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# PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE

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# Preface

This paper explores and addresses the main issues surrounding the topic of professional legal ethics by comparing ethical and professional standards in the United States to those of select countries in western, as well as central and eastern Europe. Differences in lawyers' ethical standards, where they occur, may be explained by considering that professional-ethical standards are expressions of varying socio-political and legal contexts, and reflect moral and cultural values specific to various countries.

The paper provides an overview of the organization and the sources of regulation of the legal profession in the United States and Europe, briefly highlighting the main differences existing in lawyers' ethical standards in civil law and common law systems. It reviews the main standards of professional legal ethics in the United States, and compares them with those of European countries, especially where the approach taken is substantially different (e.g. conflict of interest, advertising, fees, communications, confidentiality). It also examines the lawyer disciplinary system in the United States, addressing briefly differences with its counterparts in Europe. Finally, this paper provides a description of the challenges posed by the increase in cross-border, transnational legal practice, and an overview of the ethical regulatory responses attempted so far in this field.

The project is based on contributions by American and European experts in the field of professional legal ethics (see Appendix A), and on research and analysis conducted by Maya Goldstein Bolocan (CEELI Fellow 2001-2002). It also relies on materials gathered and translated by CEELI field offices throughout Central and Eastern Europe and the former Soviet Union. Ms. Goldstein Bolocan organized and managed the project, including editing, researching, and writing portions of it.

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# Professional Legal Ethics: A Comparative Perspective

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# Professional Legal Ethics: A Comparative Perspective

## I. Introduction

In modern democratic societies based on the rule of law, lawyers play a paramount role in the administration of justice and in safeguarding human rights and fundamental freedoms. In fulfilling their functions, lawyers operate concurrently as representatives of their clients, officers of the legal system, and public citizens having special responsibilities for the quality of justice. Virtually all ethical problems faced by lawyers arise from potential conflicts between these three responsibilities. Maintaining and observing clear ethical standards is a duty that lawyers owe not only to their clients, but also to the administration of justice, their profession and the society at large.

The terms *legal ethics*, *professional responsibility*, and *professional legal ethics* are used interchangeably to indicate standards and rules regulating the conduct of lawyers faced with conflicting moral and legal responsibilities. Such standards and rules are embodied in the written laws, as well as in the customs, professional rules and judicial decisions of a country. The creation of codes of ethics which incorporate such standards not only provides the necessary guidance to lawyers confronted by multiple, competing duties, but also contributes to fostering the client's and the public's trust in the legal profession.[1] Lawyers therefore should adhere to clear ethical-professional standards and must be disciplined when failing to do so.

Ethical codes in both the United States and Europe converge in focusing their attention on basic, common concerns: conflict of interest, confidentiality, competence and independence of lawyers. Nevertheless, differences may be observed in some of the same key areas, such as secrecy and confidentiality, conflict of interest, fees, and lawyers' advertising.

As Professor Roger Cramton observed, while the basic ethical norms and principles are shared by Europe and the United States,

> [e]ach principle…takes a different shape as one moves from country to country, and the differences are much greater between the United States and the Western European countries than between the Western European countries themselves. In addition, the relative priority in each legal system is different. The U.S. profession places highest regard on fidelity to the client, and the European professions give greater priority to professional independence.[2]

These differences may be explained by considering that professional-ethical standards are, above all, expressions of different socio-political and legal contexts, and reflect systems of moral and cultural values specific to different countries. Such diversities may have repercussions on the

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[1] In considering codes of ethics in European countries, this paper refers to the codes of conduct that govern lawyers with the right of audience. The terms lawyer, attorney, advocate are used inter-changeably.

[2] Roger C. Cramton, *A Comparative Look at Ethics Rules and Professional Ideologies in a Time of Change* 267, in John J. Barcelo' III & Roger C. Cramton, LAWYERS' PRACTICE AND IDEALS: A COMPARATIVE VIEW (Kluwer Law International, 1999). [Hereinafter Cramton].

perception of the role of lawyers, their independence and, therefore, the boundaries to their obligations.

This concept paper presents a series of commentaries on professional legal ethics.

Part II of this paper puts the topic of professional legal ethics into context. It gives an overview of the differences existing in the organization of the legal profession in the United States and Europe. It briefly identifies the sources of professional and ethical regulation of lawyers in the United States and Europe, and indicates the main differences existing in ethical standards between civil law and common law legal systems.

Part III reviews the main standards of professional legal ethics as they are regulated in the United States, and attempts comparisons with selected European countries, especially where the approach taken is substantially different (*e.g.* conflict of interest, lawyers' advertising, fees, communications, confidentiality).

Part IV illustrates the lawyers disciplinary system in the United States, highlighting briefly the differences with the discipline of lawyers in selected European countries.

Part V provides a description of the challenges posed by the increase in cross-border, transnational legal practice, and an overview of the various regulatory responses to the issues of double-deontology attempted so far.

## II. Professional Legal Ethics in Context

### A. Overview of the Structure and Organization of the Legal Profession in the United States and Europe

There are two core distinctions between the structure and organization of the legal profession in the United States and European countries. First, in the United States the legal profession is a unitary one, whereas in most European countries it is divided. In European civil law countries,

> functions typically associated with the practice of law in the United States…are generally divided among at least three different categories of legal [professionals]: 1) those…who may represent clients in court (*e.g.*, *advocates* in France…and *rechtsanwalts* in Germany); 2) those who advise on and document the transfer of real and personal property (*e.g.*, notaries in France, Italy, and Spain); and those who counsel clients on business transactions (*e.g.*, the former *avouees* and *conseil juridique* in France.)[3]

Second, in the United States each of the fifty states separately licenses lawyers, as a system of national licensing does not exist. By contrast, in most European countries a lawyer is licensed

[3] Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Code of Conduct by U.S. And Foreign Lawyers*, in 32 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1117, 1148-49 (Oct. 1999). [Hereinafter Daly].

by a local or regional court. A brief overview of the differences in the organization, practices and roles played by lawyers in the United States and European countries helps to put the topic of professional legal ethics into context.

## 1. Unitary Character and Mobility of the Legal Profession in the United States

An understanding of the structural and organizational differences characterizing the legal profession in the United States and European countries is most easily grasped by examining the multiple functions a lawyer licensed in the U.S. may perform. A snapshot description illustrates the broad range of activities in which a U.S. lawyer may engage. Within the space of a single week, a U.S. lawyer may try a case in court, negotiate the sale of a business, draft a will, mediate or arbitrate a dispute, and convey real property. The unitary character of the U.S. legal profession has a direct impact on lawyers' career paths by facilitating job mobility. Upon admission to the bar, a lawyer may enter the private or public sector. For example, the lawyer may join a law firm as an associate, the office of a public prosecutor or defender as an Assistant District Attorney or Public Defender, or the office of a government agency that handles non-criminal matters as a junior staff member. As the lawyer's career proceeds over time, he may choose to leave his original practice sector and enter another, moving, for example, from a law firm to a public prosecutor's office, or vice versa.

The term "revolving door" is the standard entry in the U.S. legal profession's lexicon to describe these sorts of movements between the public and private sector. Career mobility, moreover, carries over into the judicial branch as well. The lawyer may enter the judiciary directly from private practice or government service or vice versa.

The snapshot presented above does not capture the structure and organization of the U.S. legal profession perfectly. While the structure and organization are unitary at a formal level, they are divided at the informal level of practice. In small as well as large law firms, lawyers will often group themselves by activities (*e.g.*, litigation, business counseling, etc.) and areas of practice (securities law, employment and labor law, real estate law, etc…). Even in government agencies, analogous types of divisions occur (*e.g.*, litigator v. advisor/counselor; environmental, public corruption, or narcotics units in prosecutor and defender offices; consumer protection, or civil rights units in non-criminal law agencies). While the unitary character of the structure and organization of the American legal profession seems less clear at the level of practice, these informal divisions do not undermine the legal profession's unitary character. The divisions are a response to the increasing complexity of the law and the bureaucratization of the organizations that deliver legal services.

Legal education in the United States also plays a key role in nurturing and shaping the unitary character of the legal profession. Unlike, for example, legal education in Germany, that focuses on preparation for a position in the judiciary even though many students will not follow that career path, legal education in the United States assumes that its graduates will follow multiple and diverse paths. Nurturing and reinforcing the paradigm of a unitary profession is an important part of legal education in the United States. While students may select courses in a

particular subject matter, nowhere in their legal education are they taught or encouraged to think of the profession as being divided.

## 2. Divided Character of the Legal Profession in Europe

The divided character of the legal profession in most European countries stands in sharp contrast to the profession's unitary character in the United States. "While the common law legal professions have produced, at the most, three divisions of judge, advocate, and office lawyer (*i.e.*, barrister and solicitor), the civil code system has produced a plethora of types of lawyers--for example, notaries, magistrates, judges, advocates, civil servants, prosecutors--all as discrete categories."[4] Accordingly, it is an "ethnocentric misnomer"[5] mistake to speak of "a lawyer" in most civil law systems, because the functions associated with the practice of law, such as those described above in connection with the discussion of the U.S. legal profession, are divided among different legal professionals.

Legal education in the civil law systems sometimes reflects and fosters the divided character of the legal profession. While the precise organization of the courses of study will vary, in some countries students will be separated from one another according to their chosen career paths. Each track will have its own curriculum, professors, and apprenticeship requirements. The professional world that students encounter upon completion of their course of studies reflects these same separations. In this context, members of the different legal professions view one another as professionals in related disciplines, not as members of a single profession.

Contributing significantly to this view is the fact that the different legal professions are individually governed by distinct statutes, codes of conduct, and regulatory bodies. There is, moreover, no single organization within each European country, comparable to the American Bar Association, that can claim to represent the entire legal profession. The absence of a single voice ultimately weakens the force of any particular position espoused by an organization on behalf of one of the divided professions.

## 3. Status of In-House Counsel

The discussion of the structure and organization of the legal profession in the United States and Europe would not be complete without acknowledging the important differences in the status of in-house corporate counsel. In the United States, a lawyer may be a salaried employee of an organization and provide legal services to it. The lawyer's dependence on a single client for her salary is not considered to be an insurmountable barrier to the exercise of her independent professional judgment. There is therefore no requirement that the lawyer suspend her license for the duration of the employment or resign from the Bar. Because the lawyer's status is not affected by her employment, the attorney-client privilege applies to communications to and from the employer/client just as it would to communications to and from outside counsel.

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[4] John Flood, *The Cultures of Globalization: Professional Restructuring for the International Market*, in PROFESSIONAL COMPETITION AND PROFESSIONAL POWER: LAWYERS, ACCOUNTANTS AND THE SOCIAL CONSTRUCTION OF MARKETS 139, 146-47 (Yves Dezalay & David Sugarman eds. 1995).

[5] Richard L. Abel, *Lawyers in the Civil Law World*, in 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 4 (Richard L. Abel & Philip S. C. Lewis eds., 1988).

These observations do not hold true for many European countries. In some countries, a lawyer must place her license on a suspension roll for the duration of her employment; in other countries, she must resign from the Bar. The protection of the attorney-client privilege (known as the professional secret in some European countries) is also problematic. In those countries where the lawyer's license is suspended or she has resigned from the Bar, there is no protection for communications to and from in-house counsel. There are two explanations for the protection's absence. First, civil law lawyers have traditionally doubted that a salaried lawyer who is dependent on a single client for income would be able or willing to exercise independent professional judgment. Second, in many civil law countries, non-licensed law school graduates perform functions for their employer/client, such as advising on the law, that are remarkably similar to the functions performed by licensed legal professionals in private practice. The non-licensed law graduates were clearly second-class citizens within the hierarchy of legal professionals. Thus, a licensed lawyer who accepted an in-house position was viewed as stepping down in terms of professional prestige and power. There are significant signs that the prestige and power of in-house counsel are on the rise in Europe, prompted in large measure by the influence of Anglo-American corporate practice. That shift, however, seems to be confined to global organizations with considerable economic power and has not extended to small, middle-size companies.

## B. Regulation of the Legal Profession

### 1. Sources of the Law Governing Lawyers in the United States

The regulation of the legal profession in the United States is complex and non-hierarchical. These characteristics are the direct result of the federal character of the organization of the government in which states are principally responsible for the regulation of the legal profession. In the United States, the sources of the law are multiple, both at the federal and state level. They include statutes, court rules, the inherent power of the courts, agency rules, common law causes of action, and even the U.S. Constitution.

Very few statutes apply specifically to lawyers. Most have a general application, with lawyers falling within their scope. At the federal level, there is, for example, a statute requiring individuals who receive more than $10,000 in cash in payment for goods or services to report the payment to the Internal Revenue Service.[6] The name of the client and the fact of the payment are not protected by either the ethical duty of confidentiality or the attorney-client evidentiary privilege.[7] Moreover, at both the federal and state levels, there are conflict of interest statutes that govern the conduct of current and former employees.[8]

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[6] Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (codified as amended 26 U.S.C. § 1271 et. seq. (2002).

[7] *See United States v. Goldberger & Dubin*, 935 F.2d 501 (2d Cir. 1991) (reporting requirement under Federal Money Laundering Act).

[8] *See, e.g.*, 18 U.S.C. § 202-03, 207 & 1905 (2002); N.Y. Public Officers L. § 73 (McKinney 2002).

In addition to statutes, court rules also govern the conduct of lawyers. For example, federal and state court rules authorize judges to sanction lawyers who pursue frivolous or unfounded litigation, both at the trial and appellate levels.[9]

Common law causes of action also govern the conduct of lawyers. They impose a compensatory regime in which the lawyer must pay monetary damages to those whose interests the lawyer has injured. The most prominent causes of action are malpractice and breach of fiduciary duty. Historically, the courts have held lawyers liable only to their clients, invoking the concept of privity and the public policy argument that to hold lawyers liable to nonclients would erode the zealousness with which a lawyer must represent a client. However, in recent years, an increasing number of courts have recognized that under some circumstances a lawyer may owe a duty to a nonclient. Such circumstances might include the lawyer's affirmative promise to a nonclient to take specific action, such as filing a mortgage, or inducing the client to place its trust and repose in the lawyer's protection of the nonclient's interests.

Finally, the U.S. Constitution may also be a source of the law governing lawyers. For example, the Sixth Amendment states that in all criminal proceedings the accused shall enjoy the right to have the assistance of counsel. The failure of a lawyer to render effective assistance may be the basis for the reversal of a conviction and may subject the lawyer to malpractice liability.[10] The First Amendment's guarantee of free speech protects a lawyer's right to advertise and solicit clients.[11] The Fourteenth Amendment's due process clause acts as a restraint on prosecutors and disciplinary authorities.[12] The Supreme Court has invoked the Privilege and Immunities Clause to strike down state residency restrictions on admissions to the bar.[13]

## 2. Sources of Professional Legal Ethics in the United States

The primary source of professional legal ethics for a lawyer in the United States is the code of conduct adopted by the licensing authority in the jurisdiction in which the lawyer is admitted to practice. In each of the fifty states, the licensing authority is the judicial branch of the state's government.[14] The American Bar Association plays a major role in the creation of the codes of

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[9] *See, e.g.*, FED. R. CIV. P. 11 (frivolous motion); FED. R. APP. 38 (frivolous appeal); 28 U.S.C. §1927 (2002) (unreasonably and vexatiously multiplying proceedings).

[10] *See, e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (discussing Sixth Amendment standard); *Ferri v. Ackerman*, 444 U.S. 193 (1979) (malpractice); *Carmel v. Lunney*, 70 N.Y.2d 169 (1987).

[11] *See, e.g.*, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (advertising); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (solicitation).

[12] *See, e.g.*, *In re Ruffalo*, 390 U.S. 544 (1968) (discipline); *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963) (admission to the bar); *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecutor's withholding of exculpatory material violates the Due Process Clause of the Fourteenth Amendment).

[13] *See, e.g.*, *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

[14] In almost all the states, the highest state court is responsible for the licensing and disciplining of lawyers. One notable exception is New York State where the authority is vested in the intermediate appellate courts. In California, the legislature plays an unusually active role in creation of ethics-type rules to govern the conduct of lawyers. *See, for example*, California Business and Professions Code, §§ 6068, 6103.5, 6106.8-.9, 6149.5 (2002). In most states, the legislature has chosen not to supervise the conduct of lawyers, deferring to the judicial branch.

legal ethics.[15] Over the years, it has appointed commissions of distinguished practitioners, bar leaders, and members of the judiciary to draft ethics codes that it could subsequently recommend for adoption by the states. In 1983, the ABA House of Delegates approved the Model Rules of Professional Conduct (Model Rules), which it has amended from time to time.

The format of the Model Rules consists of black-letter rules followed by commentary.[16] At the present time, approximately forty-three states have adopted the Model Rules.[17] Most of these states, however, have modified the rules governing confidentiality, conflicts of interest, advertising, and solicitation. Thus, there is a significant variation in the rules of legal ethics from state to state. In February 2002, the ABA House of Delegates approved a set of changes to the Model Rules, intending to bring greater national uniformity. It remains to be seen, however, if the recommended changes will be adopted by the states.

Applying the rules of professional conduct to specific activities is not always an easy task. In each state, institutions exist that assist lawyers who have questions concerning how they are to proceed in a particular context. Usually these institutions are committees of state and local bar associations. For example, the New York State Bar Association sponsors a Committee on Professional Ethics to which lawyers can address written inquiries. While the opinions of these committees have no legal authority, they are regarded as valuable, informal interpretative sources of legal ethics. Their substance is carefully weighed by courts and disciplinary authorities if the inquiring lawyer's conduct is subsequently questioned or another lawyer relies on the opinions in fashioning his or her conduct.

Finally, note should be taken of the Restatement of the Law Governing Lawyers recently adopted by the American Law Institute. As its title suggests, the topics the Restatement covers are broader than legal ethics including, for example, extensive discussion of a lawyer's civil and criminal liability for certain types of conduct. A substantial part of the Restatement, however, discusses the professional responsibilities of lawyers. The views expressed in the Restatement are likely to influence courts and disciplinary authorities in their interpretation of the rules of lawyer conduct.

## 3. Professional and Ethical Regulation of Lawyers in Europe

Unlike U.S. lawyers, who are regulated principally by the courts through state bar associations, and not by the legislature, lawyers in Europe have historically been subject to more control and regulation by the state. In Italy, for example, lawyers are subject to national law that regulates matters such as fees, incompatible activities, discipline of lawyers, and admission to

[15] The ABA is a voluntary association whose membership includes approximately fifty percent of the lawyers licensed to practice law in the United States. The ABA operates a Center for Professional Responsibility that serves as a "think tank" for ideas relating to the regulation of the legal profession and professionalism.

[16] Prior to the adoption of the Model Rules of Professional Conduct in 1983, the ABA adopted the Canons of Professional Legal Ethics in 1908, and the Model Code of Professional Responsibility in 1969. Unlike the Model Rules, both the ABA Canons and the Code incorporated standards formulated in vague, general terms.

[17] No consensus exists among the states regarding the legal status of the ethical rules other than in the context of a disciplinary proceeding. In that context, they are the standards by which a lawyer's conduct will be measured. In other contexts, such as motions for disqualification or sanctions, their legal status is viewed differently by each state.

practice.[18] In Spain, the *Estatuto General de la Abogacía Española* addresses incompatibilities, lawyer advertising, fees, the rights and duties of lawyers vis-à-vis their clients, the other party, the courts, the Bar, as well as their disciplinary responsibility.[19] Similarly, in France, Germany, Poland, Romania and many other European countries, state legislation is the primary source of lawyers' regulation. In some countries, the rights and duties of lawyers are incorporated not only in statutes specifically regulating the conduct of lawyers, but also in the civil and criminal codes. In France, for instance, the lawyer's duty of professional secrecy is addressed in the criminal code.[20] In Germany, matters such as the independence of lawyers and incompatibility are regulated by the Code of Civil Procedure,[21] while the Penal Code has provisions concerning confidentiality,[22] prohibition of overcharging,[23] and party treason.[24] Along with regulation by the state, the professional lawyers' associations of these countries have adopted codes of conduct specifying the lawyers' main ethical and legal duties, and other principles governing the legal profession. Whereas in the United States each state has adopted a single code of ethics to govern the conduct of lawyers irrespective of the functions they perform (*e.g.* advocacy or business counseling), each legal profession in a civil law system is regulated by its own code of professional conduct.

In 1988, the representatives of the legal profession of the then twelve Member States of the European Economic Community (EC or ECC) adopted the Code of Conduct for Lawyers in the European Community (CCBE Code).[25] The code, which was amended in 1998, embodies what are perceived as the core ethical and professional principles governing the legal profession, and applies to cross-border practice of lawyers within the European Union and the European Economic Area. Further revisions to the Code are currently being considered, and expected to be voted on at the next CCBE's Plenary Section in December 2002.[26]

The primary purpose of the CCBE Code is to provide guidance to lawyers faced with "double deontology" dilemmas. The issue of double deontology arises when lawyers engaged in transnational legal practice are subject to two different sets of ethics rules and discipline, *i.e.* the

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[18] *See* Ordinamento della Professione di Avvocato (R.d.l. 27 Nov. 1933, n. 1578).

[19] *See* Estatuto General de Abogacía Española (2001).

[20] *See* French Penal Code, Article 266.13.

[21] *See* Ulrike Schultz, *Legal Ethics in Germany*, in 4 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 55, 61 (1997).

[22] StGB § 203.

[23] *Id*., § 352.

[24] *Id*., § 356.

[25] The CCBE (Council of the Bars and Law Societies of the European Union) is the organization representing the legal profession in the European Union (EU) and the European Economic Area (EEA). It is composed of 18 full member states (Austria, Germany, Lichtenstein, Belgium, Denmark, Norway, Sweden, Finland, France, Greece, Iceland, Ireland, United Kingdom, Italy, Luxembourg, The Netherlands, Portugal, Spain), and of 13 observer members, including Croatia, Poland, Romania, and Slovakia. *See* <http://www.ccbe.org>. The CCBE Code is now called Code of Conduct for Lawyers in the European Union. For a detailed discussion of the CCBE Code, *see infra*, Section V.

[26] Proposed revisions to the CCBE Code concern the provision on advertising, the inclusion of the Annex to the code on Money Laundering as a full article in the code, as well as modifications considered necessary in order to take into account Directive 98/5/EC on the establishment of lawyers. *See* CCBE-INFO 7 (March 2002/N.1).

ones of the home jurisdiction and those of the jurisdiction in which they practice (host jurisdiction). In cases of conflicting rules, lawyers will need guidance in deciding which rules to follow. In addition to addressing the issue of double deontology, the CCBE Code is also meant to contribute to the "progressive harmonization" of lawyers' codes of conduct of countries of the European Union and European Economic Area.[27] To date, the code has been implemented not only in the majority of the CCBE's member states, but also in some of the CCBE's observer countries, which include Croatia, Estonia, the Former Yugoslav Republic of Macedonia (FYROM), the Czech Republic, Slovakia, Poland, and Romania.[28]

## C. Professional Legal Ethics: Common v. Civil Law Systems

Lawyers' codes of conduct respect the same core values both in Europe and in the United States: independence of professional judgment, confidentiality of client communications, loyalty, and the avoidance of conflicts of interest. Nevertheless, there are remarkable differences, especially when the analysis focuses on the United States and European countries of civil law tradition. These inconsistencies reflect fundamental differences existing in the perception of the role of lawyers, the values attached to the legal profession, and legal systems of these countries. The similarities and dissimilarities in the understanding of professional legal ethics in the common and civil law systems is best addressed by contrasting the codes of conduct, the legal systems, and the disciplinary regimes in the United States and several countries in western Europe.

First, the drafting styles of the codes in the United States and European civil law countries are remarkably distinct. While codes in the United States are more legalistic and formal, and their principles are more likely to be expressed as rules rather than standards, civil law codes frame their norms in more general, less precise terms. Moreover, unlike ethics codes in the United States, civil law codes include provisions emphasizing the collegiality of the Bar, the duties that lawyers owe to one another, and the responsibilities of lawyers for the training and education of lawyer-aspirants.

Second, in the United States there is an elaborate jurisprudence interpreting lawyer codes of conduct that is derived from judicial decisionmaking. This jurisprudence can be explained by the structural differences in the conduct of litigation, and the different philosophies underlying the civil and common law systems. In the United States, a judge's role is often analogized to that of an umpire who referees a dispute in which the lawyers are the active players. There are ample opportunities for pre-trial discovery and proceedings related to it. In such context, the rules of professional conduct are often used for strategic purposes. For example, the lawyer for the party moving for disqualification may believe that an alleged conflict does not threaten her client in any way, but will make the motion nonetheless to deprive the other party of its competent, effective counsel.

Actions for malpractice and breach of fiduciary duty are a regular feature of the legal landscape in the United States. While much confusion exists over the admissibility of testimony

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[27] CCBE Code of Conduct for Lawyers in the European Union (1998), Article 1.3.2 [Hereinafter CCBE Code].

[28] Upon their adherence to the CCBE, the observer members' delegations sign a model convention under which they ensure to respect the 1998 CCBE Code of Conduct. *See* <http://www.ccbe.org>.

relating to the rules of professional conduct, no doubt exists that the rules play a formative role in the articulation of the norms governing those actions. Finally, the individual states, the U.S. federal government, and bar associations do not generally set mandatory or recommended fee schedules for legal services as is frequently the case in the civil law system. Disputes over fees are litigated in the United States, and the courts will look to the rules of professional conduct in assessing a fee's propriety or excessiveness. In sum, the nature of litigation in the United States is such that courts are called upon to interpret the rules of professional ethics much more frequently than in the civil law system, giving rise to an extensive gloss on their meaning and application. Such rules thus "directly enter the judicial arena where litigants can debate their application and meaning; trial courts can interpret them…and scholarly authors can comment upon the courts' interpretation…".[29]

In the civil law system, by contrast, a judge exercises much greater control over the taking of evidence than in the United States.[30] The civil law lawyer plays a diminished role in comparison to that of his U.S. counterpart. Rarely are there occasions in which issues pertaining to the code of lawyer conduct will be brought to the judge's attention for resolution. Disputes over conflicts of interest and fees, for example, are generally submitted to the president of the local bar association. Actions for malpractice and breach of fiduciary duty are also far less frequent due, in part, to the mandatory insurance required in most countries and to a legal culture in which actions against professionals are not as prevalent as in the United States. A study conducted by the International Bar Association on malpractice claims against lawyers outside the United States concluded that "[p]rofessional liability is still a relatively new subject, that is to say as a subject of legal publications and case law."[31]

Third, the approach taken by the United States and European civil law countries to conflicts of interest is remarkably different. In the United States, codes permit a client to waive most conflicts, provided that the client is fully informed and voluntarily assents. By contrast, civil law codes generally do not contain waiver provisions. Consequently, if a lawyer does not perceive a conflict, there is no need to withdraw from a representation. In other words, lawyers in civil law systems tend to view conflicts as "a matter of [personal] ethics, not law. Conflicts are a matter of your relationship with your client."[32]

A related distinction is that, while professional independence is the cornerstone principle governing lawyers in all legal systems, the same principle has different meanings in the United States and European civil law countries. Whereas in the first this concept primarily refers to the importance of the profession retaining a degree of self-regulation *vis-à-vis* interferences by the legislature and other governmental bodies, European civil law countries generally embrace an

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[29] *See* Daly, *supra* note 3, at 1142.

[30] The judge often takes testimony in the form of affidavits, actively questions the witnesses, and appoints experts.

[31] *See Liability of Lawyers and Indemnity Insurance* 75-240 (Albert Rogers et al. eds., 1995). In some jurisdictions, a lawyer must receive permission from the bar association that has jurisdiction over the target-defendant lawyer, before commencing an action. Philippe Sarrailhe, *Application of Professional Conduct Rules in Transnational Affairs*, in SOUTHWESTERN LEGAL FOUNDATION, PRIVATE INVESTMENTS ABROAD. PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1995 2-8 (1995). [Hereinafter Sarrailhe].

[32] Justin Castillo, *International Legal Practice in the 1990s: Issues of Law, Policy, and Professional Ethics*, 82 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 272, 283 (1992).

ideology of professional independence and autonomy from the client that is alien to, and stands in contrast with, the U.S. lawyer's primary commitment to the latter. An example of this different approach can be found in the rule, common to many European civil law systems, requiring confidentiality to cover communications between lawyers.[33]

The U.S. and civil law systems disciplinary regimes also stand in contrast. In the United States, the disciplining of lawyers has become increasingly professionalized since the publication of the Clark Commission Report in 1970, which described the state of lawyer discipline as a "scandalous situation."[34] In most jurisdictions, professional staff, working under the supervision of the judicial branch, investigate and prosecute unethical conduct. Disciplinary proceedings must conform to the due process requirements of the Fourteenth Amendment, and the sanctions imposed by the disciplinary authority are subject to judicial review. It is not uncommon for sanctioned lawyers to seek such review; consequently, there is a body of judicial decisions interpreting the lawyer codes of ethics.

In European civil law countries, a local bar association is generally charged with investigating and prosecuting lawyers' misconduct. That bar association is one attached to the local judicial district to which the lawyer has been admitted. In contrast to the United States, where some degree of transparency is generally guaranteed, disciplinary proceedings against lawyers are generally decided by members of the legal profession, and are confidential in nature, raising questions as to their overall fairness and effectiveness.

# III. Standards of Professional Legal Ethics

## A. Information on Legal Services: Advertising and Solicitation

### 1. The Ethics of Advertising Legal Services in the United States

#### a) Introduction

Lawyer advertising and solicitation are among the most controversial issues of professional legal ethics. While on the one hand advertising is a tool necessary to provide information to the public on the legal services available, therefore enhancing access to justice, on the other hand, it sometimes involves practices which give rise to mistrust and discredit the legal profession.

In contrast to European countries, where advertising by lawyers is more strictly regulated, lawyers advertising legal services in the United States have a wide range of options and opportunities in their efforts to obtain clients. However, the right to advertise and, more broadly, to communicate the lawyer's services, are relatively recent rights in the U.S. Prior to 1977, standards of professional conduct prevented lawyers from advertising,[35] and most states banned all but the most benign communications, as advertising was deemed unseemly throughout the

[33] Cramton, *supra* note 2, at 267.

[34] ABA Special Comm. on Evaluation of Disciplinary Enforcement, Problems and Recommendations (1970).

[35] The ABA's 1908 Canons of Professional Ethics condemned both solicitation and advertising.

profession. However, research began to indicate that prohibitions on advertising limited the ability of people to obtain information on the legal services provided by lawyers.[36]

In 1977, the U.S. Supreme Court held in the *Bates* case that lawyers have the right to the First Amendment protections of commercial free speech and the states could not ban them from advertising.[37] Immediately after that decision, the American Bar Association provided direction to the states in their efforts to govern lawyer advertising, first through its Model Code of Professional Responsibility,[38] and then through its Model Rules of Professional Conduct. In February 2002, the American Bar Association amended many of its Model Rules, including those on advertising. If these amendments are adopted by the states, they will modify the rules that lawyers admitted in those states must follow.

