l0.0 and not £500.

The principle of ad valorem charging has consistently been upheld by the courts, though occasionally with reluctance. In 1966-7, at the request of the Lord Chancellor, the Law Society undertook a review of the method of charge for conveyancing. After consultation with local law societies throughout the country they came to the con- clusion that the ad valorem system should be retained as being not merely in the interest of the profession (indeed alternative methods of charging would in some instances be more remunerative) but also in the interest of the public. (34) The Prices and Incomes Board, in its report on architects' fees in 1968, found that the ad valorem system had not operated to yield the profession excessive incomes, and did not recommend its abandonment. (35)

In a remarkably intolerant report published in 1969 the Monopolies Commission rejected all the arguments in favour of ad valorem scales for estate agency services. They did so on hypothetical grounds, with- out any evidence that the scales did not work well or were against the public interest. Indeed the Commission expressly found that estate agents' profits were not excessive. In a note of dissent one member of the Commission, the Hon. T.G. Roche Q.C., said it was ''wrong and unwise'' to condemn without evidence arrangements that were old established, working well and affording the public a reason- able service at a reasonable cost. (36)

A number of advantages are claimed for the ad valorem system of determining professional fees.

Certainty. The existence of a published ad valorern scale means that, if he knows the capital sum involved, the client can calculate the pro- fessional fee before he has committed himself to the transaction. He does not even have to approach any particular practitioner — the matter is a simple one of arithmetic. The capital sum may not be always known in advance, but its likely amount can usually be estimated. Another advantage of certainty is that it avoids subsequent disputes as

 to the amount of the fee, which are in themselves a cost item since they take time and trouble to resolve.

The importance of certain advance knowledge of the amount of a fee varies. Cases where it is obviously material include those of the man who is engaged in selling his house and buying another. Here the amount of cash that needs to be found, that is the difference between the net yield on the sale (sale price less fees, expenses and mortgage repayment) and the cash outlay for the purchase (purchase price plus fees and expenses, less amount raised on mortgage) is all-important and often needs to be worked out with considerable precision beforehand.

Again, a property developer needs to calculate precisely his out- goings and probable yield. Professional charges for architects, quantity surveyors, structural engineers, estate agents and solicitors may be a substantial element in this calculation and it is of assistance to the client to be able to work out their fees without even having to approach any of them first. In some countries attempts have been made to quantify the size of the job by different criteria. For example in Sweden an architect's client may choose to have

charges based on the building's cubic capacity. This basis is unpopular however because clients often wish to fix a firm sum early in their negotiations, whereas the cubic capacity may not be known with any precision until late in the design stage. (37)

Cheapness. The ad valorem system saves the expense of keeping detailed records of time spent and work done by the practitioner. No time need be spent either in compiling or assembling and checking such data, and the public are saved from having to meet the administrative cost of this operation. An ad valorem bill can be easily and quickly prepared.

Stability. The system has a built-in regulator to cope with inflation, since the relevant capital sum usually increases at about the same rate as the general increase of prices under inflationary conditions. A fixed- rate fee would have to be constantly revised, with difficulty for the public in keeping informed about the current rate.

Uniformity. The Law Society claim that it is beneficial to provide uniformity in charges throughout the country for transactions of com- parable value. (38) This is perhaps doubtful, since the economic cost of providing the service may well vary.

Prevention of Overcharging. As indicated above the ad valorem system tends to eliminate overcharging, provided the work is done properly. It is immediately obvious whether the bill submitted is higher than that regarded by the profession as appropriate. It is true of course that there may be good reasons for making a high charge in a particular

 case, as where unusual difficulties have been found in tracing a title to property. The public generally, says the Law Society, "knows very little of the work and the responsibility involved in conveyancing, and the factors which often cause substantial differences between one case and another, and if in respect of transactions of comparable value there were substantial variations in the charges made between one case and another, the public would find it difficult to understand or to accept the fact that there were good reasons for such variations". (39)

Avoidance of discrimination. The scale ensures that the amount of the fee will not be arbitrary, or discriminate between one client and another - for example by charging unusually high fees to a client whom it was desired to get rid of.

Abortive Work. Professional firms, like most businesses, have to devote a proportion of their time and overheads to dealing with pros- pective clients whose patronage does not come to anything. The ad valorem fee, like the sale price of goods, includes a contribution to- wards such abortive expenses. These must be met somehow, but it would be difficult to do this if fees charged to each client had to be calculated by reference solely to the work done for that client.

Additional Work. The client is relieved from anxiety lest the job prove unexpectedly difficult, with a corresponding rise in fees. Very often additional work will prove to be needed in order to do the job satisfactorily, but professional fees will not thereby be increased. This particularly applies to house sales, where the amount of effort needed by the agent varies enormously.

Clients not Inhibited. Where they know a scale fee is to be charged, clients will feel free to seek information or advice whenever they think it necessary in the course of the transaction. If each consultation were to be charged for separately clients would often be chary of incurring an extra fee.

Co-operation between agents. In some fields, there is a large amount of cooperation between practitioners. If one cannot secure the object desired by his client he will often have recourse to a colleague who can. The existence of a common scale fosters the co-operative spirit, since practitioners know exactly where they are in dividing work (and the resultant fee) between them. They also cease to be suspicious of under- cutting.

The following are sometimes put forward as disadvantages of the ad valorem system.

Variable Capital basis. The ad valorem system is unsuitable where the work done bears no true relation to the capital sum. Thus a structural survey cannot appropriately be charged for by reference to

 the value of the premises surveyed. Although it is true that the more valuable property may be larger, and therefore involve more time and effort in the survey, this is by no means necessarily so. A thorough structural survey of a large, rambling, Victorian mansion worth £10,000 may take ten times as long as a survey of a recently-constructed house of twice the value.

Similar considerations might be thought to apply to fees for valuing a property, but in fact the ad valorem basis applies to such valuations. This may be explained on the ground that a time basis would seldom be appropriate, since accurate valuation depends much more on skill and experience than on time taken. The valuers' scale is sometimes criticised on another ground, namely that it encourages the valuer to place his valuation as high as possible, since this will inflate his fees. It is for this reason that the Institute of Chartered Accountants object to ad valorem charges for valuations carried out by accountants: "If in those circumstances members were to calculate their charges on a per- centage basis their independence and objectivity might, however un- justifiably, be challenged. For example, an accountant reporting on profits for prospectus purposes could be embarrassed if it were thought that his fee was geared to the amount of profits stated in his report." (40)

Another criticism of this method of charging where the amount of the capital sum is under the control of the practitioner was voiced by the Prices and Incomes Board: "It could be said that the 'ad valorem' basis gives architects an incentive to design expensively, with only the ethical standards of the profession to protect inexperienced clients. Similarly cost increases caused by delay or error due to the architect himself will bring him more money." While mentioning this criticism, the Board appear to attach little weight to it. (41) The estate agents make a virtue of the fact that the capital sum, i.e. the price obtained on the sale, is to some extent in their hands. Here the incentives work the right way: the agent is encouraged to obtain the highest price possible since in doing so he increases his own remuneration.

Uneconomic Work Encouraged. Economists frequently criticise ad valorem scales on the ground that they distort the true economics of a transaction. There are many cases where the true cost of carrying out professional work is excessive in proportion to the value of the subject matter. It may even exceed that value. Under the scale, however, this true economic cost will be spread over many transactions and the fee charged in the troublesome case will be no higher. The professions defend this on social grounds. The widow with a modest investment in houses let at controlled rents is able to sell them, and receive some return, notwithstanding that the true conveyancing costs (as opposed

 to the scale fee) outweigh the economic value of the freehold. Whether the ad valorem scale is the right way to deal with such problems may be disputed, but at least it provides a simple and effective solution.

Better-than-average Work Discouraged. The practitioner who does an abnormally good job will get no extra reward for his pains under the ad valorem system. If he goes to a specialist consultant he will have to pay the latter's fee himself. (42) A man who does a poor job may scrape by and will receive the same fee. The answer to these points lies in the spirit and ethics of the profession — the true professional is uninfluenced by such considerations as these.