The cornerstone of the regulation on advertising requires lawyers who communicate their services to the public to do so in ways that are not false or misleading. Lawyers are also required to follow a series of limitations imposed by the state rules and are limited in the ways they can solicit clients.

While the Supreme Court lifted the ban on lawyer advertising in the *Bates* decision, it left many questions unanswered, indicating that the Bar would have a "special role to play in assuring that advertising by attorneys flows both freely and cleanly."[39] In other words, states could not ban lawyer advertising, but had the responsibility to govern it, even though the extent of those limits was not set out.

The ABA Model Rules set permissible limits on the communication of legal services. The rules apply to publicity and various forms of marketing, in addition to advertising and solicitation. The ABA recognizes that the communication of legal services is subject to the protections of the First Amendment and lawyers have the constitutional right to advertise in many ways, even those that may degrade the legal profession. However, the ABA also believes that it is essential that the exercise of this right does not undermine the public's confidence in the United States legal system.[40]

Forty-three states have adopted the ABA Model Rules. Even though every state has modified the rules that pertain to the communication of legal services, the vast majority of states have some provisions in common that are adapted from the Model Rules.[41]

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[36] *See, for example, The Legal Needs of the Public: The Final Report of a National Survey* (American Bar Foundation, 1977).

[37] *Bates v. State Bar Arizona*, 433 U.S. 350 (1977).

[38] Soon after the Bates decision, the ABA amended the Model Code to permit lawyers to advertise under a series of constraints.

[39] *Bates*, 433 U.S. at 384. In 1980, the Supreme Court established the constitutional test to determine the property of limiting commercial speech. *See Central Hudson Gas & Electric Corp. v. Public Service Comm. New York*, 447 U.S. 557 (1980).

[40] The ABA has adopted in 1998 Aspirational Goals designed to encourage lawyers who choose to advertise to do so in ways that reflect positively on the profession as a whole. *See* <http://www.abanet.org/legalservices/advabaaspirgoals.html>.

[41] The various states rules are available at <www.abanet.org/adrules>.

The Model Rules governing the communication of legal services have changed several times since they were originally promulgated in 1983. These changes generally occurred because U.S. Supreme Court decisions found some aspect of the rules to be unconstitutional.[42]

### b) The Prohibition Against False and Misleading Representations

The ABA Model Rules include four provisions banning false or misleading representations.

First, it is false or misleading if a communication "contains a material misrepresentation of fact or law."[43] This is a fundamental standard of consumer protection that prevents lawyers from misstating their credentials, capacity or any aspect of their services. An example of this standard would be if a newly admitted lawyer advertised 25 fields of practice, the implication being that the lawyer has some level of experience or expertise in each when in fact the lawyer does not.[44]

Second, it is false or misleading when a lawyer "omits a fact necessary to make the statement considered as a whole not materially misleading."[45] For example, if a lawyer advertises a contingency fee case and represents that there is no fee if there is no recovery, the communication would be misleading if the client would then be responsible for the costs of the case regardless of recovery. Clients who do not use lawyers frequently, in fact, will probably not know the difference between fees and costs, and may assume that an advertisement indicating no fees would result in no expense to the client. It is, therefore, a misleading omission to fail to include information about costs.[46]

The next two standards are uncommon in the regulation of advertising outside of the legal profession and create high standards that are often difficult to meet. Lawyers may not make a communication "likely to create an unjustified expectation about results the lawyer can achieve."[47] As each case depends on a series of unique factors, the outcomes of any prior cases should not be used as a standard to determine the outcome of future cases, according to the rationale of this rule. This precludes statistics about the results of litigation, and testimonials by clients that go to the outcomes of the cases. Moreover, whereas information is acceptable, persuasion should be restrained. A communication is false or misleading if it "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."[48] In other words, advertising would be inappropriate if it included terms such as "the best lawyers,"[49] "highly qualified,"[50] or "a proven and highly successful record."[51]

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[42] In 1982, for instance, the Court held that a state could not limit the subject matter of the advertisement to a list of practice areas that it had created if the content is truthful and non-deceptive. *In re R.M.J.*, 455 U.S. 191 (1982).

[43] ABA Model Rules of Professional Conduct (2002), Rule 7.1(a).[Hereinafter ABA MRPC].

[44] *See Zimmerman v. Office of Grievance Committee*, 438 N.Y.S.2d 400 (N.Y.A.D. 4 Dept. 1981).

[45] ABA MRPC, Rule 7.1. (a).

[46] *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

[47] ABA MRPC, Rule 7.1(b).

[48] *Id.* at (c).

[49] *See Virginia State Bar Ethics Opinion* 1297 (1989).

[50] *See Spencer v. Honorable Justices of Super. Ct. of Pa.*, 579 F. Supp. 880 (E.D. Pa 1984).

[51] *See Bar Association of Nassau County Ethics Opinion* 93-183B (1993).

Following revision of the Model Rules in February 2002, the provisions prohibiting the creation of unjustified expectations and the unsubstantiated comparisons of one lawyer's services to another's have been significantly modified. It is no longer false or misleading for a lawyer to create expectations about the outcome of a case, unless the expectations would be considered unjustified by a reasonable person. These changes, if adopted by the states, will allow lawyers greater latitude in their client development material, while protecting those who may be misled.

Many states include additional provisions as aspects of prohibited false or misleading communications. For example, some states explicitly prohibit all testimonials, expressions of expertise or guaranteed results. [52]

### c) Advertising Limitations

Under the ABA Model Rules, lawyers are prohibited from giving anything of value for a recommendation of the lawyer's services, with certain exceptions. It is permissible for a lawyer to pay the reasonable costs of advertising and to pay the usual charges of a legal service organization and non-profit lawyer referral service. In addition, all communications should indicate the name of at least one lawyer who is responsible for the contents of the ad.[53] Some states have included many additional restraints to advertisements by, for example, forbidding the use of jingles,[54] or the use of dramatizations.[55]

Previously, lawyers were required to retain copies of their advertisements for two years after their last dissemination.[56] This rule, however, was deleted in February 2002, as it was regarded to be unreasonably burdensome on lawyers who rely on technology as an advertising vehicle.

### d) Solicitation

In the United States, state jurisdictions may ban some forms of solicitation, but not others. The ABA Model Rules prohibit in-person or live telephone contact solicitation of a prospective client, if the lawyer has no family or prior professional relationship and the motivation for the solicitation is the lawyer's pecuniary gain.[57] The purpose of the prohibition is to prevent "ambulance chasing," which projects lawyers as opportunists who profit from the misfortune of others. However, solicitation by direct mail is permissible, under certain circumstances. The dichotomy is justified because the direct mail solicitation gives the potential client the opportunity to ignore the lawyer's invitation.[58]

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[52] *See Marketing and Legal Ethics: The Boundaries of Promoting Legal Services* 24-31, (ABA Law Practice Management Section, 2000, 3rd Ed). [Hereinafter Marketing and Legal Ethics].

[53] ABA MRPC, Rule 7.2(c) and (d).

[54] *See* Rule 7.2(e), Alabama Rules of Professional Conduct.

[55] *See* Rule 196-5, Nevada Supreme Court Rules.

[56] ABA MRPC, Rule 7.2(b).

[57] *Id*., Rule 7.3(a).

[58] Under Model Rule 7.3(c) direct mail solicitations to potential clients known to be in need of legal services in a particular matter must be labeled as "Advertising Material" on the envelope and at the beginning and ending of any

There are of course circumstances in which no form of solicitation is permissible, *i.e.* when the potential clients make it known that he or she does not want to be solicited and when the solicitation involves coercion, duress or harassment.[59] Moreover, the February 2002 amendments have introduced the prohibition of in-person solicitation when this is done through real time Internet communications. This, again, is consistent with the objective of protecting the naïve potential client.[60] As with the other rules, the states vary substantially in their prohibitions and limitations on solicitations, particularly by direct mail.[61]

## 2. The Ethics of Lawyers' Advertising in Europe

Reflecting the controversial nature of lawyer advertising in Europe, the CCBE Code does not provide a 'harmonized' rule on advertising, but employs a 'conflict of law approach'. It specifies that a lawyer should not advertise where it is not permitted. It further states that the lawyer should only advertise to the extent and in the manner the lawyer is permitted by the rules to which he is subject.[62] The CCBE Code's provision on advertising covers publicity by firms of lawyers, as well as individual lawyers, as opposed to corporate publicity organized by bars and laws societies for their members as a whole.[63] After having been intact for more than a decade, and responding to the 2000 EU Directive on Electronic Commerce,[64] the personal publicity rules of the CCBE Code are presently under review.[65]

Historically the legal professions in Europe frowned upon or prohibited advertising by lawyers. However, the advent of the CCBE Code, along with a variety of EU directives and decisions affecting the legal profession,[66] led many EU Member States to review their rules of practice and the codes of conduct for their legal professions. As a result, many EU Member States have abandoned their traditional rules prohibiting lawyer advertising in favor of permitting some form of advertising by lawyers.[67] It is likely this trend will continue, especially in light of the E-commerce Directive and revisions likely to be proposed to the CCBE Code of Conduct.

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recorded message.

[59] ABA MRPC, Rule 7.3(b).

[60] The revised Rule 7.3 expands also the ability of lawyers to solicit business in-person from other lawyers.

[61] In addition to labeling, some states require that the letters be screened for compliance with the state rules. Marketing and Legal Ethics, *supra* note 52, at 194-195.

[62] CCBE Code, Article 2.6.

[63] Explanatory Memorandum and Commentary to the CCBE Code, 2.6.

[64] Directive 2000/31/EC of the European Parliament and of the European Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1. The E-commerce Directive makes commercial communications subject to certain transparency requirements to ensure consumer confidence and fair trading.

[65] Proposed revisions to the CCBE Code personal publicity provisions target electronic communications and take into consideration Article 8 of the Directive 2000/31/EC on e-commerce, which provides that the use of commercial communications supplied by a member of a regulated profession is authorized. *See* The CCBE revision of the CCBE Code of Conduct, in CCBE-INFO (March 2002/N. 1).

[66] These include the Lawyers' Services Directive, the Diploma Directive, the Freedom of Establishment Directive and decisions of the European Court of Justice.

[67] *See* Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-wide Rights of Practice,* 15 FORDHAM INTERNATIONAL LAW JOURNAL 556, 561; 630-31 n. 182 (1992).

Whereas the liberal model of advertising in the United States is still regarded with suspicion by some European countries, an increase in fair competition and greater public awareness as determined by a general relaxation of such rules is something to be welcomed rather than feared.

Not surprisingly, there are significantly different advertising rules among European countries. These differences are exacerbated by the fact that the functions typically associated with the practice of law are usually divided among different categories of legal professionals in a country, each governed by its own rules. As a general premise, European countries of common law tradition espouse more liberal publicity rules than the civil law ones.

While most of the legal professions in Europe recognize advertising as an appropriate means of providing the public with useful or necessary information about the availability of legal services, most face-to-face solicitation is still considered with a lot of skepticism and continues to be prohibited.

### a) France

Lawyer advertising in France was strictly prohibited until 1991, when it was authorized by a state decree.[68] *Avocats*[69] are now permitted to advertise in conformity with local bar regulations. They are allowed to advertise necessary information to the public, but such advertising must be truthful and should be undertaken with dignity and taste.[70] However, approaching a client by means of 'canvassing' or 'appeal' is prohibited and unless clients request it, lawyers may not approach clients to provide them with personalized services.[71]

Advertising is restricted to the use of brochures, announcements (*e.g.* opening of a secondary office, of an associate being appointed as a partner, etc…), phone books, promotional objects, sponsorship of legal events, involvement in education and seminars, and professional shows. This notwithstanding, in 1999, a French law firm was authorized by the Paris Bar Association to advertise in two daily national newspapers, *Le Monde* and *Les Echos*. The Paris Bar Association noted that such advertising may be authorized, provided it is undertaken with dignity and discretion, and provided that the medium used is adapted to disclose necessary information to the public.[72] In all cases, comparative statements and those relating to the identity of the clients are prohibited.[73]

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[68] Decree n. 91, 1197 of November 21, 1991, Article 161.

[69] The legal profession in France is divided into several branches, the largest of which is avocats, who advise on legal matters generally and represent clients in court. *Cross Border Practice Compendium, France* 9 (Dorothy M. Donald Little ed., Supp. 3 Oct. 1993).

[70] National Council of Bars' Code of Conduct (1999), Article 10.1

[71] *Id.*, Article 10.2.

[72] Facsimile from Marie Ravanel & Etienne Pax, Gide Nouel to L. Hill (Jan. 25, 2002), citing Conseil de l'Ordre des avocats de Paris, 5 janvier 1999 ~ Demandeur: Thieffry & Associes (Ste).

[73] National Council of Bars' Code of Conduct, Article 10.

### b) Italy

Lawyer advertising has always been highly controversial in Italy, where it is still regarded by some as a practice harmful to the dignity of the legal profession. This situation has been partly reversed by the recently adopted *Codice Deontologico Forense* (Ethical Code for Italian Lawyers). A lawyer is now permitted to 'honestly' and 'truthfully' inform the public about his professional activity, while at the same time respecting the dignity and decorum of the profession and the duties of secrecy and prudence.[74] Advertising is strictly limited to the use of brochures, letterhead, professional, telephone or other directories, and telematic networks (including those with international circulation). The indication of areas of practice is also permitted, as is that of other lawyers working in the same office.[75] Notwithstanding the recent relaxation on advertising by lawyers, solicitation is still strictly prohibited.[76] According to the rationale of this rule, while advertising is directed to the general public and its objective is to win customers indirectly, solicitation is still regarded as offensive to the dignity and decorum of the profession by its direct appeal to clients.

### c) Spain

In Spain, the traditional restrictions on lawyer advertising have substantially been relaxed.[77] Advertising has been recently allowed by the *Estatuto General de Abogacía Española* and the 2000 *Código Deontológico*. Most recently amended in 2001, the *Estatuto General de Abogacía Española* permits advertising that is "loyal", "truthful", and in respect of peoples' dignity.[78] Advertising is permitted in conformity with the norms contained in the *Código Deontológico* and in local bar regulations.[79] According to the *Código Deontológico*, advertising is prohibited when it involves the revealing of facts, data or circumstances protected by professional secret; it compromises the lawyer's independence; and promises results which do not depend exclusively on the lawyer's activity which is advertised. Further, it is prohibited for a lawyer to refer to her clients, the matters handled, and the result achieved. The use of any form of comparative publicity is also forbidden,[80] as well as the direct or indirect solicitation of victims of accident or their heirs or successors.[81]

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[74] Codice Deontologico Forense (Ethical Code for Italian Lawyers, 1999), Article 17.

[75] *Id.* at (1)-(3). Proposed amendments to the regulation on advertising are expected to be voted on by the *Consiglio Nazionale Forense* (National Council of the Bar) in June 2002.

[76] Ethical Code for Italian Lawyers (1999), Article 19.

[77] A 1997 regulation of the Consejo General de la Abogacía Española strictly limited publicity by lawyers and subjected it to regulation by the local bar councils. Ley de Colegias Profesionales (1997), cited in *The Role and Responsibilities of the Lawyer in a Society in Transition* 46, note 65 (Council of Europe, 1999).[Hereinafter *The Role and Responsibilities of the Lawyer*].

[78] Estatuto General de Abogacía Española (2001), Article 25 (1). (Unofficial translation).

[79] Código Deontológico(2000), Article 7 (1). (Unofficial translation).

[80] *Id.* (2) (a)-(d), (f).

[81] *Id*. (2) (e).

### d) Germany

Prior to 1987, lawyers were allowed to advertise in legal journals and local newspapers only in limited instances, such as the opening and change of an office, the admission to another court, and the admittance of a new partner. Although advertising has been highly controversial for years, a liberalization of the rules was inevitable once the courts allowed advertising as a means to convey objective information.[82] The rules on publicity and advertising have recently been broadened, and currently authorize publicity that objectively relates to the profession. Lawyers may indicate up to five areas of interest and/or activity, provided the lawyer has been active for at least two years in that area. While information on success and turnover figures is not permissible, references to assignments and client relationships are permitted upon request, and with the consent of the respective client.[83] Advertising in newspapers, as well as the use of informational letters and the brochures is now generally allowed.[84]

### e) Sweden

Swedish *advokats* are governed by the Code of Conduct for Lawyers, which permits "correct" advertising.[85] To this end, *advokat* advertising must be factual, and must not discredit the Swedish Bar Association.[86] Unlike the United States, where comparative advertising is permitted in certain instances, a Swedish *advokat* may not "give himself out to be better or cheaper than his colleagues." Moreover, he may not present himself to be a specialist in a certain area of law.[87]

### f) Norway

*Advokats* in Norway are permitted to advertise according to the Rules of Conduct for Advocates. The Rules provide advertising "should be factually correct" without thus being "misleading or deceiving".[88] It is allowed to indicate one or several branches of the advocate's practice, provided the advocate has special knowledge and experience in that particular field. Moreover, advertising must contribute to the dissemination of objective information in ways that will benefit the category of lawyers and the general public at large.

### g) United Kingdom

The United Kingdom is divided into the three separate jurisdictions of England and Wales, Scotland, and Northern Ireland. Each jurisdiction has a distinct legal system and legal profession, with England and Wales and Northern Ireland recognizing the branches of barrister and solicitor, and Scotland recognizing the branches of advocate and solicitor.

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[82] Hamacher (1996) 81.
[83] BORA, §§ 6-10.
[84] EGH Schleswig NJW 1993, 1340; EGH Hamm, BRAK-Mitt. 1993, 226.
[85] Code of Conduct for Lawyers (1984), Sec.5.
[86] Lennart Lindstrom et. al., *The Legal Profession in Sweden*, in THE LEGAL PROFESSIONS IN THE NEW EUROPE 311, 315 (Alan Tyrrell et al. eds., 1996). [Hereinafter LEGAL PROFESSIONS].
[87] *Id*.
[88] Rules of Conduct for Advocates (2002), Article 2.4.1.

### (1) England and Wales

The jurisdiction of England and Wales currently allows advertising by both solicitors and barristers, although the rules governing publicity differ for the two branches of the profession.

Advertising by barristers in England and Wales is addressed in the Code of Conduct of the Bar of England and Wales. Most recently amended in May 2001, it provides that barristers may engage in advertising or promotion of their practice so long as this is not inaccurate and likely to mislead, is not likely to diminish public confidence in the legal profession, and is not based on direct comparisons with or criticism of other barristers.[89] Permitted advertising includes the dissemination of information concerning both the barristers' rates and the nature of the legal services offered, as well as information about the cases handled by the barrister where such information is already available to the public, or the client consents.[90] Advertising by solicitors is addressed in the Solicitors' Publicity Code, most recently amended in November 2001. Solicitors publicity may not be misleading and any advertising regarding charges "must be clearly expressed"[91]. In addition, solicitors are prohibited from publicizing their practices by making "unsolicited visits or telephone calls" to members of the public.[92]

### (2) Scotland

The jurisdiction of Scotland[93] currently allows advertising by both solicitors and advocates.

Advertising by solicitors is allowed in broad terms, with the limitation that it be decent and not defamatory, illegal or misleading. Expressly prohibited, however, is the comparison of legal fees, as well as claiming superiority over the services offered by other solicitors.[94] While advocates in Scotland are not permitted to "tout for work" or do anything which might impair public trust in their profession, advertising, subject to regulation, is permitted."[95]

### (3) Northern Ireland

The laws of Northern Ireland, based on English common law and its legal system, are closely aligned with the legal system of England and Wales.

Solicitors in Northern Ireland are permitted to advertise, however, barristers are presently not. Solicitors may advertise their practice by using any medium (including the press and electronic media), where such advertising is not misleading and fees are neither publicized nor compared to those applied by other solicitors. Advertising by the solicitor may also identify a

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[89] Code of Conduct of the Bar of England and Wales (2001), Sec. 710.2.

[90] *Id.* at Sec. 710.1 (b)-(d).

[91] Solicitor's Publicity Code (2001), Sec. 1 (b).

[92] *Id.* at Sec 1 (d).

[93] The Scottish system is primarily based on Roman law rather than English common-law.

[94] Solicitors (Scotland)(Advertising and Promotion Practice Rules, 1995). Rules 4-9.

[95] In 1991 the Faculty of Advocates determined that advocates could advertise, but that any advertising must "be consistent with professional standards and be of good taste, and it should be approved by the Dean". Ronald Mackay, *Advocates in Scotland*, in LEGAL PROFESSIONS, supra note 86, at 360, 366-67.

client provided that client consents and such identification is not likely to prejudice the client's interest.[96] Although advertising by barristers is currently prohibited in absolute terms, there are draft regulations being circulated which would remove the ban on advertising.[97]

### h) Ireland

Solicitors in the Republic of Ireland may advertise, but barristers may not. Advertising by solicitors may not be in bad taste, false, misleading or contrary to public policy.[98] Solicitation of clients is prohibited.[99] In April 2002, a law[100] was passed that extends the restrictions on solicitors advertising, and prohibits publicity that "expressly or impliedly refers to claims or possible claims for damages for personal injuries."[101]

Barristers in Ireland are categorically precluded from soliciting for clients and from advertising.[102] While not permitted to communicate or broadcast any particulars of matters on which they have been, or are currently engaged as counsel, they are permitted to speak or publish in newspapers or magazines or broadcast on radio or television notwithstanding that in doing so they express opinions on legal matters.[103]

### i) Advertising in Select Central and East European Countries

Estonia, which is an Observer Member of the EU, adopted a Code of Conduct for the legal profession in 1999 which addresses advertising and personal publicity. This code provides that a "lawyer or the law office should not advertise or seek personal publicity for himself or his activities."[104] While sounding restrictive, this article is not as limited as it appears, since the definition of personal publicity is quite narrow. Personal publicity essentially encompasses delineations of expertise, experience or superiority of a lawyer as compared with other lawyers or law offices. Personal publicity does not include dissemination of information about the business name, field of activity, location and working hours of the law office, or the names, work experience and academic degrees of the lawyers therein employed.[105]

In Romania, lawyers are prohibited from using any means that are deemed to be incompatible with the dignity of the legal profession, including advertisement or publicity, in order to attract clients.[106] Individual lawyers and law firms are only allowed to communicate the

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[96] Solicitors (Advertising, Public Relations and Marketing) Practice Regulations (1997), Rules 4-5.

[97] Regulations of the Inn of Court of Northern Ireland, Reg. 28.01-29.01 (1990); draft Reg. 28.03 (2002). The draft regulations, which address a barrister's use of the Internet and its impact on touting, would also remove the ban on advertising.

[98] Solicitors (Advertising) Regulations 1996, Reg. 5 (ii) (vii) (ix).

[99] *Id.* at (viii).

[100] Solicitors (Amendments) Act 2002, Sec. 4-6.

[101] *Id.* at Sec. 4 (2) (h).

[102] Code of Conduct for the Bar of Ireland (1987), Rules 6.1-6.2.

[103] *Id*. at Rule 6.3, 6.5.

[104] Code of Conduct (1999), Article 6(1).

[105] *Id*. at Articles 6(2) and (3).

[106] Law on the Organization and Practice of the Profession of Lawyer (1995), Article 46. (Unofficial translation).

opening or change of an office, as well as the main areas of activity, in professional publications.[107] Further, in such cases, as when the form of legal practice is modified, lawyers may be allowed to two advertisements in the press.[108] Violations of such provisions represent a disciplinary offense.[109]

In Armenia, the Code of Advocate's Conduct allows advertising by lawyers that is truthful and not misleading.[110] Advertisements may be carried out by using a wide variety of public media, including newspapers, television and electronic communications.[111]

In Poland, advertising by lawyers is restricted to communicating the opening of an office, the change of address, and the name and area of the legal practice.[112]

In Slovakia, lawyer advertising is addressed in the 1999 Rules of Professional Conduct for Advocates. Advertising which is "unfair, non-factual, inappropriate or in bad taste" is prohibited, along with any forms of comparative publicity, and advertising which could discredit other advocates or the legal profession as a whole.[113] Advocates are prohibited from advertising in billboards, as well as television and radio.[114] They are only permitted to disseminate "brief and factual information" in the daily press concerning the opening of an office or the change of address.[115]

The Croatian Attorneys' Code of Ethics categorically bans all forms of solicitation and advertising. The code provides "it is against the dignity and the reputation of the legal profession to…attract clients by means of offers, intermediaries and advertisements…give blank letters of attorney or promotional material to third parties…[and] advertise legal services in foreign newspapers or by letters sent abroad."[116] It is further prohibited to "display the attorney's specialization in a conspicuous way…and appear in public, in mass media or elsewhere by stressing one's capacity as an attorney, in a way that can be understood…as advertising."[117] Attorneys are only permitted to publish in a newspaper a notice communicating the opening of an office or the change of address.[118]

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[107] Statute on the Profession of Lawyer (2001), Article 115 (3). (Unofficial translation)
[108] *Id.* at (4).
[109] *Id.* at (6).
[110] Code of Advocates' Conduct (1999), Article 2.2. (Unofficial translation).
[111] Law on Advertisement (1996). (Unofficial translation).
[112] Code of Advocates' Ethics (1998), Article 23 (5). (Unofficial translation).
[113] Rules of Professional Conduct for Advocates (1999), Article 43 (3) (a)-(c). (Unofficial translation).
[114] *Id.* at (d).
[115] *Id.*, Article 45.
[116] Attorneys' Code of Ethics (1999), Article 18. (Unofficial translation).
[117] *Id*.
[118] Attorneys' Code of Ethics (1999), Article 19.

## 3. Arguments For and Against Advertising: Striking a Balance

Since professional associations have regulated the conduct of lawyers, the advantages and disadvantages of lawyer advertising and solicitation have been the object of much controversy and frequent debate.

Today, the trend is to allow lawyers to advertise, subject to varying degrees of regulation. Most European civil law countries, traditionally reluctant to permit such practice, are also following this trend. For instance, advertising by lawyers has been recently permitted in Italy and France. In Europe in general, further liberalization of publicity about available legal services is expected in light of recent developments in the European Union and the increased availability of various modes of electronic communications.

Over the course of time, justifications for banning advertising, and conversely for allowing it, have been posited. A primary justification for continuing the historic ban on lawyer advertising is the alleged adverse effect advertising has on professionalism. Supporters of the ban claim advertising brings about commercialization that undermines a lawyer's sense of dignity and self-worth, and erodes the public's trust in the legal profession. Proponents of the ban claim advertising by lawyers is inherently misleading and has the undesirable effect of stirring up litigation.

The supporters of lawyer advertising claim that advertising represents an effort by lawyers to reach out and serve the community by providing the public with important information about the availability of legal services. Advertising provides the public with information about fees and services, reaching people who may not have contacts that would lead them to a competent attorney. Regulatory controls can check advertising that might be misleading, for lawyer advertising, in and of itself, is not inevitably so.

While advertising might increase the public's access to the courts, it helps people to redress legitimate wrongs by legal action. As noted by the Unites States Supreme Court in *Bates*, allowing restrained advertising is in accord with the Bar's obligation to "facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."[119]

Countries in the process of adopting or reviewing ethical and professional standards on lawyer advertising have different options, ranging from the restrictive standards existing in countries like Italy for instance, to the much more liberal ones existing in the United States. Nevertheless, what seems clear is that a total prohibition of lawyer advertising would be incompatible not only with access to justice principles, and with the concept of fair competition in a free market economy, but would also be incompatible with the right of freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights.[120]

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[119] *Bates v. State Bar Arizona*, 433 U.S. 350 (1977).

[120] *See e.g.*, Ethics of Lawyers, Conclusions (Council of Europe, November 1999), Theme n. 4.

## B. The Lawyer-Client Relationship

### 1. Formation of the Client-Lawyer Relationship

Lawyers generally owe no special duties to others until the lawyer-client relationship has been established. Lawyers' rules of conduct recognize that lawyers owe some duties to courts, third parties and the law generally. But the core fiduciary obligations, designed to foster trust and confidence in lawyers, are owed only to clients.

Generally, lawyer codes of conduct are built on the assumption that a client-lawyer relationship exists, but do not mention how this occurs.[121] For example, the ABA Model Rules require duties of competence, obedience, diligence, communication, confidentiality and loyalty to clients.[122] The CCBE Code requires similar duties to clients.[123] A client-lawyer relationship can be created either by private agreement between the parties or by court appointment.

#### a) Court Appointment

Courts in the United States have the inherent power to appoint counsel in criminal and civil matters in order to achieve justice in an individual case and to preserve the credibility of the courts as a legitimate arm of the justice system.[124] The Model Rules reflects this law, by obligating lawyers to serve when appointed by a court unless they can establish that representing the client would violate the lawyer's code.[125] The CCBE Code also requires lawyers "to comply with the rules of conduct applied before that court or tribunal."[126] In Italy, for instance, it is a violation of the disciplinary rules to refuse without justification to act as appointed counsel.[127] In the Czech Republic, a lawyer appointed by a judge in a civil or criminal case may not refuse to provide legal assistance.[128] In Lithuania, the Council of the Bar has the power to appoint lawyers to provide assistance to clients who cannot afford to hire a lawyer.[129]

#### b) Private Agreement

Beyond court appointments, general legal principles, primarily contract law, determine when a consensual client-lawyer relationship arises. Courts in the United States have found that a client-lawyer relationship exists if the client requests legal assistance or advice (offer), the lawyer provides the service or agrees to provide it (acceptance), and the client pays or agrees to pay for the legal assistance (consideration).When the lawyer's response to a request for assistance does not clearly indicate consent, a prospective client's reasonable reliance on the

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[121] The only exception is contained in Model Rule 1.18 concerning prospective clients.
[122] ABA MRPC, Rules 1.1-1.4, 1.6, and 1.7-1.13.
[123] *See* CCBE Code, General Principles and Relations with Clients.
[124] *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221 (D. Neb. 1995).
[125] ABA MRPC, Rule 6.2.
[126] CCBE Code, Article 4.1.
[127] Ethical Code for Italian Lawyers (1999), Article 11 (II).
[128] The Role and Responsibilities of the Lawyer, supra, note 77, at 180.
[129] *Id.* at 184.

lawyer's advice or assistance will suffice as an alternative means of making the promise enforceable (promissory estoppel).[130]

The same result has been reached applying tort principles. The lawyer who renders legal advice, or assistance, to a person under circumstances that make it reasonably foreseeable that harm will occur to a person if the service is rendered negligently, will be held accountable to that person.[131]

In civil law countries, similar principles apply. In France, for example, the precontractual duty of good faith, which is heightened for professionals, combined with serious and foreseeable reliance by a prospective client, can create enforceable duties.[132]

### c) Duties to Prospective Clients and to Third Parties

Although some courts in the United States continue to insist on privity of contract between client and lawyer, most courts today impose duties of care to clients, prospective clients, and to non-clients invited by clients to rely on, or benefit from, their work.[133] Three situations can create ambiguity for both lawyer and client.

First, prospective clients may meet with lawyers to determine whether the matter is worth pursuing and to determine whether the client wishes to engage that particular lawyer to handle the matter. For example, a prospective client who was told both that her case had no legal merit, and that the lawyer did not wish to handle the matter, relied on the lawyer's advice until after the applicable statute of limitations had expired. The client then was able to prove reasonable reliance on what proved to be negligent legal advice and recover the value of the lost cause of action against the lawyer.[134]

The second situation involves unrepresented parties to transactions who may request assistance from another party's lawyer. A client-lawyer relationship has been found to exist in situations where a lawyer for one party to a transaction voluntarily provides services to other parties who reasonable rely on the lawyer's assistance.[135] The same is true of intended beneficiaries of documents created by a lawyer for a client, such as a will or trust.[136]

Third, like other information providers, lawyers can be held liable to third parties for misrepresentation. In an early case, the New York Court of Appeals held an auditor responsible for a reckless or intentional misstatement of material fact to a third party who relied on it, but

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[130] RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, Sec.14 (2000). [Hereinafter RESTATEMENT].

[131] *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W. 2d 686 (Minn. 1980).

[132] Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 TULANE EUROPEAN & CIVIL LAW FORUM 97, 138-139(1997).

[133] RESTATEMENT, *supra* note 130, Sec. 51.

[134] *Togstad v. Vesely, Otto, Miller & Keefe*, supra; RESTATEMENT, *supra* note 130, Sec. 15.

[135] *E.g., Nelson v. Nationwide Mortgage Corp*., 659 F. Supp. 611 (D.D.C. 1987)[Lawyer volunteered to answer questions and explain document.]

[136] *Lucas v. Hamm*, 364 P. 2d 685 (Cal. 1961).

refused to extend the accounting firm's liability for mere negligence to those beyond privity of contract.[137]

The availability of professional liability insurance and the evolution of clearer standards of professional practice gradually eroded this rule, so that today, accountants and other professionals are liable to a larger circle of those who reasonably rely on their negligent opinions. Some jurisdictions have completely replaced the privity rule with one that depends solely on foreseeability; others have adopted the limited foreseeability rule of the Restatement of Torts, which restricts liability to "a limited group of persons for whose benefit and guidance" the professional intends to supply the information." [138]

## 2. Fiduciary Responsibilities to the Client during the Attorney-Client Relationship

### a) Competence and Diligence

The lawyer's competence and diligence are key factors of the lawyer-client relationship and central to the legal services provided. Clients seek special knowledge, skills and diligence from lawyers precisely because they are unable to navigate a complex legal system by themselves. In addition, the lawyer's competence and diligence are essential to fostering public confidence in the legal profession and the administration of justice, and in maintaining high standards of professionalism among lawyers.

Both U.S. and European lawyers' ethical standards recognize this obligation. Nevertheless, general incompetence and neglect of the client's interests still represent the sources of the majority of complaints against lawyers by their clients.

In the United States, the ABA Model Rules require competent and diligent legal representation. Competence implies "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[139] Diligence requires "promptness in representing a client,"[140] as well as commitment and dedication to the interests of the client, and zeal in advocacy upon the client's behalf.[141]

Likewise, the CCBE Code prohibits lawyers from undertaking a matter unless it can be handled "promptly."[142] It further provides that lawyers should not accept cases that they know, or ought to know, they are not competent to handle without co-operating with a lawyer who is

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[137] *Ultramares v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931).
[138] RESTATEMENT OF TORTS, Sec. 552.
[139] ABA MRPC, Rule 1.1.
[140] *Id.*, Rule 1.3.
[141] *Id.*, cmt 1.
[142] CCBE Code, Article 3.1.3.

competent.[143] Once a matter has been undertaken, lawyers must advise and represent clients "promptly, conscientiously and diligently."[144]

The Italian *Codice Deontologico Forense* (Ethical Code for Italian Lawyers) establishes a general duty for lawyers to carry out the profession with "proper care". It also sets forth a duty to represent the client competently, along with a duty to inform the client of any circumstances that may impair such competence, evaluating at the same time the potential for associating another lawyer in the representation.[145] A duty of diligence is also expressly envisaged for court appointed counsel.[146] The French Code provides that lawyers owe to their clients "a duty of competence as well as of dedication, diligence and care".[147] Similarly, the Spanish *Código Deontológico* provides that lawyers should always act with diligence and competence.[148] The Albanian Advocates' Code of Ethics requires lawyers to undertake representation with "competence", "adequate legal knowledge", and "capacity".[149]

Other codes seem to assume, but omit mention of a specific obligation of competence. The Belgium *Code Judiciaire*, for example, provides that lawyers are to "act with dignity, probity, and delicacy" [150], without expressly referring to the more specific duties of competence and diligence. The Croatian Attorneys' Code of Ethics establishes a general duty on lawyers to act with "timeliness, thoroughness and conscientiousness" in the exercise of their professional duties.[151] In Armenia, the provision of legal services by lawyers implies "legal knowledge, skills, thoroughness, and preparation".[152] Finally, in Poland, lawyers are to perform their duties with "knowledge", "honesty", and "diligence".[153]

## (1) Professional Liability and Indemnity Insurance

Even in countries that specify a duty of competence and diligence in their professional code, professional discipline rarely occurs, except in cases of repeated incompetence or neglect of client matters.[154] In most countries, the law of professional malpractice provides clients with a monetary remedy in the event they suffer harm from incompetent legal representation. In the United States, the Model Rules prohibit a lawyer from making any prospective agreement

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[143] *Id*.
[144] CCBE Code, Article 3.1.2.
[145] Ethical Code for Italian Lawyers, Articles 8 and 12.
[146] *Id.*, Article 38 (2).
[147] National Council of Bars' Code of Conduct (1999), Article 1.
[148] Código Deontológico (2000), Preamble and Article 13 (10), para. 13.
[149] Advocates' Code of Ethics (1996), Article 17. (Unofficial translation).
[150] Carl Bevernage, *Belgian and CCBE Perspectives on the Duty of Competence*, in Mary C. Daly & Roger J. Goebel, (Eds.), RIGHTS, LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE, 128 (Kluwer 1995). [Hereinafter Daly & Gobel].
[151] Attorneys' Code of Ethics (1999), Article 41.
[152] Code of Advocates' Conduct (1999), Article 1.2 (b).
[153] Code of Advocates' Ethics (1998), Article 8.
[154] *E.g.*, *Attorney Grievance Commission of Maryland v. Joel Chasnoff*, 783 A. 2d 224 (Md. 2001)[Lawyer indefinitely suspended from practice due to repeated lack of skill and diligence with three clients].

limiting liability to clients and require that lawyers who wish to settle client claims must advise them to seek independent counsel.[155]

In Europe, such agreements are left to the regulation of state.[156] In some countries, courts have immunized entire areas of practice from malpractice liability. In England, for example, barristers and solicitors may be held legally accountable for negligent advice outside of court, but are not answerable for conduct that occurs in court.[157] French lawyers, on the other hand, are liable according to statutory law for negligence.[158] German clients also are able to recover damages for breach of professional duties.

In the United States, the law of legal malpractice clarifies the contours of professional duty and offers clients a monetary remedy when breach of such a duty causes clients harm. The standard of care defines the necessary level of competence. Lawyers, like other professionals, are required to exercise the skill and knowledge normally possessed by members of their profession. This means that lawyers must carefully investigate facts, formulate a legal strategy, give clients reasonable advice, file appropriate papers and take any other actions necessary to properly handle the matter.[159] Lawyers whose act or omission causes harm will be liable in damages. Ordinary tort or contract rules for causation and damages apply, but some categories of cases have created special rules.[160] In criminal cases where clients allege that a lawyer's negligence caused incarceration, most courts require the client to prove causation by showing that the conviction has been overturned or that the client was in fact innocent. [161]

Liability insurance is available in the United States to indemnify lawyers from negligence in representing clients. Only one jurisdiction, Oregon, requires that its lawyers be insured. Several others require lawyers to inform clients if they lack insurance.[162] Jurisdictions also require malpractice insurance for lawyers who form professional corporations.[163]

In the context of liability insurance, the CCBE Code goes further. It obligates all lawyers to be insured against claims based on professional negligence, or to notify their clients if they are

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[155] ABA MRPC, Rule 1.8(h).

[156] CCBE Code, Article 2.8.

[157] Geoffrey C. Hazard & Angelo Dondi, LEGAL ETHICS: A COMPARATIVE STUDY, Section 3.4.1 (Mullino Press 2002. Forthcoming). [Hereinafter Hazard & Dondi.].

[158] Patrick Thieffry, *The French Perspective on the Duty of Competence*, in Daly & Goebel, *supra* note 150, at 112.

[159] *Ziegelheim v. Apollo*, 607 A. 2d 1298, 1304 (N.J. 1992).

[160] Most noteworthy are cases where a lawyer has missed a filing deadline, such as a statute of limitations, causing the client to lose the opportunity to be heard in the matter. Most American courts in these cases apply the "case within a case" rule regarding causation. This rule requires that the aggrieved client litigate the merits of the time barred case or appeal to prove actual causation and damages. Restatement, *supra* note 130, Sec. 53.

[161] *Id. But see*, *Krahn v. Kinney*, 538 N.E. 2d 1058 (Oh. 1989)[Lawyer who failed to communicate a plea bargain for a reduced sentence to a criminal defendant liable for harm cause by more lengthy imprisonment.]

[162] *E.g.*, Cal. Bus. & Prof. Code Section 6148 (a)(4)(2001); Rules of the Supreme Court of Virginia, Part 6, Section IV, ¶ 18 (2001).

[163] RESTATEMENT, *supra* note 130, Sec. 58, cmt c.

not able to obtain it.[164] In Europe, for instance, compulsory insurance covers the Paris Bar, and also is required for lawyers in Germany, the Netherlands, Poland, and Romania.

### b) Communications and Shared Decision-Making

Communication is essential to the overall client-lawyer relationship. It defines the initial terms of the relationship, and is required for its smooth operation. It is also essential to maintaining other fiduciary obligations, especially confidentiality and loyalty.[165] Lawyers who obtain informed consent from clients do not breach but rather comply with fiduciary duties, because they act in a manner that is consistent with the client's own definition of his best interests.

The requirement that a lawyer communicate with a client balances the lawyer's power in the relationship because it obligates the lawyer to consult with the client to determine the terms and objectives of the representation. In sum, communication between a lawyer and his client is essential to ensure that the latter is satisfied with the course of the representation. Thus, the presence of a general rule regarding an attorney's duty to respond to questions about the status of the case, and to keep the client informed seem necessary in all codes of conduct.

Ethical and professional codes in both the United States and in Europe recognize, though to different degrees, that lawyers have affirmative obligations to communicate with clients. Clients often complain about violations of these rules, although professional discipline usually results only after repeated violations.[166]

In the United States, the duty to communicate with clients is formulated very broadly as it is deemed to be fundamental in empowering the client to make informed decisions regarding strategies, objectives and other matters in the representation. The ABA Model Rules require lawyers to keep clients "reasonably informed about the status of the matter," "promptly comply with reasonable request for information," and impose a duty to explain the matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[167] Following revision of the Model Rules in February 2002, a lawyer is also required to "promptly inform" the client of all matters and decisions requiring his or her informed consent, to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and to consult with the client about any relevant limitation on the lawyer's conduct when the client expects assistance contrary to the Model Rules or other law.[168]

The ABA Model Rules further require a lawyer to "abide by the client's decision concerning the objectives of the representation," specifically whether or not to accept an offer of settlement

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[164] CCBE Code, Articles 3.9.1 and 3.9.2.4.

[165] Geoffrey C. Hazard, Jr. & W. William Hodes, THE LAW OF LAWYERING, Section 7.2 (3d Ed. 2001).

[166] *See In the Matter of Bradly W. Johnson*, 32 P. 3d 1132 (Kan. 2001)[Lawyer indefinitely suspended for a lack of diligence and failing to communicate with clients].

[167] ABA MRPC, Rule 1.4.

[168] *Id*.

in a matter, and in a criminal case, what plea to enter, whether to waive a jury trial, and whether the client will testify.[169]

The CCBE Code similarly requires personal responsibility of the lawyer "for the discharge of the instructions given to him," and mandates that the lawyer keep the client informed as to the progress of the representation.[170] The Code also requires that a lawyer "not handle a case for a party except on his instructions."[171] Finally, the Code requires a lawyer to act in the best interest of his clients and to accord those interests absolute priority.[172]

In Italy, the Ethical Code for Italian Lawyers provides for a more limited duty of the lawyer to inform his client on the progress of the representation whenever he thinks this opportune, or whenever requested to do so.[173] In Germany, lawyers have a duty to inform their clients on the developments of the matter, and to answer their questions promptly.[174] In Poland, both advocates and legal advisors are under a general duty to keep the client informed on the developments of the case.[175] In Armenia, the Law on Advocacy provides that a lawyer cannot take a position on the matter without her client's consent.[176] Similarly, the Advocates' Code of Conduct states that the lawyer should follow the decisions made by the client and act in his interest.[177] In Albania, lawyers shall abide by the client's instructions regarding the objectives of the representation, and consult him on ways to pursue them.[178] Moreover, they have a duty to keep their clients informed about developments in the representation, and must explain the case in order to allow them to make informed decisions about the representation.[179] Finally, in Croatia an advocate must communicate to her client all important facts and written documents, and respond to the latter's questions "within a reasonable time".[180]

In civil law systems advocates are generally responsible for strategy and tactics in matters before a court. The client must sign a formal document or "disposal" of the case to settle it. However, the client retains all authority in transactional matters.[181]

In common law systems, the client must be consulted both in litigation and transactional matters. In the United States, the law of legal malpractice recognizes a remedy for breaches of

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[169] ABA MRPC, Rule 1.2.
[170] CCBE Code, Article 3.1.2.
[171] *Id.*, Article 3.1.1.
[172] *Id.*, Article 2.7.
[173] Ethical Code for Italian Lawyers, Article 40.
[174] BORA, § 11.
[175] Code of Advocates' Legal Ethic, § 49 (1998); Ethical Principles of Legal Advisors (1999), Article 29 (1). (Unofficial translation).
[176] Law on Advocacy, Article 19 (3).
[177] Code of Advocates' Conduct (1999), Article 1.2.
[178] Advocates' Code of Ethics (1996), Article 18.
[179] Advocates' Code of Ethics (1996), Article 19.
[180] Rules of Professional Conduct for Advocates (1999), Article 9.
[181] Hazard & Dondi, *supra* note 157, Sec. 4.2.

the duties of communication and obedience to client instructions.[182] Lawyers who draft documents for clients must explain their contents. Lawyers also must disclose lawful alternatives to clients, so that clients can decide which course to pursue. Failure to provide competent advice or to follow client instructions may result in liability.[183]

### c) Confidentiality

#### (1) Introduction

A lawyer's duty of confidentiality owed to clients is the hallmark of the client-lawyer relationship, and is endorsed in the ethical standards regulating the legal profession both in the United States and in European countries.

Although the duty of confidentiality has ancient origins, the modern rationale for this duty primarily rests upon the belief that by guaranteeing clients confidentiality lawyers represent them more effectively. Confidentiality encourages clients and lawyers to discuss matters fully and honestly. Clients may therefore provide their lawyers with all information related to their legal problems. Full communication permits the lawyer to determine what is and is not important, and it enables the lawyer to represent the client better. The duty of confidentiality also enables the client to share the information with his or her lawyer without fear that the lawyer will reveal this to others without his prior permission. Such duty generally survives the lawyer-client relationship, and the death of the client.

Ethical standards in both the United States and Europe converge in considering the lawyers' duty of confidentiality as a necessary corollary to the trust which characterizes the lawyer-client relationship. Both Europe and the U.S. consider confidentiality to be a crucial component of the work of the lawyer. In European civil law countries such duty is generally not only regarded as serving the best interest of the client, but also the public interest. By contrast, in common law countries, the duty of confidentiality is primarily considered to be a right of the client, who can release the lawyer from it.

#### (2) Confidentiality of Communications between the Lawyer and the Client

In the United States, every state jurisdiction has adopted ethics rule defining the lawyer's duty of confidentiality owed to a client. State rules generally prohibit lawyers from disclosing or using to their clients' disadvantage most of the information they receive from clients or other sources about their clients.

ABA Model Rule 1.6, as amended in February 2002 provides, subject to exceptions, "A lawyer shall not reveal information relating to the representation of a client unless the client

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[182] *Olfe v. Gordon*, 286 N.W. 2d 173 (Wis. 1980).

[183] *Ziegelheim v. Apollo*, 607 A. 2d 1298 (N.J. 1992) [Lawyer who negligently provided advice about client's realistic expectations in a divorce settlement].

gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation."[184]

In the European context, the CCBE Code identifies the receipt of confidential information by the lawyer as "the essence of a lawyer's function", and provides that confidentiality is a "primary and fundamental right and duty of the lawyer."[185] Unlike the ABA Model Rules, which contain several exceptions to the principle of confidentiality, this provision is absolute where it states that a "lawyer shall respect the confidentiality of all information that becomes known to him in the course of his professional activity".[186]

The key duty of confidentiality is also present in the ethical codes regulating lawyers' conduct in most European countries. In England, for example, confidentiality is defined by The Guide to the Professional Conduct of Solicitors as the duty to keep confidential the affairs of clients, and to ensure that other staff do the same.[187] The Code of Conduct for the Bar of England imposes the observance of a similar duty on a barrister. This may not, without the prior client's consent or as permitted by law, reveal confidential information, or use such information to the client's detriment or to his own or other client's advantage.[188]

In Italy, the Ethical Code for Italian Lawyers recognizes a "fundamental duty" and a "right" of the lawyer to preserve confidences and secrets with regard to a current client, former clients, and persons seeking advice from him, even if the lawyer does not agree to represent them.[189] Similarly, in Germany the secrecy of confidential information pertaining to clients has been qualified both as a duty and a right of the lawyer. This extends to everything the advocate becomes knowledgeable of in the exercise of his profession and continues after the end of the mandate.[190]

In France, professional secrecy is protected by the Penal Code. It is a crime to reveal professional confidences.[191] The lawyer, like other professionals, is therefore bound to keep secret everything he knows in the exercise of his profession. The duty is absolute. Neither the client, nor the judge or other authority, may release the lawyer from such duty. The French Code reiterates these principles, by providing that the lawyer's duty to respect confidentiality is "general, absolute and unlimited in time".[192] The French rule of professional secrecy, conceived

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[184] ABA MRPC, Rule 1.6 (a).

[185] CCBE Code, Article 2.3.1.

[186] *Id.*, Article 2.3.2. In 1998, the CCBE adopted as an annex to the CCBE Code of Conduct a "Policy Statement Concerning Professional Secrecy of Lawyers and Legislation on Money Laundering". The current revision of the CCBE Code intends to incorporate this annex directly into the Code itself.

[187] The Guide to the Professional Conduct of Solicitors (1990), Rule 16.01.

[188] Code of Conduct of the Bar of England, § 702.

[189] Ethical Code for Italian Lawyers (1999), Article 9 (1) and (2).

[190] Order of the Profession (1996), Article 2.

[191] "Disclosure of an information which is by nature secret by someone with whom it has been entrusted because of his status or because of his profession or because of his temporary mission or duty is punished by a one-year jail-term and a fine of fourteen thousand euros". French Penal Code, Article 266.13.

[192] National Council of Bars' Code of Conduct (1999), Article 2.1. Confidentiality extends to both advice and litigation, including: advice to clients and correspondence with clients and between lawyers, any documents in a

to protect both the client and the lawyer from state interference, has been traditionally regarded as embodying an obligation *d'ordre public*.[193] This transcends the interest of the parties involved and therefore may not be waived. Although the client may not waive secrecy, nothing prevents him from disclosing information.[194]

In Croatia, attorneys are under a duty to preserve the confidentiality of any information received from the client, or otherwise, while providing legal assistance, and must "determine alone what the client wants to be preserved as the attorney's secret".[195] Attorneys shall exercise "reasonable care" to ensure the respect of the confidentiality by persons working in the same law office, and the violation of such secret may be ground for the termination of employment. An attorney must preserve the attorney's secret under the threat of disciplinary accountability while rendering legal assistance and afterwards, as long as its disclosure is likely to be detrimental to the client.[196] In Albania, the duty of professional confidentiality shall not be restricted in time, and attorneys shall take all appropriate measures to avoid publicity of the confidential information.[197] In Macedonia, professional secrecy covers confidential information where disclosure may be harmful to the client. The breach of professional secret by the lawyer may subject him to criminal and disciplinary responsibility.[198]

Finally, in Poland, lawyers are under an absolute duty to keep confidential all information received by the client, and to ensure that other legal staff do the same.[199] Negotiations involving either advocates or legal advisors outside the court-room have also a confidential nature.[200]

### (3) The Attorney-Client Privilege

In the United States, the lawyer's duty of confidentiality is based in part on the law of evidence. In addition to ethics rules guaranteeing confidentiality, every state recognizes attorney-client privilege through its evidence rules, state laws, or judicial decisions. Attorney-client privilege prohibits a party to litigation from asking either another party or the party's lawyer what they have discussed for the purpose of seeking legal advice. Therefore, attorney-client privilege does not protect information outside of the judicial process, nor does it protect information a lawyer receives from sources other than the client. Additionally, in most states attorney-client privilege does not protect information a lawyer receives from a client if another person who does not work for the lawyer is present. As a result, in the U.S., attorney-client privilege is much more limited than the lawyer's duty of confidentiality.

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file, any communications received by the lawyers in the exercise of their profession, and the identity of clients. *See Id.,* Article 2.2.

[193] *Id*.

[194] John Leubsdorf, *The Independence of the Bar in France; Learning from Comparative Legal Ethics* 285-86, in John J. Barcelo' III & Roger C. Crampton, LAWYERS' PRACTICE AND IDEALS: A COMPARATIVE VIEW (Kluwer Law International, 1999).

[195] Attorneys' Code of Ethics (1999), Article 26.

[196] *Id.*, Articles 27, 30 and 33.

[197] Advocates' Code of Ethics (1996), Article 13.

[198] Code of Ethics of Lawyers, Associates, and Lawyers' Apprentices (1993), Article 19. (Unofficial translation).

[199] Law on Advocacy (1982), Article 6 (3), and (4).

[200] Code of Advocates' Ethics (1998), Article 33.

Attorney-client privilege does not apply when a person who is not a lawyer's client talks with the lawyer. Nor does this privilege apply if a client consults with a lawyer for the purpose of accomplishing a crime or fraud.[201] Every state recognizes an exception to the attorney-client privilege for future crimes, but a client's discussions with his or her lawyer concerning past crimes are protected.

In addition to protecting certain information through the attorney-client privilege rules and ethics rules concerning confidentiality, there may also be other rules protecting some client's information. For example, in the U.S. federal courts and most state courts there is a procedural rule that protects "attorney work product" from discovery. The work product rule protects documents and tangible items prepared in anticipation of litigation.[202] Information covered by the work product rule may also be protected by the ethics rule and by the evidentiary rule dealing with attorney-client privilege. Although there is much overlap in the various rules protecting client information, state ethics rules dealing with client confidentiality almost always protect a wider range of information.

## (4) Exceptions to the Duty of Confidentiality

### (i) In the United States

In the United States, the duty of confidentiality is not absolute. In some instances, clients provide their lawyers with information that they want disclosed to others. For example, a client hiring a lawyer to negotiate a contract will often disclose information to the lawyer that the client expects will be used for the client's benefit during the negotiation. Moreover, although the confidentiality rules are primarily designed for the protection of the client and to encourage honest communications between client and lawyer, there are a number of situations when the duty of confidentiality conflicts with other societal interests or legal duties.

In addition to permitting disclosures authorized by the client or impliedly authorized for purposes of client representation, the ABA Model Rules, as amended in February 2002, provide a lawyer may reveal information she "reasonably believes necessary" in four circumstances:

1. to prevent reasonably certain death or substantial bodily harm;

2. to secure legal advice about the lawyer's compliance with these Rules;

3. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to

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[201] The attorney-client privilege does not apply to a communication occurring when a client:
(a)consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
(b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud. *See* Restatement, Section 82.

[202] *See, e.g.*, Federal Rules of Civil Procedure, Rule 26.

respond to allegations in any proceeding concerning the lawyer's representation of the client; or

4. to comply with other law or a court order.[203]

The Model Rules exceptions to the duty of confidentiality are not mandatory but rather are permissive. In each instance, the lawyer must decide whether or not to reveal the information. If a lawyer believes a client has threatened to seriously injure or kill another, the lawyer may reveal the threat, but is not required to do so. Eleven jurisdictions, however, make the duty to reveal for such serious physical crimes mandatory rather than discretionary.[204]

A generally recognized exception to confidentiality in American jurisdictions is when necessary to defend the lawyer in a regular controversy with a client or with a third party, or to establish the lawyer's civil claim. Also recognized is an obligation to comply with a law or court order, so long as the material in question is not protected by the attorney-client privilege or work-product protection.

The exception for securing legal advice with respect to compliance with the Rules was added following revision of the confidentiality provision in February 2002. Following rejection of Ethics 2000's proposals to include financial injury among the permissive exceptions to Model Rule 1.6, the ABA left in place the Comment that permit "noisy withdrawal". According to the latter, if a lawyer must withdraw because otherwise the lawyer's services will be used in materially furthering a course of criminal or fraudulent conduct, the lawyer may withdraw or disaffirm opinions, documents, or other such materials the lawyer may have submitted on behalf of the client.[205] Despite the ABA rejection of a disclosure option within the ethical rules for financial injury, many United States jurisdictions include such provisions in their ethical codes. Thirty-seven states provide that a lawyer may reveal a client's intention to commit a criminal fraud likely to result in injury to the financial interest or property of another party, and four require this result. Nine states allow revelation of a client's intention to commit a non-criminal fraud likely to result in injury to the financial interest or property of another party, and two require disclosure in this circumstance.[206]

### (ii) In Europe

Similar to professional standards in the United States, ethical and professional codes in Europe often provide, in addition to the disclosure necessary to carry out the representation, some exceptions to the general duty of confidentiality.

In England, for example, confidentiality may be breached on grounds of public interest, when the client is seeking help in the commission of a crime, when the solicitor has been

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[203] ABA MRPC, Rule 1.6 (b).

[204] Thomas D. Morgan & Ronald D. Rotunda, Appendix A 134-44, in 2002 SELECTED STANDARDS OF PROFESSIONAL RESPONSIBILITY (Foundation Press, 2002). [Hereinafter Morgan & Rotunda, Appendix A].

[205] ABA MRPC, Rule 1.6, cmt. 14.

[206] Morgan & Rotunda, Appendix A, *supra* note 204, at 134-44.

unknowingly used by the client in the commission of a crime or fraudulent act, and when disclosure is necessary for the solicitor to establish a defense to a criminal charge.[207]

In Scotland, the duty of confidentiality is directly related to the client's right to legal professional privilege. The major exception to the privilege rule is the so-called "fraud exception." There is no privilege, nor confidentiality, where the client is seeking legal advice on furthering some illegal act, and the lawyer is directly involved in that act. The lawyer's good faith is irrelevant and does not render the communication privileged.

In Italy, exceptions to the confidentiality rule are broadly formulated, permitting a lawyer to disclose facts generally covered by such duty in cases where this is 'necessary' to prevent the client from committing any 'particularly serious crime', to provide exculpatory facts in a controversy between the lawyer and his client, or in the context of proceedings concerning the way in which the client's interests have been represented.[208] In all such cases, disclosure must be limited to the facts 'strictly necessary' in view of the purpose.[209] In contrast to the United States, and similar to what is provided by ethical rules in Germany, France (where the duty of professional secrecy is absolute), and Poland, the Ethical Code for Italian Lawyers does not include disclosure upon the client's consent among the permissible exceptions.

In Armenia, disclosure of confidential information is permitted in a number of circumstance. These include disclosure upon the client's consent, when there is a risk that illegal activities result in the death of a person, substantial bodily harm and substantial injury to the property, and disclosure deemed necessary for the protection of the lawyer in case of controversy with the client.[210]

In Croatia, disclosure of confidential information is permitted upon the client's consent, where necessary for the defense of the attorney, or in order to justify the attorney's withdrawal.[211] Similarly, in Albania disclosure may be authorized by the client, or where necessary to prove the innocence of the lawyer in relation to the client's unlawful conduct.[212] In Macedonia, disclosure may be permitted upon authorization by the client, in the interest of the defense, and in cases in which this has been authorized by the Bar.[213]

### (5) Confidentiality of Communications between Lawyers in Europe

In contrast to the United States, where the lawyer's duty of confidentiality prevents disclosure of information relating to the client to other persons, the ethical and professional

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[207] Andrew Boon and Jennifer Levin, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES 256-58 (1999).
[208] Ethical Code for Italian Lawyers (1999), Article 9 (V).
[209] *Id*.
[210] *See* Code of Advocates' Conduct (1999), Article 1.2 (d); Law on Advocacy (1999), Article 8.
[211] Attorneys' Code of Ethics (1999), Article 34.
[212] Advocates' Code of Ethics (1996), Article 32.
[213] Code of Ethics for Lawyers, Associates and Lawyers' Apprentices (1993), Article 20. (Unofficial translation).

codes of most European countries extend such duty to cover communications between lawyers, preventing disclosure even to the client.

The European rule extending confidentiality to lawyers' communications is in stark contrast with the U.S. view that the right to information, and the related decision-making power, are primarily vested with the client. The prevalent European approach reflects a different cultural conception of the role of the lawyer, where the latter is perceived as being independent and autonomous also *vis-à-vis* his clients, and not only from external influences.