Prices Rise before Fee Due. If an interval elapses between the doing of the work and the time when the fee falls to be calculated, as for example between the design and execution of a building, the practitioner may benefit from a rise in prices during that period which inflates the capital sum (the cost of the building) and

therefore the fee. The Prices and Incomes Board suggested that an architect's fee should be reduced in such circumstances, and it is difficult to resist this conclusion. (43) Quantum Meruit

The phrase quantum meruit ("as much as he has earned") is used to describe the method of calculating fees which basically depends upon the actual amount of work done, and the time taken. If the necessary data could be easily, cheaply and accurately assembled this might well be the best system — though it would still be open to abuse by those who needed an incentive to occupy their time industriously. "Fixing fees slavishly by reference to the time factor", say the Law Society, "has been tried and found wanting — notably by the accoun- tants after many years' trial." (44)

Until 1883, when ad valorem scales were introduced for conveyancing, solicitors' charges were in all cases based solely on time taken (in the case of interviews or attendance at court) or the length of documents. Bills of cost were itemised on this basis, and were often very voluminous. In 1953 a true quantum meruit system was introduced for work other than conveyancing, entitling the solicitor to charge "such sum as may be fair and reasonable, having regard to all the circumstances of the case". Particular circumstances specified as relevant are the complexity of the matter, the difficulty or novelty of the questions raised, the skill, labour, specialised knowledge and responsibility involved on the part of the solicitor, the time expended by the solicitor, the value of any property involved, and the importance of the matter to the client. (45) This summarises the considerations applying to most professional fees charged on the quantum meruit basis. It can be seen that this basis

 lacks both the advantages and disadvantages of the ad valorem system. Since the former outweigh the latter, it seems right to conclude that the architects are right in saying that wherever possible the ad valorem method should be used. Uncertainty is cited by the R.I.B.A. as the main drawback of quantum meru it. "Clients are tempted to avoid the uncer- tainty by asking for quotations, which may be reasonable enough in exceptional circumstances but could not serve as a general method of charging." (46)

A drawback of the quantum meruit system peculiar to estate agency is that it would render the multiple agency system, as practised particu- larly in the south of England, impracticable. At present, vendors are free to go to as many agents as they like and know that they will only receive a bill from the one who is successful in selling their property. Under a quantum meruit system each agent would be entitled to charge for the time and effort he had put into the attempt to effect a sale, and the result could be very expensive. The Rule against Undercutting

Undercutters are never popular with their fellows. Augustus Hervey, later third Earl of Bristol, records how as a freebooting ship's captain in the Mediterranean during the mid-eighteenth century he followed the usual practice of carrying treasure and charging 1% on its value. Captains who undercut were unpopular, and Hervey prospered in charging the full rate. (47) The same unpopularity is felt today by those who under- cut their professional brethren, though the matter is seldom taken beyond private expressions of disapproval. Carr-Saunders and Wilson, writing in 1933, found that there was no attempt by the Law Society to prohibit one solicitor undercutting another. (48) Their enquiries of the profession generally had failed to disclose any case of expulsion from the professional institute because of undercutting. (49) Shortly after the publication of Carr-Saunders and Wilson's book the solicitors did formally ban undercutting. The position about enforcement by extreme action seems not to have changed however. The R.I.B.A., for instance, reported to the Monopolies Commission that there had only been one case in the last ten years in which a member had been found guilty of undercutting. (50) This contrasts with the finding of the Prices and Incomes Board in 1968 that there had been many cases of under- cutting by architects in various forms. (51) One explanation may be the extreme difficulty of collecting sufficient evidence to secure a conviction.

The statements of the rules against undercutting vary, but not significantly. The Solicitors' Practice Rules 1936, made under statutory authority, prohibit a solicitor from holding himself out as being prepared to do professional business at less than the scale. The prohibi- tion is against quoting a reduced fee to one who is not an existing client. Once a client has been secured, therefore, the profession is

not con- cerned with the fees he is charged: the rule is in other words directed to obtaining new business unfairly. The rule in a sense duplicates another rule, made at the same time, which is explicitly directed against unfair attraction of business. In 1951 the High Court upheld a finding under the latter rule that a solicitor had been guilty of unprofessional conduct where he let it be known that he was prepared to accept instructions from members of an organisation for which he acted at less than the proper scale of charges. (52) This illustrates that the holding out need not be to the person who becomes the prospective client; it is sufficient that the holding out was to an existing client, and as a result new clients were attracted. (53)

The consulting engineers express the rule in simple terms: "A member shall not knowingly compete with another member on the basis of pro- fessional charges." (54) The Architects Registration Council is even terser: an architect "must not compete with another architect by means of a reduction of fees . . ." (55) The R.I.B.A. reinforce this by requir- ing members to uphold and apply the scale of charges.