In France, *professional secrecy* encompasses not only written or verbal exchanges between the lawyer and her client, but also those between lawyers. Exceptions to this rule include correspondence between lawyers having as its sole purpose the replacement of formal steps in legal proceedings, as well as agreements and correspondence between lawyers marked as 'official.'[214] In their relation with lawyers from other member states of the European Union, French lawyers are bound to respect the provisions of the CCBE Code. In their relations with lawyers from a non-EU country, French lawyers must ensure that rules securing confidentiality of the correspondence exist in the latter before exchanging information. Where that is not the case, they will either have to make an agreement with those lawyers to ensure confidentiality, or ask their client whether they accept the risk of a non-confidential exchange of information.[215] As in France, the Ethical Code for Italian Lawyers prevents the lawyer from disclosing to his clients confidential correspondence between himself and another lawyer.[216] A variation of the same rule also exists in Greece, Portugal, Spain, Belgium and Luxemburg. In Denmark, oral communications between lawyers with a view to settlement are usually kept confidential.[217]

Because of the different approaches possible in this context, the CCBE Code does not consider correspondence between lawyers practicing in different countries (and therefore subject to different ethical rules) confidential, unless this is clearly expressed by the sender.[218]

### d) Conflict of Interest

#### (1) Core Values Underlying Conflict of Interest Rules

The concept of loyalty to the client, together with the duties of confidentiality and zealousness, pervade every set of ethics rules governing lawyer behavior and are essential elements of the lawyer-client relationship in all legal systems. Such duties require a lawyer to avoid divided loyalties that may lead to harming a client.

Conflict of interest rules are based on the ancient maxim that a lawyer, or law firm, may not serve two masters. A lawyer laboring under a conflict of interest may not give the client effective representation, and may be less likely to be able to keep client confidences. Conflict of interest restrictions, therefore, limit lawyers in areas where divided obligations or the influences of their

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[214] National Council of Bars' Code of Conduct (1999), Article 3.2.
[215] *Id.*, Article 3.3 and 3.4.
[216] Ethical Code for Italian Lawyers, Article 28 (III).
[217] *See* Explanatory Memorandum and Commentary to the CCBE Code, Article 5.3.
[218] CCBE Code, Article 5.3.

own self-interest threaten confidentiality or loyalty to the client. By protecting these values, conflict of interest rules also help to reinforce clients' trust and confidence in their lawyers. Moreover, they enhance the effectiveness of legal representation by insuring the independence of the lawyer's professional judgment and that the lawyer will represent a client with "appropriate vigor."[219]

Conflicts may involve different subjects, and may arise in different stages of the lawyer-client relationship, but more frequently arise in litigation, where they can occur in representing opposing parties or co-parties. In choosing clients, careful practitioners must therefore learn to anticipate potential conflicts before they occur. To avoid ethical problems, every time a lawyer undertakes a new representation, the lawyer must ask whether in any way loyalty to the client may be impaired.

There are two different approaches that can be taken in formulating conflict of interest rules in ethical and professional codes. The first is the U.S. approach, followed mostly by European common law but also by a few European civil law countries, of leaving the decision on whether to waive the conflict to the client, recognizing his autonomy in matters concerning the representation. The second is the approach taken by the majority of European civil law countries of prohibiting the lawyer's representation when a conflict arises, without involving the client in such decision. The different approaches to conflicts reflect a different conceptualization of the independence and role of the lawyer in the two systems, and a European legal culture that is seemingly less 'client-centered' than in the United States.

### (2) The Rationale of the U.S. Rules on Conflicts of Interest

Conflicts of interest rules in the United States are based, in part, on the law of agency. As an agent of the client, the lawyer owes duties of confidentiality and loyalty to the client, the principal. Conflict of interest rules reduce the risk that lawyers will use confidential information to the detriment of the client or for the benefit of another person or the lawyer. Such conflicts may also arise with regard to non-lawyer personnel within a law firm.[220]

The cornerstone principle regulating conflicts in the United States is that loyalty to a client prohibits undertaking representation directly adverse to that client without his consent.[221] The Model Rules focus on the "actual" impact of conflicts and potential conflicts on the lawyer's representation of his client, and, in most cases, leave the decision on whether to waive the

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[219] "A client is entitled to be represented by a lawyer whom the client can trust. Instilling such confidence is an obligation important in itself." *See* Restatement , *supra* note 130, Sec. 121, cmt. b.

[220] In addressing the issue of whether a law firm must be disqualified where a paralegal, who worked on a case with a prior firm, joined the firm representing the opposing party, the ABA Ethics Committee stressed that the firm has an obligation to protect information that the paralegal may possess by using appropriate screening. Disqualification of the firm, however, is not required. *See* ABA Standing Committee on Ethics and Professional Responsibility Informal Op. 88-1526 (Imputed Disqualification Arising from Change in Employment by Nonlawyer Employee) (1988), Formal and Informal Ethics Opinions 1983-1998 585 (ABA 2000). A comment to Model Rule 1.10 also recognizes screening of nonlawyer support staff such as paralegals or legal secretaries. ABA MRPC, Rule 1.10, cmt. 4.

[221] ABA MRPC, Rule 1.7.

conflict to the client. These rules favor a "functional," pragmatic approach, focusing on preserving confidentiality and avoiding positions which are de facto adverse to the client.[222]

In the United States, challenges to a lawyer's acceptance or continuation of employment based on conflicts of interest may arise in various forums, including disciplinary proceedings, lawyer disqualification motions, malpractice cases, and in appeal of criminal convictions alleging ineffective assistance of counsel. Courts interpreting the conflict of interest rules have attempted to balance the lawyer's duty of loyalty to the client, the economic interests of the lawyer, and the public's interest in the availability of legal services.

### (i) Sources of Conflicts

Conflicts of interest are usually conceptualized into four categories: 1) between lawyer and client; 2) among current clients; 3) between a current client and a former client; and 4) due to a lawyer's obligation to a third person.

The Model Rules describe many situations in which a conflict actually exists or may possibly arise. However, as a general rule, a conflict exists if there is a "substantial risk that the lawyer's representation of the client would be materially and adversely affected the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."[223]

### (a) Conflicts of Interest Between Lawyer and Client

The Model Rules address issues regarding the lawyer's own interests. The underlying premise behind these rules is that there is an inherent danger in the lawyer becoming personally involved with the affairs of clients, self-dealing with clients, and "taking a piece of the action."

There are three common areas of conflicts between a lawyer and a client.

The first is when a lawyer enters into a business or financial transaction with a client and either the arrangement is not fair, reasonable to the client and concluded in writing, or the lawyer has not given the client the opportunity to seek the advice of independent counsel.[224] Even if none of these impermissible conditions are present, most states require a client to consent in writing before a business transaction with a lawyer is ethically permissible.

The second common conflict of interest between lawyer and client is when a lawyer prepares an instrument, such as a will, in which a client who is not related to the lawyer gives a gift to the lawyer or a close family member of the lawyer.[225] This type of gift from a client is prohibited because the lawyer drafting the instrument is in a position to exert undue influence

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[222] Prior to the adoption of the ABA Model Rules in 1983, many of the decisions regarding conflict of interest relied upon the notion of avoiding "even the appearance of professional impropriety". Robert H. Aronson & Donald T. Weckstein, PROFESSIONAL RESPONSIBILITY 226-27 (West Publishing Co. 1991). [Hereinafter Aronson & Weckstein].

[223] RESTATEMENT, *supra* note 130, Sec. 121.

[224] ABA MRPC, Rule 1.8 (a).

[225] *Id*, (c); RESTATEMENT, *supra* note 130, Sec. 127.

over the client. In addition, in any contest over the instrument, the lawyer's own interest may affect the lawyer's ability to testify credibly about the client's state of mind in executing the instrument.

The third category of conflict between lawyer and client is represented by any other situation in which the lawyer's personal interests may affect the representation of a client.[226] This broad category includes situations in which the lawyer may have financial interests adverse to the client's representation, or when the lawyer's representation of the client may be influenced by the lawyer's relationship with an opposing lawyer or party. For example, this may be the case where related lawyers (parent, child, sibling or spouse) represent adverse interests of more clients.[227] This category also includes situations in which the lawyer gains an interest in the litigation by securing a lien on the client's property.[228]

The question of the ethical propriety of a lawyer engaging in a sexual relationship with a current client has been the object of frequent debate. This type of conduct may indeed create a conflict because it might undermine the client's faith in the lawyer's service and interfere with the lawyer's independent professional judgment.[229] Following revision of the Model Rules in February 2002, a lawyer is prohibited from engaging in sexual relations with a client "unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."[230] Prior to revision of the Model Rules in 2002, some states had also adopted explicit ethical rules governing lawyers' sexual relations.[231]

### (b) Conflicts of Interest Among Current Clients

Conflicts of interest among current clients cover every situation in which a lawyer advancing the interests of one client may materially and adversely affect the interests of another client.[232] This encompasses conflicts such as representing two or more parties in civil litigation, representing co-defendants in criminal cases, two or more parties to the same business

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[226] RESTATEMENT, *supra* note 130, Sec. 125.

[227] ABA MRPC, Rule 1.7, cmt. 11.

[228] A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client. However, a lawyer is permitted to acquire a lien granted by law to secure a lawyer's fee or expenses. *See* Model Rule 1.8 (i). Thus, whether or not a lawyer is permitted to take a lien in a client's property is very fact specific. If the property is the subject of the litigation, then the lawyer is usually prohibited from taking lien or securing an interest is the property. *See, e.g.*, In re Rivera-Arvelo, 830 F.Supp. 665 (D.P.R. 1993) (disbarring lawyer indefinitely for acquiring property interest in the subject matter of client's lawsuit); ABA Comm. on Ethics and Prof'l Respon., Informal Op. 1397 (1997) (prohibiting lawyer from representing client in dispute over real property where lawyer had acquired an interest in the property).

[229] ABA Formal Opinion 92-364 (Sexual Relations with Clients, 1992), Formal and Informal Ethics Opinions 1983-1998 97.

[230] ABA MRPC, Rule 1.8 (j).

[231] *See, e.g., New York Code of Professional Responsibility* DR5-111 (2001) (prohibiting a lawyer from: requiring or demanding sexual relations with a client as a condition of professional representation; employing "coercion, intimidation, or undue influence in entering into sexual relations with a client"; or prohibiting, while representing a client in a domestic relations matter, to enter into sexual relations with the client").

[232] *See*, RESTATEMENT, *supra* note 130, Sections 128-31.

agreement, and any other situations in which the representation of one client will be "directly adverse to another client."[233]

A significant issue that arises with joint representation is its affect on confidentiality. A lawyer representing more than one client may have a fiduciary duty to share any information relating to the representation obtained from one client with other jointly represented clients as part of the lawyer's duties of diligence and communication. This may well include information adverse to a co-client. Thus, the existence of information that one co-client does not want to share may well be a signal to the lawyer that not all clients can be adequately represented, and may be a strong indicator that withdrawal is advisable or necessary.

As with other potential conflict situations, ethical rules in the United States may permit representation of multiple clients in a single matter. Nevertheless, if the representation of a client will be directly adverse to another client and each client has not consented, then the lawyer may not represent both parties[234] or, if the representation has started, the lawyer should withdraw and cannot continue to represent any of the parties in the cause.[235]

### (c) Conflicts of Interest Between a Current Client and a Former Client

The ABA Model Rules also govern serial, successive, or consecutive representation of clients with conflicting interests.

Conflicts of interest between a current client and a former client arise whenever a lawyer represents a client in a "matter" that is "the same or substantially related" to the lawyer's representation of a former client, and the current client's and former client's interests are "materially adverse."[236] Preserving client confidentiality is the primary reason for this rule. With narrow exceptions, a lawyer may not use information relating to a former representation to the disadvantage of the former client or reveal information relating to the representation with respect to a client.[237]

In examining whether or not the current and former representations are substantially related, one looks to see if there are common issues and the extent of the lawyer's involvement in the matter.[238] Where a court finds a substantial relationship, it will presume that the lawyer has

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[233] ABA MRPC, Rule 1.7 (a) (1).

[234] *Id*., cmt. 2.

[235] *Id*., cmt. 4.

[236] ABA MRPC, Rule 1.9 (a).

[237] For example, if a lawyer prepared a contract for the sale of goods on behalf of Client A, and subsequently the lawyer moved to a new firm, the lawyer would be prohibited from challenging the contract on behalf of a new client unless Client A consented after consultation.

[238] The "substantial relationship" analysis focuses on three elements: the nature and scope of the prior representation; the nature of the present lawsuit by the former client; and whether in the course of the prior representation, the client may have disclosed to his or her lawyer confidences which could be relevant to the present action and which could be detrimental to the former client in the current action. *See* generally Koch v. Koch Industries, 798 F. Supp. 1525 (D. Kan. 1992).

access to confidential information that would be helpful in the current litigation. Most courts hold this presumption to be irrebuttable and require disqualification. If no substantial relationship is found, the party seeking disqualification still may be permitted to demonstrate that there is a substantial risk that confidential information may be used improperly.

### (d) Conflicts Due to a Lawyer's Obligation to a Third Person

A lawyer's obligations to a third person who is not a client may also be the source of a conflict of interest.[239] This type of conflict usually arises when a lawyer is paid or directed by someone other than the client,[240] or when the lawyer has a fiduciary or other legal obligation to a nonclient.[241] In both of these instances, the lawyer's independent judgment on behalf of the client may be threatened.

### (e) Government Attorneys and Judicial Officers

Prior to 1975, ethics rules in the United States prohibited a firm to which a lawyer had moved from representing a client if that would create a conflict of interest with one of the migrating lawyer's former clients. This policy, too, was based on client confidentiality. In 1975, an exception to this principle was carved out for former government lawyers moving into a private firm if the firm created an "ethical wall" around the former government lawyer.[242] The principal rationale behind the exception was to protect the former client (the government) in its interest in being able to attract the brightest recent law graduates. The cost to the government in terms of potential loss of confidentiality was to be offset by the benefit of better legal counsel. In 1983, the ABA Model Rules endorsed this policy. [243]

### (f) Imputed Disqualification

According to the ABA Model Rules, if a lawyer has a primary disqualification in taking a representation, that disqualification is imputed to the lawyer's entire firm. Thus, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by specific conflict rules.[244]

Some jurisdictions allow so-called "ethical walls" to circumvent the rules on imputed disqualification.[245] This 'strategy' attempts to circumvent the presumption that a lawyer shares

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[239] RESTATEMENT, *supra* note 130, Sections 134, 135.

[240] ABA MRPC, Rule 1.8 (f).

[241] *See, e.g., The Florida Bar v. Vannier*, 498 So.2d 896 (Fla. 1986) (stating that lawyer improperly represented a client in dispute against church for which lawyer concurrently acted as undercover agent).

[242] ABA Formal Opinion 342 (1975), Formal and Informal Ethics Opinions: Formal Opinions 316-348, Informal Opinions 1285-1495 110 (ABA 1985).

[243] ABA MRPC, Rules 1.11 and 1.12.

[244] *Id.*, Rule 1.10. Under such rule imputed disqualification is limited to the conflict of interest situations contemplated by Rules 1.7 or 1.9. *See Id.*, Rule 1.10 (a).

[245] *See, e.g., Carbo Ceramics, Inc. v. Norton-Alcoa Propellants*, 155 F.R.D. 158 (N.D. Tex. 1994) (taking immediate screening action vis-a-vis lawyer employed by firm for only two months will rebut presumption of

client's confidences with the other lawyers in a firm. It is permitted when there is no apparent risk that confidential information of the former client will be used with material adverse effect on the former client, and the personally-prohibited lawyer is subject to screening measures adequate to eliminate involvement in the representation. In addition, timely and adequate notice of the screening must be provided to all affected clients.[246]

## (g) In-House Counsel

Special issues arise in the context of in-house lawyers or law firms that serve as counsel to corporations. In such context, the lawyer's duties to preserve confidential information and to exercise independent professional judgment run to the entity, and not to other constituents within the organization. Constituent members of a corporation may in fact have interests that diverge from those of the entity itself. Pursuant to the ABA Model Rules, the corporate lawyer must make clear to those with whom he is dealing that the corporation is the client, and that information provided by those individuals is privileged outside the corporation but not as to the corporation itself.[247]

Normally, a lawyer who obtains information from, and advises, a corporate constituent will not be disqualified from representing the corporation if a conflict between the organization and the constituent arises. Where, however, the lawyer has failed to make his or her role clear, it is possible that the lawyer may be disqualified from representing the corporation in a matter adverse to that constituent in the future. A corporate lawyer may, subject to the internal policies of the corporation, concurrently represent both the corporation and one or more of its existing or former constituents.[248] In order to do so, the lawyer must insure that the general conflict provision is followed scrupulously. The lawyer must therefore reasonably believe that he can represent both parties adequately, and must obtain the consent of the organization. [249]

## (ii) Client Consent to a Conflict of Interest

In the United States, a lawyer may usually represent a client if there is a conflict of interest provided each affected client or former client gives informed consent to the lawyer's representation.[250] Informed consent implies 'full disclosure' by the lawyer, who should explain the conflict in detail so that the client understands the risks of the conflict and the potential benefit of having conflict-free legal representation.[251] Before seeking consent, though, the lawyer must determine whether the conflict is waivable. Some situations are in fact recognized as being so fraught with danger as to preclude any valid consent or waiver. For example, representation that involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal is non waivable under the

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shared confidences).

[246] RESTATEMENT, *supra* note 130, Sec. 123.

[247] ABA MRPC, Rules 1.13 (d) and 4.3.

[248] *Id.*, Rule 1.13 (e).

[249] *Id.*, Rule 1.7.

[250] RESTATEMENT, *supra* note 130, Sec. 122.

[251] ABA MRPC, Rule 1.7, cmt. 18. Following revisions of the Model Rules in February 2002, "each affected client gives informed consent, confirmed in writing". *Id.*, Rule 1.7 (b) (4).

conflict rules.[252] Generally, a client should not be asked to consent if the lawyer believes he will not be able "to provide competent and diligent representation to each affected client."[253] Moreover, even if there is informed consent, a lawyer is prohibited from proceeding with the representation if it is not "reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients."[254] Informed consent is not sufficient if there is a legal prohibition against the representation or when one client is or will be asserting a claim against another client in the same litigation.[255]

In some cases, a client may be asked to waive an unknown conflict that may arise prospectively, even though the nature of the conflicting interest and the identity of the other party may be unknown. Such provisions, commonly appearing in the retainer agreements of large firms, are not *per se* unethical, but often their validity cannot be determined until the conflict actually arises. In such cases, the waiver is valid only if the conflict that later arises was clearly within the contemplation of the parties at the time the waiver was executed.

## (3) Conflict of Interest in European Countries

The CCBE Code of Conduct warns lawyers to avoid conflicts between their personal interests and their clients', and to avoid representing clients with conflicting interests.[256] Lawyers must cease to act whenever such conflict arises, and whenever there is a risk of a breach of confidence. Like the ABA Model Rules, the CCBE provisions also contain a 'former clients' conflict section, and address imputed disqualification.[257] However, unlike ethical-professional rules in the United States, the CCBE Code does not contain a provision for client consent to, or waiver of, conflicts.[258] The remarkable difference existing between the two approaches on such a key issue should be considered in light of a different conceptualization of the lawyer's independence and, therefore, of the lawyer-client relationship.

Whereas in the United States a lawyer is seen "primarily as an agent of the client…whose duties flow from the client," the CCBE Code suggests a perspective in which lawyers are considered as being totally independent, and thus have rights and duties which do not necessarily derive from their clients.[259] This different approach is often present, with variations, in the professional and ethical standards of both CCBE's member states and other European countries.

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[252] *Id.*, Rule 1.7 (b) (3).

[253] *Id*., Rule 1.7 (b) (1).

[254] RESTATEMENT, *supra* note 130, Sec. 122.

[255] *Id*.

[256] CCBE Code, Articles 2.1.1. and 3.2.1. *See also* Theme No. 1, in Ethics of Lawyers, Conclusions, (Council of Europe, November 1999), providing that "lawyers should scrupulously avoid conflicts of interest that might jeopardize their independence or the confidentiality of the case".

[257] *Id.* Article 3.2.3.

[258] The only exception to this rule is where it may be appropriate for the lawyer to act as a mediator for the parties and with the parties' consent. *See Id*., Commentary to Article 3.

[259] Laurel S. Terry, *An Introduction To The European Community's Legal Ethics Code Part I: An Analysis Of The CCBE Code Of Conduct*, 7 GEORGETOWN JOURNAL OF LEGAL ETHICS 1 (Summer 1993).

In Italy, the approach taken by the existing ethical rules to the issue of conflict of interest contrasts with that taken in the United States. In cases of potential conflict, the client cannot waive the conflict. According to the Ethical Code for Italian Lawyers, lawyers should desist from accepting new employment that may create a conflict with the interest of a client. Such conflict arises where there is a risk that the duty of confidentiality owed to another client may be breached, where information about the existing client's business provides an unfair advantage to the new client, or if the representation of the existing client limits the lawyer's independence in carrying out the new representation.[260] Moreover, a lawyer that assisted a married couple in a family controversy may not represent either party in a subsequent controversy between them.[261]

In France, unlike in Italy, a distinction exists between actual and potential conflicts, the latter being waivable by the client. Thus a lawyer may not advise, represent or act on behalf of two or more parties in the same matter if there is an actual conflict between their interests, or without the agreement of the parties, if there is a serious risk of such a conflict arising. When a change in the initial situation presents any such risk, the lawyer must advise the client to choose another lawyer.[262]

In Germany, conflicts of interest (referred to as 'party treason') represent a criminal offense.[263] A lawyer may not be engaged in the same case in which she has already given advice to, or legally represented the other party. Partners in any kind of professional collaboration are included.[264]

In Scotland, the rule states that solicitors shall not act where there is a conflict of interest.[265] In contrast with the United States, the client may not waive a conflict of interest by authorizing the lawyer to carry on acting. To do so could in fact amount to professional misconduct and the client's authorization would offer no protection. If there is no conflict of interest at the outset, but one later arises, then again the solicitor is required to cease acting for at least one of the parties.[266]

Some of the central and east European countries that recently adopted rules on conflicts seem to have taken the more pragmatic approach typical of the United States. In Armenia, for example, a lawyer may not act in situations conflicting with the client's interest unless the latter

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[260] Ethical Code for Italian Lawyers (1999), Article 37 (I).

[261] *Id.* at (II).

[262] Law Decree (27 November 1991), Article 155. There is a 'serious risk of conflict' when a foreseeable change in the situation gives the lawyer reason to believe that one of the above conflicts may materialize. Similarly to the hypothesis of 'imputed conflict' addressed by the ABA Model Rules, the French rules apply to the group as a whole and to everyone of its members.

[263] *See* StGB, § 356.

[264] *See* BORA Article 3; BRAO Article 43 (a).

[265] Solicitors (Scotland) Practice Rules (1986), s. 3.

[266] Interestingly, the House of Lords has ruled that there is no such thing as a successive conflict of interest because there is only one client, *i.e.* the current client. The only duty the solicitor owes to the previous client is to keep all information confidential. In the case of lawyers moving to a new firm, the use of Chinese Walls is permitted where effective and part of the structure of the new firm. *See Prince Jefri Bolkiah v. KPMG* (1999) 1 ALL ENGLAND REPORTS 517.

provides consent. Similar to the ABA Model Rules, the Armenian law mentions conflicts *vis-a-vis* former clients, between current clients, and those arising from a previous position of the lawyer on the same matter (*e.g.* if the lawyer acted as a judge, prosecutor or investigator in the same case).[267] In all such instances, the representation must be suspended unless the client consents to its continuation.

In Poland, while conflicts involving advocates can never be waived by clients, this is permissible practice in the case of legal advisors in limited cases, such as when they act as counselors for more clients.[268] In Albania, conflicts between a former and current client can be waived by the former client.[269]

In the majority of European countries, the power to resolve alleged conflicts of interest generally rests with the president of the local bar whose decision is accepted almost always as final and without further review.

### (4) Incompatible Activities

In most European countries, lawyers' ethical and professional norms establish incompatibilities between the profession of lawyer and other professions. The purpose of such rules is to protect the lawyer from any external undue influence that may impair his independence. Some activities are therefore regarded as being objectively, inherently at odds with the legal profession. This view has been endorsed by the CCBE Code which provides that a lawyer be excluded from some occupations in order to perform his functions with the "due independence and in a manner which is consistent with his duty to participate in the administration of justice."[270] In Europe, occupations deemed incompatible with the exercise of the profession of lawyer are decided on a jurisdiction-by-jurisdiction basis.

In Italy, the rules on incompatible activities established by statute are particularly strict. Activities incompatible with the profession of lawyer include the professions of notary public, journalist, stockbroker, priest, bank manager or other kinds of manager, as well as the activity of intermediary. Lawyers are also prohibited from engaging in any business activity, whether under the lawyer's own name or any other, since this would be contrary to the spirit of the profession. Finally, lawyers are forbidden from being subjected to any relation of employment, either as civil servants or in the private industry, since the inherent subordination that comes with being employed does not permit the carrying out of services in an autonomous and independent way. However, being a professor at a university or other state school is permitted, as well as being a lawyer in the legal offices of a public body.[271] The Ethical Code for Italian Lawyers requires a lawyer to avoid any situations of incompatibility which may prevent him from maintaining membership in the Bar, and to request an opinion from the bar council in cases of potential

[267] Law on Advocacy (1999), Article 19 (3).
[268] Ethical Principles of Legal Advisers (1999), Article 14 (1) and (2).
[269] Advocates' Code of Ethics (1996), Article 24.
[270] CCBE Code, Article 2.5.
[271] Ordinamento della Professione di Avvocato (R.d.l. 27 Nov. 1933, n. 1578), Article 3.

incompatibility.[272] Although nothing is expressly stated about an *avvocato* being on a company's board of directors or a managing director, local bar associations have in many cases forbidden the undertaking of managerial positions allowing, instead, the formal representation as the president of a company. It is a disciplinary violation to seek Bar's enrollment while a situation of incompatibility exists without revealing that incompatibility, even if the situation of incompatibility is later eliminated.[273]

In Spain, *abogados* must refrain from carrying out any activities incompatible with the practice of law that could create a conflict of interest.[274] The profession of *abogado* is "absolutely incompatible" with any form of public employment by the state and by any other public administration where the latter's regulations so require. Further, the profession of *abogado* is incompatible with the professions of *procurador*,[275] *graduado social*,[276] business agent, administrative agent or any other profession which so determine in its own regulations. Under no circumstances may an *abogado* carry out activities related to the auditing of accounts.[277] In case of incompatibility, she shall communicate the same to the *Junta de Gobierno* of the competent *Colegio* and cease immediately the exercise of such activity. The *abogado* who does not communicate in writing such incompatibility within thirty days will automatically be removed from the roll.[278] Further, a*bogados* may not appear before jurisdictional bodies in which the spouse, the permanent partner, or their relatives within the second degree work.[279]

In Germany, a lawyer is not allowed to take a case if she has previously acted in the same matter as an advocate, judge, public prosecutor or civil servant. She may not act as an administrator in bankruptcy proceedings or in estate matters if she has dealt with the matter before as an advocate and vice versa. Further, company lawyers may not represent their clients before the courts.[280]

The ethical and professional codes of central and east European countries contain provisions on incompatibilities similar to the ones mentioned above. In Albania, for example, activities incompatible with the profession of advocate include the professions of notary, any commercial activity exercised by the advocate on her or others' behalf, activities involving the representation of any religious cults, as well as all forms of employment by the state.[281] In Romania, the rules on incompatible activities established by law are formulated in broad terms. The practice of law is incompatible with all salaried activities (besides employment by a law firm), and commercial activities, as well as occupations which would impair the dignity and independence of the

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[272] Ethical Code for Italian Lawyers (1999), Article 16.

[273] *Id*.

[274] Estatuto General de la Abogacía Easpañola (2001), Article 22 (1)

[275] *Procuradores* in Spain represent the parties in court through a power of attorney. They also receive and deliver documents to and from the court. *See* A Guide to the Spanish Legal System (January 15, 2002), available at <http://www.llrx.com/features/spain.htm>; *see also* Articles 436 et seg. Ley Orgànica del Poder Judicial (6/1985).

[276] A *graduado social* is a legal professional who provides legal advise on social security and labor law.

[277] *Id.*, Articles 22 (2) (a) and (b); (3).

[278] *Id*., Article 23 (1).

[279] *Id.*, Article 24 (1).

[280] BRAO, §§ 45 and 46.

[281] Advocates Code of Ethics (1996), Article 13.

lawyer.[282] The profession of lawyers is compatible with public offices, activities of legal research, as well as activities as arbitrator, mediator or conciliator.[283]

Another striking difference between the United States and European countries involves the professional status of in-house corporate counsel. In the United States, a lawyer may be a salaried employee of an organization and provide legal services to it. This is not the case for many European countries, however, where such practice is considered to represent an insurmountable barrier to the exercise of the lawyer's independent professional judgment. In such cases, lawyers are either suspended for the duration of the employment, or asked to resign from the Bar altogether. Again, there are many variations in the approach taken to this issue among European states. While in Spain in-house counsels have full lawyer status, in the United Kingdom and Ireland they may not represent third parties in court. In Germany, lawyers may not represent the same company in court.[284] Finally, in France and Belgium, these legal professionals have no right to appear in court and may not call themselves lawyers but only 'company jurists'.

### e) Safekeeping of Client's Funds and Property

Lawyers have a duty to keep safe funds and property received from and on behalf of clients.[285] A lawyer is ethically responsible for keeping accurate records and provide a proper accounting to his client even if no harm, mismanagement, or wrongdoing would result from a failure to do so.

The failure to maintain client property properly and to return it to its rightful owners, *i.e.* the clients, may result in lawyer discipline or even the loss of license. Common problems include commingling of the lawyer's and the client's funds, negative individual client trust balances, failure to account to clients, and incomplete recordkeeping.

#### (1) Funds

The failure to promptly and properly account for, or to promptly remit client funds constitutes misconduct even in the absence of harm to the client.[286] The single most important duty in handling trust property, for instance, is the duty to refrain from using that property for any purpose other than as directed by the client or a third person. Courts define any unauthorized use of trust funds that deprives the client or third person of the use of those funds, even temporarily, as conversion. Unauthorized use of funds is considered conversion even if the lawyer has no dishonest motive and no client's interest ultimately is harmed.[287]

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[282] Law on the Organization and Practice of the Profession of Lawyer (1995), Article 14.

[283] *Id.*, Article 15.

[284] BRAO, Articles 45 and 46.

[285] *See generally*, RESTATEMENT, *supra* note 130, Topic 4 (Property and Documents of Clients and Others).

[286] *Florida Bar v. Neely*, 488 So.2d 535 (Fla.1986) (lawyer received a 60-day suspension, and a two-year probation during which his records would be subject to random audit, for mismanaging his client trust accounts, even though his conduct did not result in any harm to his clients).

[287] *See e.g.*, *In re Clayter*, 78 Ill.2d 276, 283, 399 N.E.2d 1318 (1980). In *Clayter*, a lawyer was found guilty of commingling and converting a client's earnest money, even though there was no evidence of a dishonest motive.

A court may order a lawyer to deposit property in court, or in an interest-bearing account, or require a lawyer to surrender an object to another party or allow its inspection, regardless of the wishes of the lawyer's client.[288] A lawyer may also be required to return promptly to its owner property that a client has stolen and placed in the lawyer's possession.[289]

The ABA Model Rules require a lawyer to take specific actions when receiving property that the client owns or in which the client claims an interest. Such property must be kept strictly separate from the lawyer's own property, and funds shall be kept in a separate account. All client funds must be held in a separate trust account or safety deposit box clearly identified as such. In addition, the lawyer must keep complete records of such account funds and other property for a period of five years after termination of the representation.[290] In the United States, most courts consider trust account rule violations sufficiently egregious to justify license revocation absent compelling mitigating circumstances. Also, a lawyer must notify the client or third party promptly when the lawyer obtains a client's trust funds or property, and must promptly deliver to the client or to the third party funds or property to which they are entitled along with a final accounting.[291]

Commingling of the lawyer's funds with those of the client is prohibited. Thus, only funds sufficient to avoid the closing of the account may be deposited to the trust account. Importantly, this also means that when the lawyer has a claim against the funds being held in trust, those funds must be withdrawn promptly.[292] A failure by the lawyer to withdraw her own portion of the funds from the trust account (as in a personal injury settlement) will constitute a commingling violation.

In the United States, lawyers holding funds on behalf of a client are usually required to place the funds either in an account that pays interest to the client, or in an "Interest on Lawyers' Trust Accounts" (IOLTA).[293] The ABA has promulgated model rules to promote the establishment, maintenance, and improvement of lawyers' funds for client protection. The purpose of these rules is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers occurring in the course of a lawyer-client or fiduciary relationship between the lawyer and the claimant.[294]

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[288] RESTATEMENT, *supra* note 130, Sec. 45 cmt. e.

[289] *Id*.

[290] ABA MRPC, Rule 1.15.

[291] *Id.* at (d).

[292] ABA MRPC, Rule 1.15. *See generally*, Use of Commingled Funds and Subsection (c): Property Claimed by Both Lawyer and Another Person, in Annotated Model Rules of Professional Responsibility Rule 1.15, 234-36, 240-41 (1999).

[293] IOLTAs are interest-bearing accounts for client deposits that are nominal in amount or expected to be short-term, where the interest that might be earned for the client would be less than the cost of establishing and maintaining an account for the benefit of the client. Although each IOLTA deposit earns a very small amount of interest, the pooled IOLTA accounts accumulate enough interest to make a substantial contribution to improving the administration of justice and to providing civil legal services to individuals who cannot afford to hire a lawyer.

[294] ABA Model Rules for Lawyers' Funds for Client Protection Rule 1 (1989).

The CCBE Code provides that the clients' funds in possession of the lawyer be kept in the account of a bank or similar institution, that the lawyer make accurate records available to the client on request, and that all funds be paid to the client immediately or upon such conditions as he may authorize.[295]

In Italy, a lawyer must administer "punctually and diligently" any money received by her client or third parties, and shall account for such sums "promptly." It is a disciplinary violation to keep any sums received on behalf of the client longer than strictly necessary. In case of fiduciary deposits, the lawyer shall request written instructions and adhere to them.[296] A lawyer is entitled to retain sums of money that he received from his client or from third parties to compensate him for his expenses, provided he gives notice to the client. A lawyer may also retain such sums to pay his own fees if his client consents, or if such sums have been awarded to him by a court's judgment. In cases of objections, a lawyer must put such sums immediately at his client's disposal.[297]

In Spain, lawyers have a duty to deposit the funds and property received by the client or on her behalf in the account of a bank or similar institution. Such funds must be kept separate from those of the lawyer or the law firm. Moreover, the lawyer may not use them to undertake any kind of payment, including compensating him for legal fees, unless expressly authorized by the client.[298]

In Norway, advocates must keep clients' funds separate from their own and other funds which do not belong to the clients. Such funds comprise all money entrusted to the advocate, including advance payments for expenses and fees, and securities of any kind.[299]

In Croatia, attorneys are under a general prohibition to commingle a client's money with their funds.[300] Further, they are prevented from using such money for purposes other than the designated one, and to retain it for the advanced payment of legal services to be provided.[301]

In Slovakia, advocates must keep complete and accurate records of all the funds received, and should use values and other property entrusted to them only for the designated purpose.[302] Finally, in Albania funds received from the client must be kept in a "special account," separated from the lawyer's funds, and must be returned to the former immediately upon request.[303] All

[295] CCBE Code, Article 3.8.
[296] Ethical Code for Italian Layers (1999), Article 41.
[297] *Id.*, Article 44.
[298] Código Deontológico (2000), Article 20 (1) and (2).
[299] Regulations for Advocates (2001), § 3-5.
[300] Attorneys' Code of Ethics (1999), Article 133.
[301] *Id.*, Article 135.
[302] Rules of Professional Conduct (1999), Article 13 (1) and (3).
[303] Advocates' Code of Ethics (1996), Article 38.

related records and documents should be kept by the lawyer for seven years following termination of the representation.[304]

#### (2) Records and Files

A client should be entitled to inspect and copy at reasonable times documents in the lawyer's possession relating to the representation, unless substantial grounds to deny the request exist. According to the Model Rules, a lawyer must preserve records for a suggested period of five years (or such period as established by rule in the lawyer's jurisdiction) after termination of the representation.[305] Before client files may be destroyed, the client should be notified. In addition, any method of storage or disposal of such files should take into consideration the confidentiality to which the lawyer is bound. A lawyer, therefore, does not have a general duty to preserve all of his files permanently. But clients and former clients can 'reasonably expect' from their lawyers that 'valuable and useful information' in the lawyers' files, otherwise not readily available to the former, will not be destroyed prematurely to the client's detriment.[306]

An opinion issued by the ABA Committee on Ethics and Professional Responsibility has indicated that, in the event of the lawyer's death, 'reasonable efforts' must be made by the lawyer who assumes responsibility for the affairs of the deceased to contact and notify all the latter's clients of his death, and to request instructions regarding the disposal of their files and properties.[307]

The duty to safeguard client's property also includes preventing inadvertent disclosure of privileged or confidential material. In most jurisdictions, inadvertent disclosure of confidential documents constitutes a waiver of the attorney-client privilege. Such a waiver occurs when a privileged communication is disclosed to a third party, even through inadvertent disclosure. Lawyers are under the duty to safeguard property, including property inadvertently received. Thus, a lawyer who receives documents known to be property of another must notify the sender and return them if so requested.[308]

### 3. Lawyer Fees

#### a) Introduction

The attorney fee greatly affects both the attorney-client relationship and the system of justice. While on the one hand adequate compensation is a crucial element in supporting the lawyer's professional role, the availability of legal services to those in needs is inextricably linked to their cost. The way in which different legal systems regulate the attorney fees thus provides insight into values that underlie the system of justice.

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[304] *Id.*, Article 37.

[305] ABA MRPC, Rule 1.15 (a).

[306] ABA Informal Opinion 1384 (Disposition of a Lawyer's Closed or Dormant Files Relating to Representation of, or Services to, Clients (March 14, 1977), Formal and Informal Ethics Opinions: Formal Opinions 316-348, Informal Opinions 1285-1495, 270 (ABA 1986).

[307] ABA Formal Opinion 92-369 (Disposition of deceased Sole Practitioners' Client Files and Property), (December 7, 1992), Formal and Informal Ethics Opinions 1983-1998, 155.

[308] *See* ABA Formal Opinion 92-368 (November 10, 1992).

All types of fee agreements imply a conflict between the lawyer and the client. While a fixed fee may encourage access to legal services due to its predictability, it allocates all risk of loss to the client and none to the attorney. Hourly fee agreements are generally regarded as fair. Nevertheless, while the attorney has both a financial and a reputational incentive to invest time and energy on the case, the risk of losing the case is completely allocated to the client. Finally, in contingency fee cases the entire risk of loss is allocated to the attorney, with an obvious increase in access to the justice system.[309] Nevertheless, this type of fee is highly criticized for encouraging speculative litigation, and negatively affecting the public perception of fairness in the justice system.

There are fundamental differences in the way attorney's fees are regulated in the United States and in Europe, and, in the latter case, between civil law and common-law countries. First, the United States government and bar associations do not generally set mandatory or recommended fee schedules for legal services, as is frequently the case in European civil law systems. Second, whereas the use of the contingent fee is very popular in the United States, the potential for its abuse by unethical lawyers makes it highly controversial in Europe, where, in its original form, it is still widely rejected.

## b) Lawyer Fees in the United States

### (1) Determination of Legal Fees

#### (i) Client-Lawyer Contracts

States jurisdictions in the United States regulate attorney fees and permit a broad range of choice in fee arrangements. Common methods include hourly billing, fixed fees, and contingent fees.[310]

Legal fees are most commonly determined by contract between client and lawyer. The ABA Model Rules do not require that fee agreements be in writing,[311] although there are several states that do so.[312] The Model Rules do require, however, that contingent fee contracts be in writing.[313] Additionally, they require the lawyer to communicate the basis or rate of the fee, "preferably in writing, before or within a reasonable time after commencing the representation."[314]

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[309] Under a contingency fee, the attorney is not entitled to payment unless the client wins or settles the case, and the amount of the fee depends on the amount of damages awarded or settled upon.

[310] Recently, lawyers and clients have experimented with various alternative billing methods, including unit billing, blended hourly rates, modified contingent fees, and reverse contingent fees (for defendants).

[311] ABA MRPC, Rule 1.5(b).

[312] *See e.g.*, Connecticut Rules of Professional Conduct, Rule 1.5(b); D.C. Rules of Professional Conduct, Rule 1.5(b); New Jersey Rules of Professional Conduct, Rule 1.5(b); Cal. Bus. & Prof. Code § 6148(a). All but one of the states (California) provide that the writing requirement applies only when the lawyer has not regularly represented the client.

[313] ABA MRPC, Rule 1.5(c).

[314] *Id.* at (b).

Lawyers should not charge fees that are larger than reasonable[315]. Lawyers who charge excessive fees may be subject to discipline, or a court may refuse to enforce the fee agreement.[316] The Model Rules identify the following factors to be considered in determining the reasonableness of a fee:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. the fee customarily charged in the locality for similar legal services;

4. the amount involved and the results obtained;

5. the time limitations imposed by the client or by the circumstances;

6. the nature and length of the professional relationship with the client;

7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. whether the fee is fixed or contingent.[317]

Aside from the reasonableness of the fee, the fee must not be unlawful. Contingent fees are subject to greater regulation than other types of fee agreements, and their use is prohibited in specific instances. The Model Rules also provide that a lawyer may not acquire a proprietary interest in the subject matter of litigation,[318] make or guarantee a loan to a client in connection with litigation,[319] or make an agreement giving the lawyer media rights in information relating to the representation.[320]

Article 3.4 of the CCBE Code addresses the issues of the regulation of fees. Among other things, it requires that a fee be fully disclosed to the client, fair, and reasonable.[321]

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[315] *Id.* at (a).

[316] RESTATEMENT, *supra* note 130, Sec. 24, cmt. a.

[317] ABA MRPC, Rule 1.5(a).

[318] *Id*., Rule 1.8(i).

[319] *Id.*(e) (1) (providing exceptions for advancing court costs and expenses, repayment of which is contingent on the outcome of the matter).

[320] *Id*.(d).

[321] CCBE Code, Article 3.4.1. "Subject to any proper agreement to the contrary between a lawyer and his client, fees charged by a lawyer shall be subject to regulation in accordance with the rules applied to members of the Bar or Law Society to which he belongs. If he belongs to more than one Bar or Law Society the rules applied shall be those with the closest connection to the contract between the lawyer and his client." *See Id.*, Article 3.4.2.

### (ii) Post-inception and Modified Fee Contracts

Once the lawyer-client relationship has been formed, the lawyer owes fiduciary duties to the client. As a result, any contracts made after this time, including modifications to the initial fee agreement, are viewed with suspicion. If they benefit the lawyer, as when the rate or amount of compensation is increased, courts will view them as presumptively fraudulent and voidable at the election of the client.[322] Similarly, the Model Rules provide special protections for clients whenever the lawyer enters into a business transaction with the client (including but not limited to modification of a fee agreement) or knowingly acquires an ownership, possessory, security or other pecuniary interest adverse to a client. These protections also apply when the lawyer accepts certain property as a legal fee, as when the lawyer takes shares in a client corporation in lieu of a legal fee.[323]

### (iii) Absence of a Contract

Even if the client and lawyer have not agreed on a fee, a lawyer who performs legal services for a client is entitled to reasonable compensation under the doctrine of *quantum meruit*.[324] Similarly, a lawyer who enters into a contract later determined to be invalid, or a contingent fee lawyer who withdraws or is discharged before the contingency has occurred, may be entitled to the fair value of the lawyer's services.[325] If a fee contract is invalid or the lawyer has been discharged for cause, the lawyer's misconduct may be ground for total or partial forfeiture of any legal fees.

### (iv) Court-Awarded Legal Fees

Unlike many European countries, where the 'loser pays rule' is common practice, in the United States the general rule is that each litigant is responsible for his or her own legal fees, unless the parties have contracted to shift the winner's legal fees to the loser.[326] Courts will enforce such private agreements unless the amount makes it an unreasonable penalty.[327] Aside from fee-shifting promises, common law courts may award legal fees to a litigant whose lawyer's efforts created a "common fund" from which others will benefit. In such cases, for example in many class action lawsuits, the compensation comes from the fund itself. In addition, federal or state statutes sometimes provide for payment of a prevailing party's legal fees, in order to encourage litigation benefiting the public that might not otherwise be brought.[328]

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[322] *See* RESTATEMENT, *supra* note 130, Sec. 18, cmt. e.

[323] *Id.*, Sec. 126, cmt. a.

[324] *Id.*, Sec. 39.

[325] Measuring fair value includes consideration of such factors as the market rate for similar legal services, what a fully informed and properly advised client would agree to pay for such services, and other circumstances bearing on the fairness of the fee. *See Id.*, cmt. c.

[326] *See* Charles W. Wolfram, MODERN LEGAL ETHICS § 16.6.1 (1986). [Hereinafter Wolfram].

[327] *See* RESTATEMENT SECOND, CONTRACTS, Sec. 356 cmt d.

[328] *See* Wolfram, *supra* note 326, at 923-24, 929-30.

### (v) Fee Forfeiture

A lawyer who has engaged in a clear and serious violation of a duty to a client, such as the duty to avoid impermissible conflicts of interest, may be required to forfeit some or all of the lawyer's compensation for the matter. In determining whether to require forfeiture and, if so, whether the forfeiture will be total or partial, courts will consider such factors as the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work, any harm to the client, and the adequacy of other remedies.[329]

## (2) Special Types of Fees

### (i) Contingency Fees

Contingent fees are widely used in the United States, particularly on the plaintiff's side in litigation, and sometimes on the defense. Acceptance of this type of fee in the United States was initially prompted by the inability of economically disadvantaged persons to pay the fee necessary to access the judicial system. By the mid-1960s, all fifty American states recognized the validity of this type of fee. Currently, the vast majority of cases involving multi-million dollar awards and punitive damages see engaged contingency fee attorneys.

In the United States, lawyers charging contingent fees are subject to special requirements under codes of legal ethics and to greater regulation than other types of fee agreements. For example, the Model Rules prohibit lawyers from charging contingent fees in a domestic relations matter when the payment or amount is contingent on securing a divorce or on the amount of any alimony, support or property settlement. Moreover, a lawyer may not charge a contingent fee in a criminal case. [330] Most jurisdictions also have statutes or rules that limit the amount of contingent fees generally or in certain types of cases.[331]

Contingent fee agreements must be in writing and must state the method by which the fee is to be determined, including the percentage that shall accrue to the lawyer in the event of settlement, trial or appeal.[332] When the matter is concluded, the lawyer provides the client with a written statement stating the outcome of the case and, if there is a recovery, showing the remittance to the client and the method of its determination.[333]

Contingent fees are subject to the same requirement of reasonableness as other types of fees. The contingent nature of the fee is one of the factors used to determine whether a particular fee is reasonable.[334]

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[329] RESTATEMENT, *supra* note 130, Sec. 37.

[330] ABA MRPC, Rule 1.5(d).

[331] Some jurisdictions, like New Jersey, provide that the lawyer must offer the client an alternative fee arrangement before agreeing to this type of fee. N.J. Court R. 1:21-7 (2001).

[332] The agreement must also identify litigation and other expenses to be deducted from the recovery, and whether the latter are to be deducted before or after the contingent fee is calculated. *See* ABA MRPC, Rule 1.5(c).

[333] *Id*.

[334] *See* ABA Informal Ethics Opinion 86-1521 (1986).

### (ii) Referral Fees and Division of Fees Among Lawyers

Lawyers may not compensate non-lawyers for referring cases to them, either by sharing legal fees or by other form of payment. Whether lawyers may reward other lawyers not in the same law firm for referring a case depends on the circumstances and the rule in the particular jurisdiction. Under the Model Rules, a lawyer may not pay a straight referral fee to another lawyer,[335] and a division of fee is permissible only if "the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation."[336] In addition, the client must agree to the arrangement in writing, and the total fee must be reasonable. Following revision of this rule in 2002, the client need agree to the share that each lawyer will receive.[337] To date, some states have adopted strict requirements, for example, that the client must consent to the fee division agreement.[338] Other states have relaxed the requirements, for example, by omitting the qualification that the division must be in proportion to services performed or that each lawyer must assume joint responsibility for the representation.[339]

Like the ABA Model Rules, the CCBE Code forbids lawyers from requesting or receiving "a fee, commission or any other compensation for referring or recommending the lawyer to a client."[340] Nevertheless, fee-sharing agreements between lawyers may be permitted on a proper basis.

## (3) Collection of Fees

### (i) Security and Advance Payments

A lawyer may ask a client to provide security for payment of legal fees. Often this security consists of advance payment of fees and costs. Lawyers are required to put advance payments in a client's trust account until they are either earned by the lawyer or returned to the client.[341]

A lawyer may also obtain a security interest in some of the client's assets. In such case, the transaction must be fair and reasonable to the client and must be in writing. In addition, the lawyer must give the client an opportunity to obtain independent counsel, and the client must give informed consent.[342]

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[335] ABA MRPC, Rule 7.2(b) (providing that a lawyer may not "give anything of value to a person for recommending the lawyer's services").

[336] *Id.*, Rule 1.5 (e) (1).

[337] *Id.*, Rule 1.5. (e) (2) and (3).

[338] *See, e.g.*, NJ Rules of Prof'l Conduct, Rule 1.5(e).

[339] *See, e.g.*, Pa Rules of Prof'l Conduct, Rule 1.5(e).

[340] CCBE Code, Article 5.4.

[341] An advance payment, which must be returned if unearned, should be distinguished from a true "retainer" fee, which is earned on payment and is limited to situations in which the client has paid to secure the lawyer's availability. *See* ABA/BNA Lawyers Manual on Professional Conduct at 41:2002. [Hereinafter ABA/BNA Lawyers Manual].

[342] ABA MRPC, Rule 1.8(a).

Finally, depending on the jurisdiction, the lawyer may be entitled to assert common law or statutory attorneys' liens in order to collect unpaid fees. Retaining liens apply to a client's property in the lawyer's possession, and permit the lawyer to maintain such possession until the client pays.[343] Most jurisdictions recognize retaining liens, but there are ethical restrictions on when and how they may be properly asserted. Unfortunately, there is no consensus on how the ethical restrictions apply.[344]

### (ii) Unpaid and Disputed Fees

In the United States, lawyers are permitted to sue clients or former clients to collect an unpaid fee, but are encouraged to resolve disputes without litigation; for example, by submitting to alternative dispute resolution proceedings such as fee arbitration or mediation.[345] Indeed, most jurisdictions have bar-sponsored fee dispute resolution services. Lawyers may request clients to agree in the fee contract that disputes over fees will be submitted to arbitration, but such provisions may not be upheld unless the lawyer fully discloses the consequences and the client seeks independent legal advice before signing the contract.[346]

Whatever procedures used, and in light of the ordinary duty of confidentiality to which the lawyer is bound, the latter is permitted to disclose information relating to the representation of the client or former client, but only to the extent reasonably necessary to collect the fee.[347] If the client disputes the amount of the lawyer's fee, the lawyer must keep the disputed amount of any funds from which the lawyer's fee will be paid in a client trust account until the dispute is resolved.[348]

## c) Lawyer Fees in Europe

Most European countries place greater limits on the ability of attorney and client to negotiate a fee arrangement than is the practice in the United States. Moreover, in contrast to the United States, the 'loser pays rule', is part of the European tradition and is followed by most legal systems, except for Luxembourg.[349] The permissible fee arrangements of these legal systems are quite diverse, but they can be grouped into the hourly fee system and the fixed fee system, with high variability as to contractual freedom to establish the fee.

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[343] *See* ABA/BNA Lawyers Manual, *supra* note 341, at 41:2002-2111.

[344] Some courts enumerate a list of factors to consider in deciding whether to assert a lien, for example, whether there was just cause for discharging the attorney, the client's ability to provide security or pay the fee, and the importance of the files to the client. *Id.* at 2110.

[345] *See, e.g.*, ABA MRPC, Rule 1.5, cmt. 9.

[346] ABA/BNA Lawyers Manual, *supra* note 341, at 41:115.

[347] ABA MRPC, Rule 1.6(b)(3).

[348] *Id*., Rule 1.15, cmt 3.

[349] According to this rule, the losing party in a case must pay the court and the legal costs sustained by the other party. Austria, Denmark, Germany, and The Netherlands routinely follow this rule. In other countries, such as in Belgium, Finland, Italy, Spain and Norway, courts may still adjust the payment of costs and attorneys fees, and may order both parties to bear their own costs in some circumstances.

As in the United States, the hourly fee arrangement is the dominant fee system in European countries, and is generally negotiated in a relatively free manner in Austria, Denmark, Finland, Ireland, Spain, Portugal, Norway, The Netherlands, and Luxembourg. Sometimes the hourly fee is referenced to a non-binding fee schedule, as it is the practice in Austria, Belgium, and France. More commonly, the lawyer is governed by a code that lists factors to be considered in determining whether the fee is reasonable. This is the practice in Sweden, Denmark, Ireland, Portugal, Scotland, Greece, and Germany (for services performed outside the court).

### (1) Minimum Fee Schedules

Some of the European legal systems prescribe a schedule of fees that attorneys are bound, to varying extents, to charge for their services. At the extreme, fees are set statutorily, and this is more likely to be the case for in-court representation.

Among systems that establish legal fees, the most common practice is for the Bar to set the minimum fee schedule, to permit negotiation for a higher fee, and to regard a lower fee as unethical and void. In Germany, for instance, schedule of fees are set forth by statutory law and are based upon the stages of representation and the amount object of the controversy. This system is supposed to subsidize the smaller cases by the larger ones, thus containing elements of social justice. Whereas an agreement to charge less than the amount indicated by the fees schedule is not enforceable, an agreement to charge more than the latter is subject to prior approval by the client in writing.[350] Amendments to this statute are currently being discussed in the German parliament.

Similarly, in Italy the National Bar Council sets the *tariffa forense*, a complex minimum and maximum allowable fee set for work in different areas of law.[351] The minimum amounts established by the scale are compulsory, and any contrary pact is considered null. The rationale behind the system is to preserve the decorum and dignity of the legal profession that would be negatively affected by fees excessively low with the aim of securing clients. While the general principle in the determination of fees is that of contractual freedom,[352] in the absence of an agreement between the parties, the compensation is determined by the scale of fees, by custom, or by legal authority, after the opinion of the local bar association to which the lawyer belongs. The Bar in Greece also establishes minimum fee schedules.

To the U.S. attorney, the use of fee schedules promulgated by the state or by the Bar is an unusual feature of European legal systems. Since the U.S. Supreme Court struck down the minimum fee schedule as contrary to federal antitrust law in 1975, the amount of a fixed fee in

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[350] BRAGO (Federal Act on Advocates' Fees, 1957), § 3.

[351] The scale of fees is fixed by the National Bar Council every two years and adopted, upon approval by the Minister of Justice, by ministerial decree. In the February 2002 judgment on the case of Arduino, the European Court of Justice determined that the Italian procedure for the adoption of the compulsory tariffs for the fees payable to members of the Bar is compatible with Community competition law. *See* Arduino, C-35/99.

[352] Italian Civil Code, Article 2233. Within the limits set by the 'tariffa' the parties may negotiate a fee based on factors such as the nature and value of the case, the complexity and importance of the issues, the result of the representation.

the United States has been essentially unregulated, subject primarily to price competition and to the overall restraint of reasonableness.[353]

The continued presence of fee schedules in some European countries reflects a different attitude towards price competition in the legal profession and professional ethical principles. Some countries that formerly engaged in this practice appear to have ceased for antitrust reasons.

### (2) The United Kingdom's Conditional Fee

The United Kingdom's conditional fee embodies the 'no cure no pay principle' common under the United States contingency fee system, and represents a radical departure from the traditional practice in the U.K., where solicitors were previously limited to the choice of either the fixed fee or the hourly fee. The conditional fee is an hourly fee that may include a premium for success, whose percentage is agreed upon in advance by the parties.[354] Unlike the U.S. contingency fee, this arrangement rewards success, but bases the reward on the effort expended rather than on the amount recovered.

The use of this type of fee was initially authorized in personal injury cases, insolvency proceedings, and proceedings before the European Court of Human Rights. As a result of reforms initiated in the early 1990s, conditional fee arrangements may now be used for any type of litigation, so long as full disclosure of the terms of the engagement are provided to the client and the other parties. Prior to the passage of this rule in 1995, courts in the U.K. were quick to strike down fee arrangements that provided a differential payment based on outcome as contrary to public policy. Public policy still prohibits proportional contingency fees (or *Pactum de quota litis*).

The conditional fee has obvious repercussions on the legal aid system in the United Kingdom, as it considerably increases access to justice. Not surprisingly, legal aid is viewed as unnecessary in the type of cases where a conditional fee arrangement could be used. Whereas, at one time, legal aid paid the attorney fees for almost half of the serious civil litigation in England, over the last few years this has been scaled back significantly with reduced state funding.

### (3) *Pactum de Quota Litis*: a Critical Division

While the different European legal systems have adopted various elements of fee schedules and cost-shifting, none of them permit the use of the contingency fee to the extent permitted in the United States.

The U.S. contingency fee, called *Pactum de quota litis* in Europe, is still amply rejected by the professional and ethical codes of the majority of the European countries, the only exceptions being Finland and Greece.[355] The rationale behind this reality lies in the necessity to ensure the

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[353] *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). Until 1975, the minimum fee schedule was common in the United States for straightforward transactions such as real estate transactions, wills, divorces, and trusts.

[354] The premium may be charged up to 100% of the hourly fee. The U.K. conditional fee is a variation of the Scottish rule that permits a fee on a "no win, no pay" basis.

[355] Whereas the majority of European countries prohibit agreements making the attorney fee directly proportional to

lawyer's independence and autonomy, which is regarded as being substantially compromised when a lawyer has a personal interest in the outcome of any case. In other words, this type of fee is regarded as creating a conflict of interest, as the lawyer's own interest may prevent the lawyer from acting in the client's best interest.

Reflecting the controversial nature of this type of fee in the majority of the European countries, the CCBE Code prohibits the use of *Pactum de quota litis.* The seemingly harmonized nature of this rule, however, is undercut to some degree by the fact that agreements charging fees in proportion to the value of the matter handled by the lawyer are permitted, so long as the state or the bar under a fee schedule regulates the fee.[356] The CCBE Code thus leaves room for establishing a fee arrangement that carries some features of a contingency fee, such as it is the case for the U.K. conditional fee.

In Germany, contingency fees and *Pactum de quota litis* are forbidden. Although a change in the system seems necessary,[357] there is still a strong feeling among legal professionals that such arrangements are immoral, and do not fit the image of advocates as organs of justice.

The Ethical Code for Italian Lawyers, similarly, prohibits such agreements. Any agreement to the contrary is null and void and subjects the lawyer to disciplinary sanctions. Nevertheless, a 'reasonable' complementary payment may be agreed upon in writing and be conditional on the favorable outcome of the case.[358] France also prohibits the *Pactum de quota litis,*[359] whereas what is allowed, similar to Italy, is the written agreement concerning a 'complementary fee' calculated in function of the result obtained.[360] The Spanish *Código Deontológico* contains a similar provision as well.[361]

Although contingency fees are not generally favored by countries where there is, to a greater or lesser degree, an effective legal aid system, these have been considered to be acceptable in countries where there is no State-funded legal aid and where individuals could not otherwise receive legal assistance.

In central and eastern Europe, as well as in the former Soviet Union, contingency fee agreements are not generally explicitly prohibited. In Ukraine, for example, parties have the broadest contractual freedom in the determination of legal fees. In Croatia and Slovenia, contingency fees are expressly allowed in some civil cases.[362] In Armenia, the practice of charging contingency fees, though not expressly prohibited, seems to be rather rare among private attorneys due to the high degree of economic risk it implies for the lawyer.

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the recovery, the same countries often permit the attorney to use the obtained results of the representation as one factor to be considered in establishing a fee.

[356] CCBE Code, Article 3.3.3.

[357] In Germany, several years ago companies were set up which finance court proceedings on a contingency fee basis.

[358] Ethical Code for Italian Lawyers (1999), Article 45.

[359] National Council of French Bars' Code of Conduct (1999), Article 19.3.

[360] Statute Law of December 31, 1971, Article 10.

[361] Código Deontológico (2000), Article 16.

[362] The Role and Responsibilities of the Lawyer, supra note 77, at 62.

### (4) Contingency Fees, Access to Justice, and Ethics

Access to the legal system is a strong and important consideration in public policy toward justice. The contingency fee arrangement represents, in effect, a public decision to subsidize access by shifting risk and rewards to private attorneys. Whereas Americans justify the contingency fee largely on the basis of access to justice, this can be provided in other ways. Legal aid, for example, has been an important factor in western Europe, both among civil law and common law countries. Nevertheless this has diminished significantly through the 1990s, even in the northern European countries which historically have been more generous. The different approach in the United States and Europe towards the contingency fee arrangement, at least partly, reflects the U.S. penchant for utilizing the private sector to secure public goods, and the traditional European preference for public sector solutions.