Rules against undercutting are difficult to frame and apply where the profession has no published scale. Despite this handicap the Institute of Chartered Accountants does regard as guilty of undercutting a mem- ber who has obtained professional work through having quoted with that object a fee lower than that charged by an accountant whom he has replaced. The Institute recognises that the mere charging of a lower fee is not necessarily discreditable, since "it may be a smaller firm, more conveniently situated geographically or even perhaps more efficient". Another indication of transgression, if it could be proved, would be where the business had been obtained by the quotation of a fee lower than the firm's normal fee. The Institute has resisted pressure by its members to rule that wherever a client changes his accountant th.e incoming accountant should seek an assurance that the change has not been made for the purpose of securing a reduction of fees. The conclu- sion was that it would be impracticable and contrary to the public interest to adopt this course. (56) The R.I.C.S. adopt a double-barrelled approach. No member must "undertake or offer to undertake work for charges which in the opinion of the Council would be unfair to other members". Not content with this, the bye-laws go on to prohibit members from attempting to compete with each other on the basis of fees with the object of securing instructions. (57)

Particular exception is taken by the professions to the practice of

 tendering. Many local authorities, filled with a praiseworthy desire to save on the rates and familiar with the system of tendering for building contracts, see no reason why outside professional consultants should not also tender. Thus firms of architects or valuation surveyors may be invited to submit quotations of their fees for a particular project in the same way that building contractors will later be asked to do for the same project. The proper course is for firms to decline to respond to this invitation, but the temptation to seek business in this way is some- times difficult to resist and not resisted. The British Medical Association has been particularly vigilant in seeking to prevent members from responding to advertisements which in effect offer work to the practi- tioner who puts in the lowest bid. (58)

Allowable Reduction or Waiver of Fee

The consultant professions recognise numerous exceptions to rules laying down scales of fees. The rules are not likely to be enforced where an established client is concerned, or where a reduction or waiver is made on grounds of poverty or other hardship. A barrister is allowed to waive his fee when acting for a personal friend, another member of the Bar or a charity. (59) A solicitor may, with the consent of his local professional society, charge a reduced fee where he acts for a near relative, an employee or in similar circumstances. (60) Where repetitive work is involved, as in conveyancing of similar houses on a building estate, or the client lightens the }oad, as in the case of building societies providing standard forms for mortgages, the solicitor may legitimately charge a reduced fee. (61)

The professions are frequently compelled to accept lower fees when working for public bodies. Here the client is so substantial and powerful that the individual practitioner can do little to resist, and his professional institute very often finds itself unable or unwilling to exert sufficient pressure to rectify the position. Surveyors who act for persons of unsound mind are thus expected by the Court of Protection to charge less

than the scale fee. The architects have a long-standing grievance against the public sector: “the overall pattern has been marred by per- sistent attempts by some public authorities to buy private architects’ services on special terms.” The R.I.B.A. allege that a few public clients have unduly exploited the power given by their extensive patronage. “In some cases, public authorities seem even to have acted in bad faith.” Between one fifth and a half of all local authorities required some form of reduction of fees from architects whose services were retained. The R.I.B.A.

particularly object to the arbitrary manner in which these reductions are imposed, and the fact that they often have no reasonable

 relation to the work done by the architect. (62) The chartered accoun- tants complain of Treasury scales indicating lower rates than members would normally expect to charge. (63)

The Objection to Undercutting

Why do professional people feel so strongly about undercutting, while not feeling able to do anything drastic about it? Carr-Saunders and Wilson give the explanation that it is “indecent to undercut” and that the offender will cut himself off from friendly intercourse with his colleagues and perhaps be ostracised. (64) This is more a description than an explanation. The Law Society put its finger on the root cause when, in its submission to the Monopolies Commission, it remarked that the basic object of the rule was to maintain charges at a level which was not uneconomic. It is significant that the solicitors introduced their rule in the years following the depression of the early 1930s. The desperate search for work had led to vicious and severe undercutting, when work would be done for a fee ludicrously small and quite unecono- mic merely because it was better than having no work at all. A number of professions suffered in this way and the memory still lingers among the older members.

The Monopolies Commission, in its 1969 report on estate agents, was indifferent both to the economic dangers of allowing unrestrained undercutting and to its effect on the sense of brotherhood and desire for cooperation within the profession. In a typical manifestation of current official opinion the Commission found no difference between price competition in professional services and in the supply of goods. They thus rejected, on doctrinaire grounds rather than concrete evidence, the whole basis of consultant professionalism and its philosophy. (65)