The main critics of the contingency fee argue that this type of fee arrangement promotes speculative litigation and reduces the attorney's independence and judgment. Moreover, it seems meritorious claims with limited pecuniary prospects will likely not be pursued under contingency fee arrangements. On the other hand, forbidding the contingency fee altogether reduces access to the legal system for those who need it most, and prevents the attorney from absorbing more of the risk of loss. The United Kingdom's experiment with the conditional fee is motivated by a concern for access to justice. Indeed, it may be assumed that most European countries are wrestling in various ways with the issue of whether access to justice for ordinary citizens should be a good provided at public expense or one provided privately by permitting greater risk and rewards for attorneys.

In countries where civil legal aid programs are generally inadequate if not inexistent, limited contingent fee agreements may be viewed as an option, as they provide access to justice for persons who cannot otherwise afford litigation costs.

## 4. Termination of the Lawyer-Client Relationship

### a) Termination by the Client

Ordinarily, the lawyer-client relationship terminates when the representation ends as provided by contract, or because the lawyer has completed the contemplated services.[363] There are a number of ways, however, in which the relationship may terminate prior to the completion of such services. For example, subject to a court order requiring the representation to continue,[364] the client has the absolute right to discharge the lawyer at any time for any reason, even if such discharge violates a contractual agreement between the lawyer and the client. Under some circumstances, the client may be liable to the lawyer for such discharge, but the lawyer must cease representation of the client at the client's request.[365] A contract forbidding the client to discharge the lawyer is unenforceable. A client's death or incompetence also terminates the

[363] RESTATEMENT, *supra* note 130, Sec. 31(2) (e).
[364] *Id*. at Section 31(1).
[365] *Id*. at Section 31 (2) (a) and cmt d.

lawyer-client relationship, as does a lawyer's death, disbarment, disqualification, or incapacity.[366]

### b) Lawyer's Withdrawal

The lawyer-client relationship may also be terminated when the lawyer withdraws. Under the ABA Model Rules, withdrawal is mandatory when the representation will result in violation of the rules of professional conduct or other law, when the lawyer's physical or mental condition materially impairs the lawyer's ability to continue the representation, and when the lawyer is discharged.[367]

Subject to a court order to the contrary, withdrawal by the lawyer is also permitted if:

1. withdrawal can be accomplished without material adverse effect on the interests of the client;

2. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

3. the client has used the lawyer's services to perpetrate a crime or fraud;

4. the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

5. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

6. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

7. other good cause for withdrawal exists.[368]

A lawyer who improperly withdraws from a case exposes himself to liability for the resulting neglect of the case and may lose the right to compensation for his services. A lawyer who does not withdraw when required to do so by the Model Rule or the rules of a state jurisdiction is subject to disciplinary action.[369]

The CCBE Code provides that a lawyer shall not withdraw from a case if the client may be unable to find alternative legal assistance in time to prevent prejudice to his interest.[370]

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[366] *Id*. at Section 31(2)(b) & (d).

[367] ABA MRPC, Rule 1.16(a). If the client attempts to discharge the lawyer, the lawyer may not withdraw if the court orders the representation to continue.

[368] *Id.* (b).

[369] Aronson & Weckstein, *supra* note 222, at 301.

[370] CCBE Code, Article 3.1.4.

In Spain, a lawyer must withdraw from the representation where circumstances arise which may impair her independence and the duty of professional secret to which she is bound. Withdrawal may also occur in cases of disagreement with the client arising in the course of the representation.[371]

The Ethical Code for Italian Lawyers provides for a broad right of the lawyer to withdraw from representation of a client, without indicating any express limitations to such faculty.[372] In such cases, the lawyer must give adequate notice to the client, and must inform him of the steps necessary to avoid prejudice to his case.[373] If the latter does not retain a new lawyer within a reasonable time, the lawyer cannot be held responsible for the subsequent lack of legal assistance, although he will have to inform the client of any communications concerning the representation that he might have received.[374] In Spain, a lawyer who withdraws from a case must take all necessary steps to ensure that his client remains represented.[375]

In Croatia, an attorney may withdraw from a case where it appears impossible that this will have a successful outcome, and the withdrawal will not cause excessive damage to the client that cannot be avoided by entrusting the representation to another attorney. In such cases, the lawyer shall represent the client until she finds another counsel, but no longer than 30 days from the cancellation of the power of attorney. In criminal cases, withdrawal is prohibited where this may endanger the client's position, or it would be impossible for her to find another attorney.[376] Further, an attorney may withdraw from a case only if her "professional ethics" impedes her to carry out the representation.[377] In Macedonia, a lawyer may withdraw from a case only for "just reasons" which have become known to the lawyer after undertaking representation. These include the existence of small probabilities of a positive outcome of the case, and the client's inability to pay for the legal services.[378]

### c) Lawyer's Duties on Termination

Under the ABA Model Rules, regardless of how the representation is terminated, the lawyer must take reasonably practicable measures to protect the client's interests, such as giving reasonable notice to the client, allowing time for the employment of other counsel, surrendering papers and property to which the client is entitled and refunding any unearned or unexpended advance payment of fees or costs. The lawyer may retain papers relating to the representation to the extent permitted by other law, as when the lawyer has a valid lien.[379]

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[371] Código Deontológico (2000), Article 13 (3).
[372] Ethical Code for Italian Lawyers (1999), Article 47.
[373] *Id.*, Article 47 (I) and (II).
[374] *Id.*, Article 47 (II).
[375] Código Deontológico (2000), Article 13 (3).
[376] Attorneys' Code of Ethics (1999), Article 64.
[377] *Id.*, Article 65.
[378] Code of Ethics for Lawyers, Associates, and Lawyers' Apprentices (1993), Article 2.
[379] ABA MRPC, Rule 1.16 (d).

Following termination of the representation, the lawyer must preserve the confidentiality of information regarding the representation,[380] take no action on the former client's behalf without new authorization,[381] and refrain from using information obtained during the representation to the disadvantage of the former client.[382]

## C. Duties to the Society: Access to Counsel and Pro Bono Activity

### 1. Right to Counsel in Criminal Cases in the U.S. and Europe

In 1963, the U.S. Supreme Court held in *Gideon v. Wainwright* that indigent criminal defendants have a right to counsel at no cost under the Sixth Amendment of the U.S. Constitution whenever conviction could result in incarceration.[383] While the Fourteenth Amendment of the U.S. Constitution requires a state to provide counsel for an indigent on a first statutory appeal, the Supreme Court has held that this does not require appointment of counsel for indigent appellants in discretionary state appeals, applications for review in the U.S. Supreme Court, or in state *habeas corpus* proceedings.[384] The *Gideon* right to counsel attaches only after the commencement of formal judicial proceedings, and U.S. courts have resisted attempts to extend such right to stages prior to institution of such proceedings where rights could still be at stake, *e.g.*, in pre-indictment plea bargain negotiations.[385]

While the U.S. Supreme Court affirms the limited right to counsel for indigent criminal defendants, states are left to provide the resources to do so for non-federal prosecutions. The Supreme Court has not specified what mechanism must be used to provide public representation for indigent criminal defendants. U.S. states and counties use three forms of public representation including: public defender programs, contract-attorney-representation, and assigned-lawyer programs.[386] Whereas public defenders are salaried employees of an organization providing indigent defense, contract attorneys are private practitioners contracted, either directly or through a law-firm or bar association, to do indigent defense work. Assigned-lawyer programs operate through a case-by-case appointment.

Survey evidence and fact patterns have shown that resources are often inadequate to provide competent counsel.[387] Hourly rates under contracts are often quite low, and some states impose low fee caps, even for capital offenses. In addition, caseload frequently carried by public defenders is extremely burdensome. In 1994, U.S. Supreme Court Justice Harry Blackmun cited his concerns about the effectiveness of the requirement of competent legal counsel for

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[380] *Id*., Rule 1.9 (c) (2).

[381] RESTATEMENT, *supra* note 130, Sec. 33(2)(b).

[382] *See* ABA MRPC, Rule 1.9(c)(1).

[383] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[384] Joshua Dressler, UNDERSTANDING CRIMINAL PROCEDURE 519, 521 (2nd Ed. 1996).[Hereinafter Dressler].

[385] James S. Montana and John A. Galotto, *Right to Counsel: Courts Adhere to Bright-Line Limits*, 16 CRIMINAL JUSTICE 4 (Summer 2001).

[386] Dressler, *supra* note 384, at 511-12.

[387] *See generally* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MARYLAND LAW REVIEW 1433 (1999).

defendants in death penalty cases as one of the reasons that he would no longer uphold the sentence of death in any case coming to the Supreme Court.[388]

In European countries, access to justice and legal aid in criminal cases are generally guaranteed both in the Constitution and statutory laws. In Italy, for example, the Constitution provides that "defense shall be an inviolable right at every stage…of legal proceedings", and that "the poor shall be entitled, through special provisions, to proper means for…defense before all courts."[389] A lawyer must provide representation to a client upon request by the judicial authorities in compliance with the applicable laws. It is a disciplinary offense to refuse without justification to act as appointed counsel, or to request payment from the client for such service.[390] Legal aid for criminal defense is provided under a law of 1990, and covers cases where the accused faces a civil claim for compensation made by the victim of the offence.[391]

Under Spanish law, access to courts is guaranteed for all, including foreigners. The existence of a special procedure, called *recurso de amparo*, entitles individuals to claim basic constitutional rights, including access to justice. The applicant may do so in person, or the case may be brought by the public prosecutor, or the *defensor del pueblo* (Ombudsman). Legal aid in criminal cases extends to pre-trial advice and representation in courts. Anyone taken into police custody to be questioned is entitled to have a lawyer present.[392]

Special provisions on legal aid and access to justice exist in the lawyers' ethical codes of some post-conflict countries. The Croatian Attorneys' Code of Ethics, for example, establishes a broad duty on attorneys to represent deprived persons and victims of the war in civil and criminal cases whenever requested by an authorized body of the Croatian Bar Association.[393]

## 2. Provision of Civil Legal Services in the U.S. and Europe

While the right to counsel in criminal cases has been partially guaranteed, the U.S. Supreme Court in *Lassiter v. Department of Social Services*[394] effectively refused to extend the right to counsel to civil cases. In light of the *Lassiter* case, the government is not constitutionally obliged to fund civil legal services. In 1999, the total expenditure on civil legal services from federal, state, and local government sources, as well as revenue from Interest on Lawyer Trust Accounts (IOLTA) was less than US $600 million. In the same year, the United Kingdom spent the equivalent of US $1.35 billion on access to civil legal services for lower income people for its considerably smaller population. [395]

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[388] *Id.* at 1437-38 & n. 24 citing McFarland v. Scott, 512 U.S. 1256, 1264 (1994) (Blackmun, J. dissenting from denial of certiorari).

[389] Italian Constitution (1948), Article 24 (1)-(3).

[390] Ethical Code for Italian Lawyers (1999), Art. 11.

[391] Legge 30 Luglio 1990, n. 217.

[392] *Guide to Legal Aid and Advice in the European Economic Area*, <http://www.europa.eu.int/comm/dgs/health_consumer/library/pub/legalaid>.

[393] Attorneys Code of Ethics (1999), Article 36.

[394] *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

[395] Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other*

Unlike many other countries, American law imposes no obligation on lawyers to take any particular client who seeks the lawyer's services.[396] The ABA Model Rules balance this general freedom with the exhortation that lawyers have a responsibility to assist in providing pro bono public service, and by "accepting a fair share of unpopular matters or indigent or unpopular clients."[397] In addition to this ethical exhortation, the freedom to choose clients is limited if a court appoints a lawyer to represent a client. In such instances, the lawyer may be excused only for "good cause".[398] Compulsory appointment, even without compensation, has been upheld.

Earl Johnson Jr., an appellate California judge who has conducted comparative studies on the provision of legal aid, describes the contrasting situation in countries in Europe and elsewhere with regard to right to counsel in civil cases.

> Most other Western European countries, like the United Kingdom, enacted a statutory right to counsel in civil cases over a century, or at least decades ago. France enacted such a right in 1851; Germany in 1877; the Scandinavian countries and most other Northern European nations in the early 20th Century. Austria, Greece, Italy, and Spain enacted statutory rights to counsel in the late 19th or early 20th Century. In the 1960s and 1970s several members of the U.K. Commonwealth including Hong Kong, New Zealand, and some Australian states and Canadian provinces followed suit.[399]

In other countries, court decisions have supplemented statutory rights to counsel. The Swiss Supreme Court, for example, has interpreted the constitutional provision guaranteeing equality to all citizens before the law to require the provision of "free lawyers to indigent litigants in all civil cases requiring 'knowledge of the law.'"[400] Likewise, the German Constitutional Court has recognized that the constitutional right to a fair hearing may require in civil cases the appointment of free counsel for poor people where the legal aid statute does not.[401]

In *Airey v. Ireland*, the European Court of Human Rights issued a strong statement about the government's affirmative obligation to provide equal access to justice for lower income citizens, by holding that:

> [T]he fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and 'there is…no room to distinguish between acts and

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*Industrial Democracies*, 24 FORDHAM INTERNATIONAL LAW JOURNAL S83, S84, and S97. [Hereinafter Earl Johnson, Jr.].

396 Wolfram, *supra* note 326, at 571, 573.

397 ABA MRPC, Rule 6.2., Comment; Rule 6.1.

398 *Id.*, Rule 6.2.

399 Cappelletti et. al., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975), cited in Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOYOLA OF LOS ANGELES LAW REVIEW 341 (1985).

400 Earl Johnson, Jr., *supra* note 395, at S89.

401 *Id.* at S90 & n. 29 citing Decision of June 17, 1953 (No. 26), Entscheidungen des Bundesgerfassungsgerichts [BverwGE] 2, 336 (1953).

> omission.' The obligation to secure an effective right of access to the courts falls into this category of duty.[402]

It is important to note, however, the European Court of Human Rights emphasized that the European Human Rights Convention's guarantee of a right to a "fair hearing" in civil cases does not require member governments to provide free counsel to poor people in all forums. They can satisfy the Convention by establishing – or continuing – forums that are simple enough in both procedure and substantive law to allow citizens to have a "fair hearing" without the assistance of a lawyer.

### 3. Pro Bono Obligations of U.S. Lawyers

In their original version, the ABA Model Rules only stated that lawyers should provide public interest legal services. In 1993, the ABA adopted a substantially revised rule providing instead that a lawyer should aspire to render at least 50 hours of *pro bono publico* legal services per year.[403] The rule also stated that a "substantial majority" of the hours should be provided "without fee or expectation of fee" to person of limited means or non-profit organizations designed to address the needs of people of limited means, and that a lawyer "should voluntarily contribute financial support for organizations that provide legal services to persons of limited means." No state has mandated pro bono service despite the many proponents of this position.

## D. Lawyer's Functions and Responsibilities

### 1. The Lawyer as an Advocate

The lawyer's role as an advocate is central to the adversarial system of justice. In the U.S. to a large extent that role is defined and regulated by the ABA Model Rules of Professional Conduct that have been adopted, in one form or another, by the supreme court of each of the states.

The resolution of legal disputes in the U.S. system may often take the form of litigation in a judicial procedure, where the disputing parties are represented by lawyers who vigorously advocate their clients' position. The lawyer for a party seeking a legal remedy against another party has the initial responsibility to evaluate the client's legal cause of action to determine whether it has merit to support the filing in court of a legal complaint. The lawyer must not file a frivolous complaint. Then it is the lawyer's role to prepare the complaint in legally sufficient form. The complaint and answer join the issues that will be litigated at trial.

In civil litigation each lawyer has equal responsibilities to loyally pursue his client's best interests. While the judge presides at the trial and rules on legal and procedural matters, the lawyers have the sole responsibility to develop the facts in dispute through the questioning and cross-examination of fact witnesses and the presentation of documentary and physical evidence before a jury (or before the judge if he is the trier of fact).

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[402] *Airey v. Ireland*, European Court of Human Rights, Judgment of 9/10/1997, para 25.

[403] ABA MRPC, Rule 6.1.

Although theoretically a trial is a "search for truth", each lawyer's professional responsibility is to present those facts most favorable to the client's interest, and is permitted to not disclose facts she has discovered in the course of the representation which may be harmful to the client's interest. Also, by application of governing rules of evidence, the lawyer is professionally permitted to seek to exclude facts offered by the opposing lawyer.

However, the underlying assumption of the adversarial system is that the opposing lawyers are equally competent with access to all the admissible facts, and that those facts withheld by one advocate will be supplied by the opposing advocate to permit the trier of facts to determine the "truth". Each lawyer has the role to sum up the facts in the most favorable light for the client, and to argue the legal inferences from those facts in support of the client's position before an impartial decision-maker. Each lawyer has the responsibility to request that the judge instruct the jury on those principles of law that will be favorable to each lawyer's client, but it is the responsibility of the judge, alone, to instruct the jury on the governing law. Again, it is an assumption of the adversary system that, in this way, all the relevant facts and law will be learned by the jury to enable them to render a fair verdict.

In this light, the lawyer's partisan and competent representation not only aids the client but, promoting wise and informed decisions, aids the court and the development of the law.[404]

### a) Preparation for Trial

The professional role of the lawyer in preparation for trial is most demanding and essential to his professional responsibility to fully and zealously represent the client. Success in representing the client's interests at trial depends primarily on the adequacy of the lawyer's preparation for trial. The ABA Model Rules require that the lawyer be competent to handle the particular legal and factual issues involved in the representation of the client.[405] To some extent, the ability of the client to pay for an adequate preparation by the lawyer may be permitted to limit the completeness of the preparation. However, once the lawyer undertakes to represent the client, the lawyer's preparation must be sufficiently thorough to comply with the lawyer's responsibility to competently represent the client. An inadequate fee cannot justify an inadequate representation.

The lawyer must become fully informed on all of the relevant facts of the dispute. He must seek to learn not only the facts favorable to the client, but also those that are or may be harmful to the cause of action. The client is the first and best source of the facts and the lawyer must insist on complete candor from the client to permit the lawyer to evaluate the facts, conduct further investigation, to research the relevant law, and in the end, provide the best advice to the client. In interviewing the client, the lawyer must advise the client to provide only truthful facts and caution the client that the lawyer will not and professionally must not offer false testimony

[404] Aronson & Weckstein, *supra* note 222, at 133.
[405] ABA MRPC, Rule 1.1

or evidence. The lawyer must caution the client that information the client gives the lawyer is protected by confidentiality.[406]

Depending on the complexity of case, the lawyer's preparation for trial requires the lawyer to locate and interview all the relevant witnesses (even those who may be hostile to the client), and to obtain necessary documentary or physical evidence. The lawyer must not misrepresent the lawyer's role in seeking information from unrepresented persons.[407] On the basis of the facts and evidence obtained, the lawyer must thoroughly research the relevant law in support of the client's cause of action.

During the course of the lawyer's preparation the lawyer must act diligently in meeting procedural and filing deadlines.[408] Also, the lawyer must be sensitive to the client's concerns and apprehensions and keep the client fully informed on all developments in preparation for trial.[409] In this regard, the lawyer is admonished by the Model Rules that the client makes the ultimate decisions as to the objectives of the representation, and the lawyer, in consultation with the client, makes the decisions as to the means and professional strategies of the representation.[410]

The more thorough the lawyer prepares for trial, the more able the lawyer is to accomplish an out of court settlement of the dispute favorable to the client. However, in negotiating a settlement with the opposing party and lawyer, the lawyer must keep the client advised and obtain the consent of the client to any settlement offer after full consultation.[411]

### b) Duty of Candor to the Tribunal

The U.S. adversarial system has been accused of frustrating the search for truth in litigation, rather than fostering it. The professionally permissible role of the lawyer in concealing harmful facts against the client in the presentation of evidence at trial and in arguing logical inferences to the jury from evidence introduced at trial, but which the lawyer knows are untrue,[412] are put forward in support of the accusation. The fault does not lie with the lawyer's duty of loyalty to the client, but with the underlying assumption that opposing lawyers are equally competent and prepared. The fact that often they are not, prevents the working of the theory of the adversary system that facts omitted or distorted by one side will be provided or corrected by the other side.

However, the Model Rules seek to safeguard the search for truth at trial by:

1. prohibiting the lawyer from making a false statement of fact or law to the court;

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406 ABA MRPC, Rule 1.6
407 *Id.*, Rule 4.3
408 *Id.*, Rule 1.3
409 *Id.*, Rule 1.4
410 *Id.*, Rule 1.2 (a)
411 *Id.*, Rule 1.4, cmt.1.
412 Stephen Gillers, REGULATION OF LAWYERS 409-414 (Aspen, Fifth Edition).

2. requiring the lawyer to disclose to the court legal authority in the controlling jurisdiction known by the lawyer to be directly adverse to the position of the client and not disclosed by the opposing lawyer;

3. prohibiting the lawyer from offering evidence the lawyer knows to be false, and requiring the lawyer to take reasonable remedial measures, including disclosure to the tribunal, if the lawyer comes to know that material evidence offered by the lawyer, the lawyer's client, or a witness called by the client was false;

4. requiring a lawyer to take reasonable remedial measures, including disclosure to the tribunal, to prevent or rectify a client's criminal or fraudulent conduct related to an adjudicative proceeding

5. requiring the lawyer in an *ex parte* proceeding to inform the court of all material acts known to the lawyer, whether or not the facts are adverse to the client, to permit the court to make an informed decision. [413]

The ABA Standing Committee on Legal Ethics and Professional Responsibility has interpreted this Rule to prohibit a lawyer from knowingly allowing the client to give false testimony at trial.[414] The lawyer's mandatory role is to dissuade the client from committing perjury, and if the client insists on testifying falsely, the lawyer's role is to disclose to the court that the testimony is false. Significantly, this rule specifically states that the lawyer's duty to disclose the client's false testimony to the court supercedes the lawyer's duty to not disclose confidential information of the client.[415] The ABA Formal Opinion also provides that the lawyer has the option to not permit the client to testify when the lawyer knows the client intends to testify falsely. The U.S. Supreme Court held that when a lawyer threatens to reveal the perjury to the court where the client persists in giving false testimony, the lawyer does not violate the client's right to be assisted by counsel under the Sixth Amendment to the U.S. Constitution.[416]

The application of this rule is understandably controversial, and has been criticized by some lawyers as being incompatible with the lawyer's duties of confidentiality and zealous representation of the accused client in a criminal case. An alternative rule has been adopted by the District of Columbia Court of Appeals. This prohibits a lawyer from disclosing the client's perjury to the court, but permits a procedure to insulate the lawyer from specifically adducing the perjured testimony. The rule permits what is called the "narrative approach" by which the lawyer simply puts the client on the stand and asks the client to tell the client's version of what happened without the lawyer directly examining the client. However, the lawyer is not permitted to argue the false testimony of the client to the jury.[417] This solution is considered by most lawyers as flawed on the ground that the lawyer still is assisting the client's perjury by allowing the client to testify falsely, and, at the same time, making it clear to the prosecutor, court and jury

[413] ABA MRPC, Rule 3.3 (a), (b) and (d).
[414] ABA Formal Opinion 353 (1987).
[415] ABA MRPC, Rule 3.3 (c).
[416] *Nix v. Whiteside*, 475 U.S. 157 (1986).
[417] Rule 3.3 (a)(4)(b), Washington, D.C. Rules of Professional Conduct.

that the lawyer does not believe the client when the lawyer fails to argue the client's testimony to the jury.

Following revision of the ABA Model Rules in February 2002, the lawyer's obligations to the client have been strengthened where the lawyer represents the client in criminal proceedings. In such cases, the lawyer may now not refuse a defendant to testify in his defense if the lawyer only "reasonably believes" the testimony will be false.[418]

The approach taken by the ABA Model Rules to the issue of client's perjury is in sharp contrast with the one taken, at least, by some European civil law countries. Whereas the civil lawyer may not encourage her client or another witness to lie, she is not responsible for how witnesses, including her own client, testify. Thus, the broader obligations with regard to witness testimony found in the ABA Model Rules have no counterpart in some European civil law systems. In those systems, the judge is responsible for taking the testimony and warning witnesses of the penalties of perjury when sworn testimony is taken, whereas lawyers are not expected to 'filter out' false evidence.

### c) Trial Conduct

The lawyer's paramount duty to show respect for the court and maintain decorum at trial is common to the professional and ethical standards of all countries. This duty in no way diminishes the duty of the lawyer to zealously and loyally represent the client. Indeed, especially in the American adversarial system, respect for the court and decorum do not mean that the lawyer should be servile to the court and not provide aggressive protection for the client. It is a proper role for the lawyer to object to evidence offered by the opposing lawyer and obtain a ruling by the court. However, once the ruling is made the lawyer should not persist in arguing with the court, but should rely on the record that has been made in case of appeal. Also when the court has sustained an objection against the lawyer's question to a witness or offer of evidence, the lawyer should abide by the ruling and not seek to improperly circumvent it. In arguing issues before the court, the lawyer may be a persistent and vigorous advocate, but must not be offensive or disrespectful to the court. Similarly, the lawyer should demonstrate civility to the opposing lawyer and other participants at the trial. Civility is not inconsistent with vigorous representation of the client.

It is proper conduct for the lawyer to vigorously cross-examine a witness offered by the opposing lawyer for the purpose of impeaching that witness' testimony. The lawyer may even be required to engage in such impeaching cross-examination of a witness the lawyer knows is testifying truthfully. The adversary system permits the use of these strategic tools to benefit the client in the examination of opposing witnesses. Also, it is professionally permissible for the lawyer to take advantage of mistakes in testimony of opposing witnesses or ambiguous questions from opposing lawyers to argue logical inferences from the testimony or from an evasive answer of the client to the ambiguous question, even though the lawyer knows the inference is false or the answer misleading.[419]

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[418] ABA MRPC, Rule 3.3 (a) (3).

There are professional restrictions on what the lawyer may argue at trial. The lawyer must not allude to any matter the lawyer does not reasonably believe is relevant or that will not be admissible evidence. Further, the lawyer is prohibited from stating the lawyer's personal opinion as to the justice of a cause, the credibility of a witness, or the guilt or innocence of the accused.[420] The lawyer must refer solely to the evidence adduced at the trial.

Also, the lawyer is prohibited from asserting personal knowledge of the facts in issue except while testifying as a witness.[421] However, in the United State and other countries alike, if the lawyer must be a witness, the lawyer is disqualified from representing the client at the trial.[422]

### d) Fairness to the Opposing Party and Counsel

In the adversarial system, the lawyer must be the loyal, partisan advocate of the client's cause and has no fiduciary obligations to the opposing party and counsel. However, the lawyer's relationship to opposing parties and counsel must be one of honesty and fairness.

The lawyer is prohibited from obstructing another party's access to evidence and from destroying or concealing any document or other material having potential evidentiary value.[423] The lawyer is prohibited from falsifying evidence, counseling or assisting a witness to testify falsely, or offering any inducement to a witness prohibited by law.[424] In pretrial proceedings, the lawyer must not make any frivolous discovery request[425] or fail to make diligent effort to comply with a legally proper discovery request by the opposing party.[426] Moreover, the lawyer must respect the opposing client-lawyer relationship and must not communicate with a represented person on the subject matter of the representation unless the other lawyer consents.[427] A similar rule is also present in the professional and ethical codes of most European civil law countries.[428]

The lawyer should also respect the confidential communications between opposing parties and their lawyers. If the lawyer inadvertently receives a document he reasonably knows to

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[419] *Bronston v. United States*, 409 U.S. 352 (1973).
[420] ABA MRPC, Rule 3.4 (e).
[421] *Id*.
[422] ABA MRPC, Rule 3.7.
[423] *Id.*, Rule 3.4 (a).
[424] *Id*. at (b).
[425] *Id.* at (d).
[426] *Id*.
[427] ABA MRPC, Rule 4.2.
[428] In Italy, for example, a lawyer may not directly contact an opposing party who is represented by another lawyer. It is a disciplinary violation for a lawyer to meet with the opposing party, knowing that the party is represented by another lawyer, without informing the latter and obtaining his permission. Ethical Code for Italian Lawyers (1999), Article 27. In France, when lawyers are appointed by the opposing party in legal proceedings, lawyers shall communicate solely with those lawyers. National Council of Bars' Code of Conduct (1999), Article 8.3. *See also* the Spanish Código Deontológico (2000), Article 14.

contain confidential information of an opposing party, the lawyer may not use it and must contact the opposing lawyer and seek instructions on what to do with the document.[429]

The lawyer must not take advantage of an unrepresented person. The lawyer must not state or imply that the lawyer is disinterested.[430] When the lawyer knows or reasonably should know the unrepresented person misunderstands the lawyer's role, the lawyer must attempt to correct the misunderstanding.[431] This responsibility is particularly important when the lawyer represents an organization like a corporation and is speaking with an employee or officer of the organization.[432]

The lawyer must not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.[433] Also the lawyer must not use methods to obtain evidence that violate the legal rights of a person.[434]

## e) Fair Trial, Trial Publicity, and Restrictions on Lawyers

A crucial responsibility of the lawyer is to represent the client in such a way that the ultimate outcome of the legal dispute is based solely on the merits established exclusively by the evidence adduced at trial, and the law as instructed by the court.

Therefore, the lawyer should not participate in any activity that allows extraneous influences to intrude on the trial process. For this reason, the ABA Model Rules provide that the lawyer who is engaged in preparation for litigation, or in the litigation, must not make an extra-judicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.[435] However, there are certain types of statements the lawyer may make.[436] These include:

1. the claim, offense or defense involved and, except as prohibited by law, the identity of the persons involved;

2. information contained in a public record;

3. that an investigation of a matter is in progress;

4. the scheduling or result of any step in litigation;

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[429] Formal Opinion 92-363, American Bar Association Standing Committee on Legal Ethics and Professional Responsibility.
[430] ABA MRPC, Rule 4.3.
[431] *Id*.
[432] ABA MRPC, Rule 1.13 (d).
[433] *Id.* at 4.4 (a).
[434] *Id*.
[435] ABA MRPC, Rule 3.6 (a).
[436] *Id.* at (b).

5. a request for assistance in obtaining evidence and information necessary thereto;

6. a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

7. in criminal cases, in addition:

    i. the identity, residence and occupation and family status of the accused;

    ii. if the accused has not been apprehended, information necessary to aid in apprehension of the person;

    iii. the fact, time and place of arrest; and

    iv. the identity of investigating and arresting officers or agencies and the length of the investigation.

Moreover, there may be occasions where the client is substantially prejudiced by recent publicity not initiated by the lawyer or the lawyer's client. In such cases, if the lawyer reasonably believes a correcting public statement is required to protect the client, the lawyer may make such a statement.[437] However the statement must be limited to such information as is necessary to mitigate the recent adverse publicity.

A lawyer who is not participating in litigation is not prohibited from making an extra-judicial statement reviewing or criticizing matters involved in the litigation. The lawyer's free speech rights protect the lawyer on such statements. On the other hand, ethical rules prohibit a lawyer from making a statement that the lawyer knows to be false, or with reckless disregard to the truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.[438]

Provisions regulating the lawyer's relationship with the media contained in the codes of conduct of European countries have a more limited scope than those in the ABA Model Rules. In their relationship with the press and other media, for example, Italian lawyers must maintain "balance and moderation in issuing statements and giving interviews, out of respect for the duty of discretion and confidentiality towards [their] clients and to avoid competitive behavior towards other lawyers. With the consent of and in the interest of his client, an attorney may reveal information to the press and other media if such information is not protected by the secrecy of investigation."[439] The Norwegian Rules of Conduct only provide that an advocate should exercise "particular restraint" when engaging in public discussion of ongoing or

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[437] *Id.* at (c).

[438] ABA MRPC, Rule 8.2 (a).

[439] Ethical Code for Italian Lawyers (1999), Article 18 (1). The principle that lawyers must always have regard to professional secrecy in their relations with the media, particularly in pending cases during the investigation stage, has received widespread recognition. *See* The Legal Profession: Practicing in the 21st Century. Which Lawyer for the Third Millennium?, (Council of Europe, October 2000).

upcoming court cases in which he is, or will be engaged.[440] In Croatia, attorneys must not make any public statements in the course of a criminal action that may have an impact on the progress and outcome of the proceedings.[441]

### 2. The Lawyer as an Advisor

In representing a client, the lawyer first and foremost serves as an advisor to the client. As mentioned above, this requires the lawyer to be competent in the legal subject matter of the advice.[442] Also, the lawyer must fully protect the confidentiality of the information provided by the client, and must assure the client of such confidentiality in order to obtain candid information from him.[443]

In most matters, the lawyer must base advice to the client on thorough research of the facts and the relevant law. In providing candid advice to the client, the lawyer must exercise independent professional judgment. However, the lawyer need not limit the advice to strictly legal rights or options of the client, but may refer to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[444]

### 3. Extra-Judicial Dispute Resolution Proceedings: The Lawyer as a Negotiator

A lawyer acting as a negotiator represents the client and remains an advocate for the client's position while at the same time trying to reconcile the latter's interests with that of the opposing party. Negotiated, rather then litigated, settlement of disputes presents the advantage of relieving the workload of an already overburdened justice system, and of providing the parties with consensual, rather than imposed, solutions.

The lawyer representing a client in extra-judicial dispute resolution proceeding, or in negotiations with third persons and their lawyers, is not bound by the same restrictions that apply to representations of a client before a court or tribunal.

The lawyer must not make false statements to third persons,[445] but is bound by the duty of confidentiality to the client to not reveal confidential information. In some instances, during negotiations the lawyer's knowledge of relevant facts gained in the course of the representation may put the client in an unfair advantage over the other negotiating party when that party's lawyer has no knowledge of these facts. However, once again, the adversarial system does not require a lawyer to do the other lawyer's preparation, and permits the lawyer in possession of the relevant facts to not disclose them and to take advantage of the other lawyer's ignorance.[446] In some situations, however, where the lawyer knows that the other lawyer or person has

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[440] Rules of Conduct for Advocates (1997), Article 2.4.2.
[441] Attorneys' Code of Ethics (1999), Article 67.
[442] *Id*., Rule 1.1.
[443] *Id*., Rule 1.6.
[444] *Id.*, Rule 2.1.
[445] *Id.*, Rule 4.1 (a).
[446] *Brown v. County of Genesee*, 872 F.2d 169 (6th Cir. 1989).

substantially relied on the withheld facts not being in existence in coming to an agreement, the courts have held that the lawyer who is aware of the existence of those facts must disclose them. An example is where a lawyer has advised a client to settle a dispute in the conviction that the opposing witness' testimony will be devastating at trial, and the lawyer ignores that the witness has died, a fact known to the opposing lawyer. In this situation, the court set aside the settlement on the ground that the opposing lawyer had a duty to disclose the death of the witness before settlement.[447]

Also, the lawyer must not counsel or assist the client in conduct that the lawyer knows is criminal or fraudulent.[448] And, unless the information is protected from disclosure because of confidentiality, the lawyer must reveal a matter to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.[449] Where the lawyer is precluded from such disclosure because of confidentiality protections, the lawyer must advise the client to refrain from or rectify such criminal or fraudulent conduct, and if the client persists, the lawyer should withdraw from the representation.[450] In some such cases, where the lawyer has made representations to the third person that the lawyer learns are not true or are fraudulent, the lawyer in withdrawing from the representation, may notify the third person of the withdrawal and inform that person not to rely on the prior representations of the lawyer.[451] This has been called a "noisy" withdrawal.

### 4. The Lawyer as Prosecuting Attorney

In the adversarial system, the prosecuting attorney is an advocate for, and represents the people of a particular jurisdiction. However, because of the nature of the client, the prosecutor role as advocate is more limited than that of the defense lawyer. The ultimate role of the prosecutor is to seek justice, and not merely to convict.[452] The U.S. Supreme Court expressed this special role of the prosecutor as follows:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereign whose obligations to govern impartially is its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is… the servant of the law, the twofold aim of which is that guilt shall not escape nor

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[447] *Virzi v. Grand Trunk Warehouse & Gold*, 571 F. Supp. 507 (E.D. Mich. 1983). In other situations, where during negotiations the lawyer knows the other lawyer has made a mathematical error in a suggested settlement figure, or has inadvertently left out of an agreement a provision both sides have agreed to, the former may inform the other lawyer of the mistake without consultation with the lawyer's client, and without being disloyal to the client. Informal Opinion 86-1518, American Bar Association Standing Committee on Legal Ethics and Professional Responsibility.

[448] ABA MRPC, Rule 1.2 (d).

[449] ABA MRPC, Rule 4.1 (b).

[450] *Id.*, Rule 1.16 (b) (2).

[451] Formal Opinion 92-366, American Bar Association Standing Committee on Legal Ethics and Professional Responsibility.

[452] Standard 3-1.2, American Bar Association Standards for Criminal Justice: The Prosecution Function

innocent suffer.[453]

Both the U.S. Constitution and the ABA Model Rules limit the prosecutor's role as an advocate. In a number of instances the ethical rules mirror the constitutional provisions. From the beginning of a criminal case to its conclusion, the prosecutor must act in accordance with law and justice. The prosecutor must not prosecute a charge the prosecutor knows is not supported by probable cause.[454] He must make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel and has been given reasonable opportunity to obtain counsel.[455] The prosecutor must not seek to obtain from an unrepresented accused a waiver of important pretrial rights.[456]

A constitutional and ethical obligation of the prosecutor is to make timely disclosure of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and the court all unprivileged mitigating information known to the prosecutor.[457] To prevent extraneous or prejudicial information to influence the verdict, the prosecutor must exercise reasonable care to prevent any person assisting or associated with the prosecutor in a criminal case from making an extra-judicial statement that will likely materially prejudice an adjudicative proceeding in the matter. The prosecutor also must refrain from making such statements.[458]

A prosecutor must avoid all conflicts of interest. He must not prosecute a case where his conduct would be limited or influenced by the prosecutor's personal, financial or political interest.[459] Also the prosecutor should not seek employment with a lawyer or law firm that is currently representing an accused in a matter the prosecutor is prosecuting or in which the prosecutor is associated.[460]

## IV. Disciplinary Enforcement of Ethical and Professional Standards

### A. Introduction

The practice of law is a privilege surrounded with public interest, but vested as well with private responsibility. Acts of misconduct, including those committed outside the exercise of the legal profession, and violation of ethical and professional standards by lawyers may be cause for professional discipline. While the primary purpose of disciplinary proceedings is identified with the need to protect the public by taking corrective action against unprofessional lawyers, their use also ensures that professional ethical standards are maintained at a sufficiently high level.

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[453] *Berger v. United States*, 295 U.S. 78 (1935).
[454] ABA MRPC, Rule 3.8 (a).
[455] *Id.* at (b).
[456] *Id.* at (c).
[457] *Id.* at (d).
[458] *Id.* at (f).
[459] American Bar Association Standards for Criminal Justice: The Prosecution Function, Standard 3-1.3 (a) - (h).
[460] *Id*.

Independence and impartiality are key features of any disciplinary system, including the one applicable to lawyers. Individuals who complain about their lawyers' conduct must feel that their grievance will be dealt with in a fair and unbiased manner. According to the United Nations (UN) Basic Principles on the Role of Lawyers, a variety of approaches is possible in this context, as disciplinary proceedings against lawyers can be brought before an impartial disciplinary committee established by the legal profession, an independent statutory authority, or before a court.[461]

Disciplinary systems that are entirely self-regulated, *i.e.* operated exclusively by the professional association itself, have been criticized for their apparent bias and partiality. In the United States, the ABA has recommended that, in order to avoid even the appearance of impropriety, the disciplinary system be controlled and managed exclusively by the state's highest court, and not by state or local bar associations.[462]

Disciplinary proceedings must also be dealt with expeditiously and fairly under appropriate procedures. This implies that lawyers subject to such procedures should be entitled to due process, including the right to be assisted by a lawyer,[463] to receive written notice of the charges, and to a trial-type hearing before the competent body, being it a committee or a court. Moreover, as stated in the UN Basic Principles on the Role of Lawyers, and related procedures adopted by different legal systems, disciplinary proceedings should always be subject to independent judicial review.[464]

Unlike the United States, where the disciplining of lawyers has become increasing professionalized, and is now under the supervision of the judicial branch, in most European countries local bar associations are still generally charged with such tasks.

## B. Lawyer Disciplinary Systems in the United States

In the United States, the principles of a disciplinary structure under the aegis of the jurisdiction's highest court, of open hearings, and the introduction of public representatives on hearing panels and review boards were all recommended by the 1970 Clark Report. This report called for the professionalization of lawyer disciplinary enforcement as opposed to the 'scandalous' situation determined by the existing unregulated, bar controlled disciplinary system that investigated relatively few complaints, imposed sanctions secretly and inconsistently, and protected the bar's elite.[465] Following the Clark Report, in the mid 1970s, U.S. states began to review lawyer disciplinary systems and initiated substantive and procedural changes. A few years later, the ABA adopted guidelines for lawyer disciplinary proceedings.[466] In 1993, the

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[461] UN Basic Principles on the Role of Lawyers (1990), § 28. [Hereinafter UN Basic Principles].

[462] Lawyers Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement (Mc Kay Report) (ABA Centre for Professional Responsibility, 1992), at 1.

[463] UN Basic Principles, *supra* note 461, §27.

[464] *Id. See* also Recommendation (2000) 21 of the Committee of Ministers of the Council of Europe on the Freedom of Exercise of the Profession of Lawyer, Principle VI (3).

[465] Special Comm. on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 1 (American Bar Association, 1970), 1-2, 24-25, 175-78.

[466] ABA Standards for Lawyers Discipline and Disability Proceedings (1979).

ABA adopted the Model Rules for Lawyer Disciplinary Enforcement, which were later revised, to provide a single statement of ABA policy on the proper structure of disciplinary proceedings.[467] The majority of states currently follow these guidelines.

## 1. General Features of the Disciplinary System

### a) Judicial Overview

In the United States, lawyers are admitted to practice law and primarily subject to discipline by the highest courts of the 50 states and the District of Columbia.[468] State supreme courts delegate the discipline of lawyers to state lawyer disciplinary agencies. In two-thirds of the states, the state bar is an agency of the state supreme court and, in some of these "unified bar" states, serves as the disciplinary agency. In most states, however, the state's supreme court delegates responsibility for lawyer discipline to an independent agency, responsible directly to the supreme court, with both prosecutorial and adjudicative components. The vast majority of states have professional disciplinary counsel (a lawyer employed by the disciplinary agency full-time) to receive, investigate and prosecute complaints against lawyers. Generally, the disciplinary counsel is assisted by a staff of support personnel and investigators.

For the most part, therefore, the judicial branch of government in the U.S. has been determined to be the appropriate *'situ'* of lawyer discipline. This has been accepted either under the view that courts have inherent power to control conduct before them or under the view that courts are better equipped than the more political branches of government, *i.e.*, the executive and the legislative, to regulate the legal profession.

### b) Purposes of Lawyer Discipline

Lawyer discipline has multi-faceted purposes including the protection of the public, of the courts, and the fostering of public confidence in the administration of justice. While deterrence is often mentioned as a purpose of lawyer discipline, almost all jurisdictions state that punishment is not the primary scope of disciplinary proceedings. Whereas, for the most part, only individual lawyers are subject to discipline, law firms in the states of New Jersey and New York are now also subject to it.

Professional discipline is not the only way of responding to lawyer misconduct. In recent years, courts in the United States have increasingly imposed other sanctions on lawyers, including fines and assessment costs. In addition, malpractice liability, criminal conviction, contempt of court citations, denial of legal fees, and summary court orders to turn over funds or property, are all alternative tools to help redress unprofessional behavior.[469]

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[467] ABA Model Rules for Lawyers Disciplinary Enforcement (2001). [Hereinafter ABA MRLDE].

[468] Federal courts grant admission to practice before them based upon admission to the bar of at least one state; federal courts also discipline lawyers admitted to practice before them, but such disciplinary actions are usually based upon conduct which has already resulted in state discipline.

[469] Aronson & Weckstein, PROFESSIONAL RESPONSIBILITY, *supra* note 222, at 71.

### c) Public Participation in Disciplinary Proceedings

Charges filed by disciplinary counsel are mostly adjudicated by panels composed of lawyers and non-lawyers who serve on a voluntary, uncompensated basis. The addition of non-lawyers to disciplinary adjudicative bodies in recent years has been an important development in attempting to improve public confidence in state lawyer discipline systems. In some states, such as Florida and Maryland, disciplinary cases are filed in courts of general jurisdiction and heard before trial judges; in two states, disciplinary cases are heard by full time disciplinary court judges.[470]

### d) Transparency of Disciplinary Proceedings

Another important development in disciplinary proceedings in the U.S. over the past twenty years has been the opening of disciplinary proceedings to the public. This approach is supported by improved public confidence in the system. In Oregon, for example, disciplinary matters are open from the time an individual complains about a lawyer; in three other states, disciplinary matters are open once the complaint has been dismissed or formal charges, based upon a determination of "probable cause," are filed against the lawyer.[471] In less than one third of the states, disciplinary matters are still confidential unless and until the highest court publicly sanctions the lawyer; in those states, hearings are closed to the public. For about twenty years, the ABA has recommended that disciplinary proceedings be open to the public upon a determination of probable cause to believe that misconduct has occurred.

## 2. Disability

Because the principal responsibility of the disciplinary agency is to protect the public, it should also concern itself with disabled lawyers who endanger the interests of clients, even if no misconduct has been committed.[472] Nevertheless, it is important that incapacity not be treated as misconduct, and to clearly distinguish willful conduct from conduct beyond the control of the lawyer. If the lawyer's disability has been judicially determined or is admitted, there is no need for further proceedings before the court issues an order of transfer to disability inactive status.

If the respondent in a disciplinary proceeding alleges inability to conduct a defense because of present disability, she should be transferred immediately to disability inactive status to protect existing and prospective clients, and a proceeding to determine whether the respondent is in fact disabled should be initiated immediately. [473]

Disability proceedings should remain confidential until the final order of the court, because medical evidence or other peculiarly personal information relating to the lawyer is often involved. Public disclosure is necessary whenever a lawyer's license to practice has been limited in any way. Failure to reveal the fact of transfer to disability inactive status would otherwise mislead the public and others likely to come into contact with the lawyer into believing that he

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[470] *See, e.g.*, California, Colorado.

[471] Arizona, Florida, West Virginia.

[472] *See* ABA MRLDE (1996), Rule 23.

[473] If it is determined that the claim of current disability is unsubstantiated, the proceedings predicated on the allegations of misconduct should be immediately resumed.

remains eligible to practice. The order transferring the lawyer to disability inactive status should clearly state the conditions that must be met for the lawyer to be reinstated to active status.[474]

### 3. Grounds for Discipline

#### a) Violation of the Rules of Conduct

In the United States, as in any other country, violation of the rules of professional conduct constitutes grounds for discipline. When a lawyer is admitted to practice, she becomes subject to the rules of professional conduct in that jurisdiction. A violation of those rules triggers the jurisdiction of the disciplinary agency. This does not mean that every violation necessarily requires the imposition of a sanction, but merely that the agency can investigate the matter.

#### b) Reciprocal Discipline

In cases where a lawyer suspended or disbarred in one jurisdiction is also admitted to practice in another jurisdiction, swift action should be taken in the public interest. In such cases, if no action can be taken against the lawyer until the completion of a new disciplinary proceeding, the public in the second jurisdiction would be left unprotected. Any procedure that so exposes innocent clients to harm cannot be justified, exposes the profession to criticism, and undermines public confidence in the administration of justice.

In the United States, the disciplinary agency's jurisdiction to investigate and to take appropriate action is also triggered by discipline imposed in another state or federal court. Disciplinary counsel in the forum jurisdiction should be notified by the jurisdiction where the original measures were imposed. Upon receipt of such information, the former serves upon the lawyer an order to show cause why identical discipline or disability inactive status should not be imposed in the forum state. The imposition of discipline in one jurisdiction (state or federal) does not mean that every other jurisdiction in which the lawyer is admitted must necessarily impose the same sanction, but the burden is on the respondent lawyer to demonstrate that the imposition of the same sanction is inappropriate.[475] A judicial determination of misconduct or disability by the respondent in another jurisdiction is conclusive, and not subject to re-litigation in the forum state.

#### c) Conviction of a Crime

The rules of conduct are rules of legal ethics, but they may also import certain crimes that reflect adversely on the lawyer's honesty, trustworthiness or fitness to practice. Generally, a lawyer found guilty of a "serious crime" is immediately suspended from the practice of law.[476]

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[474] In any situation in which the lawyer is not available to protect clients - as when a lawyer is transferred to disability inactive status or dies or disappears, the agency should appoint counsel as trustee to protect that lawyer's clients' interests. *See* ABA MRLDE, Rule 28.

[475] *See* ABA MRLDE, Rule 22.

[476] Serious crimes are defined as "any felony and any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false

The rationale for interim suspension upon conviction of a serious crime is to protect members of the public and to maintain public confidence in the legal profession. Interim suspension not only removes any danger to clients and the public which the respondent may impose, but also serves to protect the profession and the administration of justice from the specter created where an individual found guilty of a "serious crime" continues to serve as an officer of the court in good standing.

Interim suspension is not final discipline; therefore disciplinary counsel must proceed to file formal charges based upon the finding of guilt and subsequent conviction.[477] Formal disciplinary proceedings should not be conducted until all appeals from the conviction have been exhausted, unless the respondent so requests.[478]

Interim suspension is provisional and temporary, awaiting the affirmance or reversal of the judgment of conviction. An interim suspension remains in effect until the court lifts it, or until the court imposes a final disciplinary sanction. Such suspension should be terminated if the underlying basis no longer exists. Thus, if a finding of guilt or subsequent judgment of conviction for a "serious crime" is reversed or vacated, the court should immediately enter an order terminating the interim suspension.

A respondent should also have the possibility to petition the court to terminate an interim suspension on the grounds that extraordinary circumstances exist. For example, if the suspended lawyer demonstrates that, because of the lawyer's unique qualifications, his or her unavailability to conduct an important trial would seriously prejudice a client, the court should limit its order terminating the suspension to that trial.[479]

The order terminating the interim suspension does not prevent the agency from continuing with any disciplinary proceeding initiated, but the underlying conduct must be established by evidence other than the determination of guilt or the conviction.

### d) Substantial Threat of Serious Harm

Interim suspension of a lawyer who poses a substantial threat of serious harm to the public is another important tool available in a majority of state jurisdictions in the United States. Certain misconduct poses such an immediate threat to the public and the administration of justice that the lawyer should be suspended from the practice of law immediately pending a final determination of the ultimate sanction to be imposed. Interim suspension is also appropriate when the lawyer's continuing conduct is causing or is likely to cause serious injury to a client or the public, as, for example, where a lawyer abandons the practice of law or is engaged in an ongoing conversion of trust funds.[480]

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swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy or solicitation of another to commit a serious crime." ABA MRLDE, Rule 19(C).

[477] *Id.* at (B).

[478] *Id.*, Commentary.

[479] *Id*.

[480] *See* ABA MRLDE, Rule 20, Commentary.

In the United States, the procedures for interim suspension in such cases are similar to those applicable to civil temporary restraining orders, except that an immediate interim suspension order does not expire automatically, but requires a motion for dissolution or modification.

Since immediate interim suspension may be imposed *ex parte* following reasonable efforts to notify the lawyer, a lawyer suspended without a hearing should be afforded an opportunity to seek dissolution or modification of the suspension order on an expedited basis.

### e) Failure to Cooperate with Disciplinary Authority

All lawyers are required to cooperate promptly and fully when confronted with complaints, accusation or charges of professional misconduct. Such cooperation extends to all phases of the investigation and includes the duty to appear at disciplinary hearings. Failure to cooperate with the disciplinary agency by willfully violating a valid order imposing discipline, willfully failing to comply with a validly issued subpoena, or knowingly failing to respond to a lawful demand from a disciplinary authority constitute grounds for discipline.[481]

Lawyers are entitled to due process in disciplinary proceedings and are protected by Fifth Amendment rights under the U.S. Constitution against self-incrimination. A lawyer who fails to answer charges or fails to appear before a disciplinary body may be deemed to have admitted the factual allegations.[482]

## 4. Disciplinary Proceedings

### a) Nature and Procedural Fairness of Lawyers' Disciplinary Proceedings

Disciplinary proceedings against attorneys for professional misconduct in the United States are not criminal proceedings. Nor are they civil proceedings. They are *'sui generis'*, adversary proceedings in which the standard of proof is clear and convincing evidence, *i.e.* lower than the criminal standard of beyond a reasonable doubt.[483]

The holder of a license to practice law is subject to discipline for breaches of the rules of professional conduct, but the license must not be taken away arbitrarily. A lawyer accused of a disciplinary offense is in fact entitled to the protection and guarantees of due process of law relating to such conduct. Such due process rights include fair notice of the charges, right to counsel, right to cross-examine witnesses, right to present arguments to the adjudicators, right of appeal,[484] and right to subpoena and discovery.[485] Fairness requires that no recommendation adverse to the respondent lawyer be made without providing him an opportunity to be heard.[486]

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[481] *Id.*, Rule 9(a)(3).
[482] *Id.*, Rule 33.
[483] *Id.*, Rule 18(C).
[484] *Id.*, Rule 11.
[485] *Id.*, Rules 14 and 15.
[486] This does not mean that the respondent is entitled to notice immediately upon receipt of a complaint. In some

Discipline and disability proceedings serve to protect the public from lawyers who are unfit to practice; they measure the lawyer's qualifications in light of certain conduct, rather than punish him for specific transgressions. Thus, statutes of limitations seem inappropriate in lawyer disciplinary proceedings.[487] Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice. The time between the commission of the alleged misconduct and the filing of a complaint predicated thereon may be pertinent to whether and to what extent discipline should be imposed, but should not limit the disciplinary agency's power to investigate. Finally, immunity should be granted to disciplinary agency personnel as an integral part of the judicial process in order to protect their independent judgment.[488]

### b) Screening, Investigation, and Dispositions by Disciplinary Counsel

Under the ABA Model Rules, disciplinary counsel reviews all information coming to the attention of the agency.[489] This includes complaints from members of the public, clients, lawyers and judges (both of whom have an ethical duty to report misconduct). It also includes reports of criminal proceedings and of discipline imposed elsewhere, as noted above, and information from scanning the news media. A very effective tool is notification by financial institutions of trust account overdrafts.[490] Some states have also initiated random audits of trust accounts as a preventive mechanism.[491] Investigation is reserved only for allegations which, if true, would constitute misconduct. Therefore, the most common complaints against lawyers, such as cases of minor neglect of client's affairs and overcharging, are adjusted without formal disciplinary proceedings.[492] Other cases, such as misappropriation of client's funds or commission of a felony, call for an investigation.

If the matter is terminated at the screening stage because it does not involve allegations of misconduct, disciplinary counsel notifies the complainant. Complainants should have the right to appeal a dismissal of their complaints.[493] It is important that complainants feel they have had their day in court on the basis of their complaint. Without a right of appeal, complainants may feel that their grievances were not given sufficient consideration by the disciplinary system as a whole. Public sentiment of "lawyers protecting their own" can stem from this misunderstanding. A complainant should be able to have the court review the disposition of a matter if he or she believes that the agency has acted improperly. The court should not consider the appeal unless there is presented a *prima facie* showing that the agency abused its discretion.

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instances, in fact, early notice would be harmful to the investigation. It does mean that the respondent has a right to be heard before the investigation is concluded and an adverse disposition formulated.

[487] *See* ABA MRLDE, Rule 32.

[488] *Id.*, Rule 12, Commentary.

[489] *Id.*, Rule 11 (A).

[490] *Id.*, Rule 29. Under Rule 1.15(a) of the ABA Model Rules of Professional Conduct, lawyers have an ethical duty to hold client funds in trust accounts.

[491] *See, e.g.*, New Jersey, North Carolina. *See also* ABA Commission on Evaluation of Disciplinary Enforcement (hereinafter "McKay Commission").

[492] Complaints concerning fees, for instance, can be referred to fee arbitration programs, in jurisdictions where they exist.

[493] *See* ABA MRLDE, Rule 31.

In cases where an investigation was conducted, disciplinary counsel may: dismiss the case; refer the respondent, in cases of lesser misconduct, to the Alternate Disciplinary Program; or recommend probation, admonition, the filing of formal charges, the petitioning for transferring to disability inactive status, or a stay.[494]

Where formal proceedings are necessary, disciplinary counsel shall formulate formal charges in writing that give fair and adequate notice of the nature of the alleged misconduct to the accused lawyer. The respondent shall file a written answer within twenty days.[495] Fairness requires that no recommendation adverse to the respondent be made without providing him an opportunity to be heard.

### c) Discipline by Consent

Acceptance of stipulated discipline by a lawyer who has been guilty of misconduct and desires to avoid the trauma and expense of a proceeding is in the interest of the public and the agency. The public gains immediate protection from further misconduct by the lawyer, who might otherwise continue to practice until a formal proceeding is concluded, and the agency is relieved of the time-consuming and expensive necessity of prosecuting a formal proceeding.

According to the ABA Model Rules, if an agreement provides for reprimand, suspension or disbarment, or if any agreement is reached after formal charges have been filed, the agreement must be approved by an adjudicative panel. If the stipulated discipline provides for the most serious forms of suspension and disbarment, it must also be approved by the court.[496] Discipline by consent that results in the lawyer withdrawing from the practice of law should be recorded and treated as disbarment, not as resignation. An agreement made when the charges are before the board should be reviewed by the court.

### d) Disciplinary Hearings

If the respondent lawyer does not consent to an agreed upon sanction, the matter goes to hearing. In order to encourage public confidence in the process, the ABA and many states recommend a hearing before a committee composed of two lawyers and one non-lawyer.[497]

The procedure in disciplinary hearings is similar to that in court trials. The hearing should be recorded by any method authorized in the jurisdiction, and attendance of witnesses and production of documents may be compelled. If the hearing committee determines the lawyer has done no wrong, the complaint is dismissed.

As mentioned above, transparency and publicity are important features of lawyers' discipline in the United States. Whereas confidentiality characterizes the stage preceding the

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[494] *Id.*, Rule 11.

[495] *Id.* at (D).

[496] *See* ABA MRLDE, Rule 21.

[497] A pre-hearing conference may be held by the chairman *sua sponte*, or upon request of counsel, the respondent (or respondent's counsel), or another hearing committee member. Prehearing conferences need not be held in lesser misconduct cases.

formulation of charges, once formal charges have been formulated, and in order to promote the integrity of the disciplinary system in the eyes of the public, proceedings should be open to the public.[498] Moreover, all records of the agency are generally made available to the public after the service of formal charges.[499]

### e) Review

While the hearing committee is the initial trier of fact, the disciplinary board serves an appellate review function. Review of decisions is a fundamental feature of such proceedings. Unless the decision of the hearing committee or the board is appealed by either party, and unless the board or court affirmatively decides to review a matter, cases should be disposed of at the earliest possible stage.

State supreme courts retain ultimate responsibility for all disciplinary matters and, thus, reserve the right to review any matter or even hold a *de novo* hearing. This should occur only in extraordinary cases involving significant questions of law. In all other cases, the court should rely on its disciplinary agency to dispose of matters in accordance with established disciplinary law. If new evidence warranting a reopening of the proceeding is discovered, the case should be remanded to the hearing committee.

## 5. Alternative Procedures in Cases of Lesser Misconduct

The overwhelming majority of complaints made against lawyers allege instances of minor misconduct. In such cases, the respondent's conduct does not justify imposing a disciplinary sanction. Therefore, these matters should be removed from the disciplinary system and handled administratively. For example, in some cases it may be appropriate to compensate the client for the respondent's substandard performance by a fee adjustment or other arbitrated or mediated settlement. In others, the respondent may need guidance to improve his skills or to overcome a problem with substance abuse.

Single instances of minor neglect or minor incompetence, which technically represent violations of the rules of professional conduct, are almost always dismissed by disciplinary agencies. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with the system. The ABA has thus recommended the establishment of simplified, alternative procedure called "Alternatives to Discipline Programs" for instances of "lesser misconduct." [500]

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[498] ABA MRLDE, Rule 16, Commentary.

[499] *Id.* at (A).

[500] *See* ABA MRLDE, Rule 11(G). Minor misconduct is that which does not warrant a sanction restricting the respondent's license to practice law. ABA MRLDE, Rule 9(B).

### a) Voluntary Participation

Participation by the attorney to such programs is voluntary, and disciplinary counsel may recommend formal charges even if the original complaint alleged lesser misconduct. After the filing of formal charges, a referral to any such program can be made as a written condition attached to an admonition or a reprimand.[501]

Each participant in the program will become a party to a contract that is specifically designed to address the alleged violations. It will be the respondent's responsibility to carry out the contract provisions. In order to encourage voluntary participation in Lawyer Assistance Programs (LAP) for substance abuse, such programs provide confidentiality.

### b) Nature and Determination of Lesser Misconduct

Participation in the Alternatives to Discipline Program is not intended as an alternative to discipline in cases of serious misconduct and will only be considered in cases where the presumptive sanction would be less than suspension or disbarment or other restrictions on the right to practice.[502] The existence of one or more aggravating factors does not necessarily preclude participation in the Alternatives to Discipline Program. For example, neglect cases often include a pattern of misconduct and multiple offenses, but do not involve dishonesty, bad faith, or a breach of fiduciary obligation. In addition, the existence of prior disciplinary offenses does not necessarily make a respondent ineligible for referral to such programs. Consideration should be given to whether the respondent's prior offenses are of the same or similar nature, whether the respondent has previously been placed in any such program for similar conduct, and whether it is reasonably foreseeable that the respondent's participation in program will be successful.

Simplified, expedited procedures should also be utilized when a matter meets the definition of lesser misconduct but there is no agreement that the respondent will participate in an appropriate program.[503] In such cases, a procedure involving a single hearing committee member should expedite a matter that can only result in a sanction that does not restrict the right to practice. Such procedures are fair, equitable and offer sufficient protection to the concerned attorney: they preserve the rights to notice and hearing, to present evidence and confront witnesses, and to seek review.

## 6. Forms of Discipline

Discipline of lawyers may take several forms, depending on the particular circumstances of the case and on the severity of the disciplinary offense.

In 1986, the ABA adopted Standards for Imposing Lawyer Sanctions. The purpose of these Standards was to set forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct, and helping to achieve the degree of consistency and fairness necessary to the imposition of lawyer

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[501] *See* ABA MRLDE, Rule 10(B).
[502] *See* ABA MRLDE, Rule 9 (B).
[503] *Id.*, Rule 18 (H).

discipline. According to such standards, a variety of factors should be taken into consideration in determining the sanction to be applied in cases of lawyer's misconduct. These include:

1. what ethical duty the lawyer has violated (e.g. a duty to a client, the public, the legal system, or the profession);

2. the lawyer's mental state at the commission of the act of misconduct (e.g. whether the lawyer acted intentionally, knowingly, or negligently);

3. the extent of the actual or potential injury caused by the misconduct; and

4. the existence of aggravating and mitigating factors.[504]

In deciding the type of sanction to be applied, it is clear that the most important duties are those obligations that a lawyer owes to clients, such as the duty of loyalty, of diligence and competence.

In the United States, disciplinary sanctions range from the most severe, such as disbarment and suspension, to probation, public reprimand and private admonition. While prior discipline is relevant and material to the issue of the sanction to be imposed for the conduct that is the subject of the pending charges, the introduction of evidence of prior discipline before a finding that the present charges have been sustained is prejudicial and should not ordinarily be introduced until a finding of guilt has been made.[505]

### a) Private v. Public Discipline

Ultimate disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of recidivism, should private discipline be imposed.[506] Broad dissemination of information concerning public discipline serves important purposes, including facilitating reciprocal discipline where necessary, and protecting the public and the legal community from being misled concerning the lawyer's eligibility to provide representation.[507]

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[504] Aggravating factors include: prior disciplinary offenses; a dishonest or selfish motive; a pattern of misconduct; bad faith; the vulnerability of the victim; and indifference to making restitution. Mitigating factors include: absence of a prior disciplinary record, absence of a dishonest or selfish motive; personal or emotional problems; a timely good faith effort to make restitution or to rectify consequences of one's misconduct; a cooperative attitude with the disciplinary agency; inexperience in the practice of law. ABA Standards for Imposing Lawyers Sanctions (1992), 9.

[505] If evidence of prior discipline is necessary to prove the present charges (*e.g.* an allegation that the respondent continued to practice despite being suspended) or to impeach (*e.g.* false testimony by respondent as to lack of prior discipline), it may be offered. However, it should not be used as a substitute for proving the allegations at issue.

[506] ABA MRLDE 10 (D).

[507] *Id.*, Rule 17 (A).

### b) Types of Sanctions

#### (1) Admonition and Reprimand

There are situations in which it may be appropriate to impose private discipline. A private sanction in those cases informs the lawyer that her conduct is unethical but does not unnecessarily stigmatize her. As mentioned above, certain kinds of minor misconduct can be adequately disposed of without a full trial if the parties concur. The determination that admonition is the appropriate sanction in a particular case requires not only consent by the respondent, but also approval, in writing, by a hearing committee chair.[508] Admonitions should be in writing and served upon the respondent. They constitute private discipline because they are imposed before the filing of formal charges. A reprimand is imposed only in cases of relatively minor misconduct, after the filing of formal charges and a hearing. A reprimand should be in writing.

#### (2) Probation

Probation is the appropriate sanction when the respondent can perform legal services and will not likely harm the public, but has problems that require supervision. Its use may be appropriate in certain cases of disability, if the condition is temporary or minor, and capable of treatment without transfer to disability inactive status. The terms of probation should specify periodic review of the order of probation, and provide means to supervise the progress of the respondent. Usually probation should not be renewed more than once; if the problem cannot be resolved by probation of two years or less, probation may be an inadequate sanction and a suspension may be more appropriate. In exceptional circumstances, however, probation may be renewed for a specified period of time.[509]

#### (3) Disbarment and Suspension

Disbarment removes the lawyer's license and in some states is permanent. Since the court has exclusive responsibility to license lawyers, it has the sole authority to remove the license. The duration of a suspension should reflect the nature and extent of the lawyer's misconduct and any mitigating or aggravating circumstances involved.[510] Where the misconduct is so severe that even a three-year suspension is not adequate, the lawyer should be disbarred. Notice that a lawyer has been disbarred or suspended should be given to all clients, co-counsel, and opposing counsel with pending matters.[511]

### c) Readmission or Reinstatement

Reinstatement occurs when a suspended lawyer is returned to practice, and is appropriate when a lawyer shows rehabilitation. As a condition of readmission or reinstatement, a disbarred or suspended lawyer is usually required to establish rehabilitation, fitness to practice and

[508] If the respondent refuses to accept an admonition, however, the admonition is vacated and the matter disposed of by formal charges.
[509] ABA MRLDE, Rule 10, Commentary.
[510] *Id.*, Rule 10(C).
[511] *Id.*, Rule 27.

competence; he may also be required to pay the costs of the disciplinary proceedings, to make restitution, to disgorge all or part of his or the law firmÕs fee, to pass an examination in professional responsibility, and to comply with court orders. In no event should a lawyer be considered for readmission until at least five years after the effective date of disbarment.[512]

When a limitation on a lawyer's license has been removed through reinstatement, readmission or transfer to active status, publication and notification help the lawyer avoid a potential burden involved in correcting misunderstandings concerning her eligibility to practice. It is therefore fair and reasonable to give notice of reinstatements, readmissions, and transfers to active status in the same manner as notice of public sanctions.

### d) Restitution

Whenever possible, the disciplinary process should facilitate restitution to the victims of the respondent's misconduct without requiring victims to institute separate proceedings at their own expenses.[513] Whenever a respondent is found to have engaged in misconduct warranting the imposition of discipline, she should be required to reimburse the agency for the costs of the proceedings, including reasonable attorney fees. Restitution should be made a part of the disciplinary order as a condition of reinstatement.[514] Failure to comply with the order for restitution may itself warrant discipline.

## C. Overview of Lawyer Discipline in Select European Countries

Unlike the United States, where lawyer disciplinary systems have for the most part been transferred from state bars to autonomous, professional disciplinary agencies supervised by the highest states courts, in many European civil law countries, local bar associations are charged with investigating and prosecuting lawyers' misconduct. The performance of adjudicative functions by bar controlled bodies may result in little, if any, transparency, in biased decisions, and public distrust in the system of lawyer discipline as a whole. The difference between the U.S. and some European civil law systems has been captured in the following observations:

> "[Disciplinary] proceedings are, as a general rule, heard in chambers; the French Bar considers such affairs to be 'internal,' thereby emphasizing the mutual protection of the members…[This] is in direct contrast to the transparency of the various American state bars…"[515]

> "In Dutch procedure complaints are filed with the Bar Association's presidents of the legal districts, who operate as a first sieve. A president may try to reach a settlement or appease parties in other informal ways…"[516]

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[512] *Id.*, Rule 25 (A).
[513] *Id.*, Rule 10, Commentary.
[514] *Id.*, Rule 25(I).
[515] Philippe Sarrailhe, *supra* note 31, at 2-8 (1995).
[516] Leny E. De Groot-Van Leeuwen, Polishing the Bar: The Legal Ethics Code and Disciplinary System of the Netherlands, and a Comparison with the United States, 4 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 9, 14

An overview of the lawyer disciplinary systems present in some European countries seems to confirm this hypothesis.

In France, the Bar Council exercises disciplinary function *vis-à-vis* its members for misconduct, faults and breaches of the Code of Conduct. French lawyers are also subject to disciplinary proceedings for breaches of honor committed outside their professional life.[517] Both the lawyer and the district attorney may appeal the case to the court of Appeal. Even in such case, hearings are confidential, unless the lawyer demands a public hearing.

In Italy, the Ethical Code specifies that disciplinary violations result from the voluntary failure of the lawyer to comply with her duties, and that sanctions be proportionate to the seriousness of the disciplinary offense.[518] While each local bar association acts as the disciplinary body of first instance, with an administrative function, the National Bar Council acts as second instance, having judicial function. In proceedings before the local bar association, if the claims against the lawyer are deemed to be well founded, formal charges are communicated to both the lawyer involved and to the public prosecutor. The decision is at this stage reached in chambers. The accused has a right to appeal to the National Bar Council. In case of appeal, both the Attorney General to the Court of Cassation (Italy's Supreme Court) and the local bar must take part in the proceedings. The appeal hearing is public. Further appeals to the Court of Cassation are only admissible on limited grounds.[519]

In Germany, clients' complaints are addressed to the executive committee of the regionally competent chamber of advocates. While cases of minor disciplinary misbehavior are subject to reprimand by the executive committee of the chamber of advocates, those involving more serious professional misconduct are dealt with by the advocates' court. These are ordinary courts which are separated from, and independent of the chamber of advocates. While advocates' courts of first instance are exclusively composed of advocates,[520] the advocates' courts considering appeals have mix composition.[521] In the third instance, appeals on legal merit are considered by the advocates' Senate at the Highest Federal Court, also having a mixed composition.[522] Disciplinary proceedings are of a quasi-criminal nature, and are not open to the public.

In Armenia, disciplinary hearings take place before the Disciplinary Commission of the local bar association where the lawyer has membership,[523] and can take place *in absentia* where

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(1997).

[517] State Decree (27 November 1991), Articles 180 and 183.

[518] Ethical Code for Italian Lawyers (1999), Article 2 and 3.

[519] These grounds include: incompetence, excess of jurisdiction, and violation of the law. Pending a decision by the Court of Cassation, the accused can request suspension of the application of the sanction imposed by the National Bar.

[520] BRAO, §§ 94-96. The advocates are nominated by the Ministry of Justice on the proposal of the chamber of advocates.

[521] Such courts are part of the appeals courts. Out of five judges, two are judges of the appeal court. *See* BRAO, § 104.

[522] BRAO, §§ 106-107. The panel is composed by four judges and three advocates.

[523] Disciplinary proceedings cannot be initiated if the time-limit for disciplinary responsibility has elapsed. The statute of limitations is three months after the discovery of the violation. In case of continuing violations, this term

the lawyer intentionally neglects them. The Code of Ethical Conduct provides for the right of the accused lawyer to be assisted by counsel and to call witnesses.[524] Although it specifies that disciplinary proceedings can be initiated on the basis of a written report, the code does not indicate who has the right to present such report, nor its content. Following preliminary examination by the President of the local bar association, the case is submitted to the Disciplinary Commission. Decisions of the Disciplinary Commission may be appealed to the court within one month from the day of imposition of the sanction.

In Poland, disciplinary proceedings are closed to the public. Only members of the Association of Advocates and representatives of the Minister of Justice can be present at disciplinary hearings. Decisions taken by the Superior Disciplinary Court can be appealed to the Supreme Court by the parties to the disciplinary proceeding, the Ministry of Justice, the Ombudsman, and the President of the Superior Advocates' Board.

Unlike procedures adopted by some of the countries just mentioned, the system of lawyers' discipline in Scotland is characterized by a high degree of transparency and fairness. Following a preliminary investigation by the Law Society, complaints that appear to be well founded are referred to a Client Relations Committee, composed of both solicitors and lay members. Such committees have the power to award limited compensation and to order the solicitor to remedy any defects in the services provided. If, however, the matter is seen as one which may constitute professional misconduct, the Council of the Law Society may prosecute the solicitor before the independent Solicitors Discipline Tribunal. If a complainant is dissatisfied with the way the Law Society has dealt with a complaint, she may refer the matter to the Legal Services Ombudsman. The latter is entitled to review the procedures used by the Law Society and recommend that the complaint be considered again. This recommendation is normally followed by the Law Society. The Ombudsman prepares an annual report which is available to the public, detailing the nature and disposal of referral to her office.

## D. Recommendations on Lawyer Discipline

Whereas the features of lawyers' disciplinary systems can vary from country to country, there are fundamental elements necessary to ensure the general fairness, impartiality and effectiveness of such systems. For instance:

1. the exercise of lawyer discipline should not be subject to the exclusive control of the professional body in order to allow for more transparency;

2. disciplinary rules should be worded with specificity, giving fair notice to the lawyer of the specific conduct that could result in discipline;

3. due process rights should be guaranteed to the accused lawyer, including the right to counsel, to receive prompt notice of the charges, and to appeal to a judicial body;

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is one month. Law on Advocacy (1999), Article 22.

[524] Article 11 (1) and (2) of the Code of Advocates' Conduct (1999).

4. disciplinary sanctions should be proportionate to the gravity of the disciplinary offenses; and

5. alternatives to disciplinary proceedings and sanctions should be used in cases of minor misconduct.

## V. Legal Ethics and Transnational Legal Practice[525]

Commentators have expressed different views about the significance of globalization on the legal profession. In his study of globalized law firms, for example, Professor Richard Abel observed that "transnational law practice is *numerically* a trivial component of all national legal professions and will remain so for the foreseeable future."[526] Other commentators, however, have focused on the tremendous effect of globalization on legal services markets. Regardless of whether one views globalization as the "main show" or a "side show" to legal services, it is clear that the globalization phenomenon has an impact on legal services. A significant number of lawyers now work with foreign clients, work with foreign lawyers or a foreign legal system, or work, at least occasionally, in foreign countries. This phenomenon should not be too surprising; given clients' ever-expanding global business and personal interests, some globalization of legal services probably was inevitable.

Clearly, globalization and transnational legal practice are on the rise. Statistics from the U.S. Department of Commerce Bureau of Economic Analysis show a twenty-fold increase, from $97 million to $1.9 billion, between 1986 and 1996 with respect to the export of U.S. legal services.[527] The U.S. import of foreign legal services also grew significantly from 1986 to 1996, increasing from $40 million to $516 million.[528] Law firm mergers across borders are now commonplace. In sum, even if the transnational practice of law is still a relatively small percentage of the legal services market, it is an important and growing segment of the legal services market. Various regulatory responses have been adopted so far in the context of globalization and the emergence of transnational legal practice.

### A. Regulatory Responses to the Transnational Legal Practice Phenomenon

Given the increase in transnational legal practice and the globalization of legal services, it is not particularly surprising to find a significant increase in the regulatory and advisory policies that cover transnational legal practice. The regulatory or advisory schemes applicable to transnational legal practice that have emerged within the last ten years include the following:

1. General Agreement on Trade in Services (GATS), which was adopted as an annex to the agreement creating the World Trade Organization (WTO);

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[525] The material in this section is based in substantial part on Chapter VI – Ethics Meets Globalization, in Mary Daly & Laurel Terry, THE LEGAL PROFESSION IN A GLOBAL WORLD (forthcoming; title subject to change).

[526] *See, e.g.*, Richard L. Abel, *Transnational Law Practice*, 44 CASE WESTERN LAW REVIEW 737, 738 (1994).

[527] *See* U.S. Department of Commerce, 1999 Bureau of Economic Analysis, Table 1.-Private Services Transactions by Type, 1986-96, <http://www.bea.doc.gov/bea/ai/1097srv/table1.htm>.

[528] *Id*.

2. North American Free Trade Agreement (NAFTA);

3. European Union (EU) directive on the establishment of lawyers from one EU country in another EU country;

4. agreements between the ABA and the Brussels Bars, the ABA and the Paris Bar, and the City Bar of New York and the Paris Bar;

5. OECD (Organisation of Economic Cooperation and Development) Convention on Bribery; and

6. International Bar Association's (IBA) Statement of General Principles for the Establishment and Regulation of Lawyers.

In addition to these regulatory schemes, the following advisory codes for transnational practice have been in place for many years:

1. IBA Code of Conduct; and

2. CCBE [Council of the Bars and Law Societies of the European Union] Code of Conduct and its policy statement on professional secrecy and legislation on money laundering.

Several other international organizations also have issued policy statements on core aspects of lawyering. These include:

1. United Nation's Basic Principles on the Role of Lawyers; and

2. Council of Europe's Recommendation Concerning the Freedom to Exercise the Profession of Lawyer.

For those outside of the European Union, the most significant of these developments likely will be the GATS, the first multilateral trade agreement that applied to services, rather than goods. WTO Member States currently are engaged in a new round of negotiations to further liberalize trade in legal services. The interim and final deadlines for these negotiations are June 30, 2002, March 31, 2003 and January 1, 2005.[529] This new round of negotiations is likely to result in even further liberalization and increased transnational legal practice throughout the world.

The regulatory and advisory responses to transnational legal practice generally address three categories of issues. These categories include: 1) "forms of practice" issues; 2) "scope of practice" issues; and 3) "ethics and discipline" issues.

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[529] For a short introduction to the GATS, see E-Inteview with Laurel Terry, Question 2, available at <http://www.crossingthebar.com/Terry.htm>. For a comprehensive discussion of the GATS and legal services, see Laurel S. Terry, *GATS' Applicability to Transnational Lawyers and its Potential Impact on Domestic Regulation of U.S. Lawyers*, 34 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 989 (2001).

## B. Possible Responses to Double Deontology

The term *double deontology* often is used, particularly in Europe, to express the idea that a lawyer engaged in transnational legal practice may be subject to the ethics rules and discipline in both the home jurisdiction and the host jurisdiction. If a lawyer is subject to two different sets of ethics rules and discipline, the possibility exists that the rules may not be identical. In such cases, the foreign or transient lawyer will need to decide whose rules to follow should there be a conflict. There is a perception by some lawyers engaged in international work and some academics that transnational lawyers have not been given sufficient guidance about how to reconcile multiple sets of ethics codes. The problem presented by double deontology compounds the difficulty already faced by global lawyers who may have less guidance than they would like in determining how to apply their domestic rules to transnational legal practice.

To date, there have been at least five types of responses to the possible double deontology dilemma facing transnational lawyers.

The first type of response is really no response at all. It is not uncommon for a single regulatory authority to simply require the global or transient lawyer to comply with the host state's ethics rules as well as the home state rules. This approach simply ignores any double deontology problems that might result from the fact that the transient lawyer is subject to both host and home state rules. An example of this approach is the original version of ABA Model Rule of Professional Conduct 8.5, which failed to address the double deontology problem faced by U.S. lawyers who are licensed in more than one U.S. state and thus subject to more than one set of rules.

The second type of response offers the global lawyer the comfort of knowing that she will not be entirely alone in confronting a double deontology problem. In this approach, a lawyer is still subject to dual and perhaps conflicting rules, but the lawyer has some recourse if she is about to be disciplined in the host jurisdiction for acting in a manner required by the home state jurisdiction. An example of this modest approach is found in EU Directive 98/5, which governs lawyers who become permanently established or based in an EU country other than the EU country that licensed them. This directive does not provide a single harmonized set of ethics rules for the EU, nor does it provide a comprehensive conflicts of law principles for resolving all differences in ethics rules. Instead, Directive 98/5 states that a global lawyer will be subject to the ethics rules in both the home and the host state and provides the home state the opportunity to offer comments before the host state disciplines a lawyer.

> Before initiating disciplinary proceedings against a lawyer practising under his home-country professional title, the competent authority in the host Member State shall inform the competent authority in the home Member State as soon as possible, furnishing it with all the relevant details ….[T]he host Member State shall take the measures necessary to ensure that the competent authority in the home Member State can make submissions to the bodies responsible for hearing any appeal.[530]

[530] EU Establishment Directive 98/5, Articles 7 (2&3).

The ABA-Brussels Bar Agreement is another example of this consultation approach. The agreement requires U.S. lawyers working in Brussels to follow European rules, but provides for consultation among the Brussels and U.S. bar associations if a U.S. lawyer is charged with a disciplinary violation.[531]

A third possible response to the double deontology situation is a conflicts of laws' approach. Under this approach, one or both jurisdictions will specify the rules that take precedence should a conflict arise. The CCBE Code of Conduct, for instance, includes some provisions that might be described as conflicts of law provisions; they specify whether the transient lawyer should use home or host state rules if the rules conflict.

A fourth possible approach might be referred to as a positive list approach. In this approach, the transient lawyer is directed to use the host state rules except for certain specified rules with which the lawyer need not comply.

The fifth possible response to double deontology is to eliminate the conflict by replacing the "double deontology" with a single harmonized set of rules to which all lawyers or certain lawyers are subject. The IBA International Code of Conduct represents such an effort.

None of these solutions have escaped criticism. Critics have pointed out the lack of guidance and irresponsibility of jurisdictions that use the first approach and simply subject global lawyers to their own rules, without explaining how those rules may and should be reconciled with the rules of other jurisdictions. The consultation approach used in EU Directive 98/5 has been criticized because of the lack of guidance it provides to global lawyers who perceive a conflict in rules and would prefer not to have to wait until the discipline stage to resolve that conflict. Critics have also challenged the efficacy of the third approach, insofar as the conflicts of laws approach tells the foreign lawyer to use the stricter rules, or provides unclear guidance. The fourth approach, or positive list approach, was first considered, and ultimately rejected as unworkable by the ABA representatives drafting the ABA-Brussels Bar Agreement. Indeed, such an approach is even less likely to appeal to civil law lawyers, who may prefer a more general style of drafting.

Finally, some lawyers also have criticized the attempts to develop an overarching code, such as is found in the IBA Code of Ethics, on the grounds that these efforts have not proved particularly useful for global lawyers. One U.S. lawyer observed that "[t]hus far, the only effort that may be called truly international in scope is the International Code of Ethics drafted in 1956 by the International Bar Association ("IBA"). Although encompassing generally accepted principles of professional conduct for lawyers, the International Code has not been widely cited or accorded the force of law, and it is not viewed as particularly valuable in resolving practical ethical questions ..."[532] These critiques may give global lawyers pause. The experiences of the

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[531] For a discussion of the differences between the EU and ABA-Brussels consultation procedures and the ethics provisions generally, see Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-border Legal Practice: the Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INTERNATIONAL LAW JOURNAL 1382, 1444 (1988).

[532] *See* Rona R. Mears, *Ethics and Due Diligence: A Lawyer's Perspective on Doing Business with Mexico*, 22 ST.

IBA, CCBE, and ABA suggest that responses to double deontology do not come without significant involvement of lawyers. Such involvement costs time and money. For example, by the time the negotiations for the ABA-Brussels Bar agreement were concluded, the parties had met fifteen times and produced thirty drafts of the agreement. The ABA negotiators were lawyers in private practice who volunteered their time and effort. If the results of such negotiations are viewed as ineffective, one must wonder whether lawyers in private practice will continue to devote significant time and effort towards resolving double deontology problems. If lawyers in private practice will not make such efforts, one must ask who is both in a position to address these issues and willing to do so.

## C. Possible Sources of Ethics Rules for Transnational Lawyers

There are many different methods of responding and many different kinds of entities which may and do respond to the need to establish ethics rules for transnational lawyers. For example, one possible response is to create a single entity that will then adopt legislation governing transnational legal practice. In the Treaty of Rome and subsequent treaties, EU Member States joined together to create institutional bodies with authority to regulate certain aspects of transnational legal practice in all Member States. As a result, both the EU Lawyers Services' Directive 77/249 and the Lawyers' Establishment Directive 98/5 have provisions specifying whose rules of conduct a foreign lawyer should use. Another less developed example is NAFTA. Although NAFTA itself does not specify the rules of conduct that apply to transnational lawyering, NAFTA delegated to a working group the responsibility for developing such rules.

The issue of double deontology is easiest to resolve if there is a single entity, such as in the EU, with the authority to issue rules that will govern transnational lawyering in both the host and home states. In the absence of such a competent authority, other solutions have been devised. Some jurisdictions, for example, may provide a choice of law provision that will inform the foreign lawyer whether to use host or home state rules, should they conflict. This approach may not solve the double deontology problem, however, unless the choice of law provisions in both home and host state lead to the same result.

Another approach that has been used when there is no single entity that can specify the rules for foreign lawyers is government-to-government negotiations. In the past, for example, the U.S. government has lobbied Japan to change its ethics rules in order to permit Japanese lawyers to be partners with non-Japanese lawyers. A third approach to the no single entity situation was used in the context of the ABA-Brussels Bar Agreement. The ABA-Brussels Bar Agreement was an agreement about the governing rules for foreign, *i.e.* U.S. lawyers in Brussels; the agreement was executed by the ABA, an organization with no power to bind its members, and the Brussels regulators.

Some of the most significant efforts, however, have occurred in the context of negotiations among lawyers from different countries, acting through the auspices of some type of bar organization. The most notable efforts to resolve double deontology problems have been undertaken by the IBA and the CCBE.

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MARY'S LAW JOURNAL 605 (1991).

## 1. The IBA Code of Conduct

One of the earliest efforts to develop an overarching ethics code applicable to transnational legal practice is the International Bar Association's International Code of Ethics. This Code was first adopted in 1956 and most recently amended in 1988[533], and represents the IBA's attempts to draft a harmonized code of ethics for lawyers around the world.

The International Bar Association is a voluntary organization; it is not a licensing body. Accordingly, unless adopted in a particular jurisdiction, the IBA Code of Ethics is a voluntary, non-binding code. As the preamble makes clear, this is simply "a guide as to what the International Bar Association considers to be a desirable course of conduct by all lawyers engaged in the international practice of law" [534] and, except where the context otherwise requires, it applies to lawyers of one jurisdiction in relation to their contacts with lawyers of another jurisdiction or to their activities in another jurisdiction. Nevertheless, the IBA enjoys no enforcement authority whatsoever. In case of infractions, the IBA may bring incidents of alleged violations to the attention of the relevant disciplinary authorities.[535]

Consisting of twenty-one "Rules," the IBA Code is essentially a statement of norms evidencing a professional culture similar to that found in the ABA's 1908 Canons and the ABA Model Code of Professional Responsibility.[536] Lawyers are admonished to "maintain the honour and dignity of their profession…treat their professional colleagues with the utmost courtesy and fairness…[g]ive clients a candid opinion on any case…never strip up litigation….."[537] The IBA Code contains no provision relating to conflicts of interest other than a general admonition that lawyers shall preserve independence in the discharge of their professional duty.[538] As noted earlier, some critics have suggested that the IBA Code of Conduct provides little practical guidance to transnational lawyers.

In addition to the Code of Conduct, the IBA has promulgated several resolutions in recent years that are also relevant to the issue of transnational legal practice. After five years of work and multiple drafts, the IBA Council approved on June 6, 1998, its "*Statement of General Principles for the Establishment and Regulation of Foreign Lawyers."* The Chair of the drafting committee, has written:

The experience of the International Bar Association ("IBA") on only one of these issues– the status of "foreign legal practitioners" or "consultants" - illustrates [the] difficulty [of achieving consensus from the world's legal profession on transnational legal practice issues.] It

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[533] The International Bar Association is the world's largest organization of national Bar Associations and Law Societies and individual members. Founded in 1947, it is composed of more than 16,000 individual lawyer members in 183 countries and 178 Law Societies and Bar Associations together representing more than 2.5 million lawyers. The Association's overriding aim is to provide a forum where lawyers can contact, and exchange ideas with, other lawyers.

[534] IBA International Code of Ethics (1988), Preamble.

[535] *Id.*

[536] *See* Daly, *supra* note 3, at 1159.

[537] IBA International Code of Ethics, Articles 1,4,10, and 11.

[538] *Id*., Article 3.

also illustrates that consensus can be achieved on the most controversial of issues where the will to reach agreement exists.[539]

Most significantly, the IBA Council was able to agree on a section entitled "Common Regulatory Principles." It is also interesting that for both the full licensing approach and the limited licensing approach, the resolution indicates that the foreign lawyer should comply with the host state's rules.

### 2. The CCBE Code of Conduct

In addition to the IBA's efforts to develop a global ethics code, there also have been efforts to develop a code of ethics that would apply to regional transnational legal practice. The CCBE Code of Conduct applies to European lawyers engaged in transnational legal practice in EU Member States and certain other European countries. The CCBE was established in 1960 in order to study, consult, and provide representation with respect to the problems and opportunities for the legal profession arising from the 1957 Treaty of Rome that created the European Economic Community (EEC or EC).[540] Currently, the CCBE has 18 Member States and another 13 Observer States. The CCBE is the representative and liaison body for the Bars and Law Societies of the Member States of the European Union and the European Economic Area.[541] The CCBE thus represents some 500,000 lawyers in Europe. Unlike the ABA, however, individual lawyers may not join the CCBE.

The CCBE first adopted its Code of Conduct in 1988, and revised it in 1998. In November 2000, the CCBE initiated a revaluation of its Code of Conduct in light of the EU e-Commerce Directive, and the Lawyers' Establishment Directive.[542] The CCBE is to consider proposed changes recommended by the CCBE Deontology Committee in December 2002.[543]

The CCBE Code of Conduct was not the first effort the CCBE had made at addressing the topic of legal ethics. In 1977, the CCBE had issued a short statement of ethics, which was entitled "The Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community." The Declaration of Perugia was similar in style and format to the IBA Code. Consisting of eight brief ethical recommendations that were clearly "standards" rather than rules of conduct, it was neither a full Code of Conduct, nor a binding set of rules, but a short discourse on the function of a lawyer in society, and on some of the more

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[539] *See* Bernard L. Greer, Jr. *The Challenge of Globalization*, 4 BUSINESS LAW INTERNATIONAL 388-402 (Sept. 2000).

[540] The CCBE's current Constitution was adopted during the Plenary Session held in Lyons in November 1998 and was approved by Royal Decree dated June 1, 1999. The CCBE is governed by Belgian law.

[541] The CCBE has a permanent delegation to the European Court of Justice, the Court of First Instance of the European Communities, to the EFTA Court, and to the European Court of Human Rights.

[542] *See* Directives 2000/31/EC, and 98/5 EC.

[543] During the same time that the CCBE was working to revise its Code of Conduct, the ABA Ethics 2000 Commission was engaged in its reevaluation of the ABA Model Rules of Professional Conduct. §§ 106-107. Unlike the public, extensive debate generated by the revision of the latter, the CCBE Code of Conduct revisions occurred mostly in private, through confidential discussions and negotiations among a small group of interested, committed individuals. As of June 2002, the proposed changes have not been posted on the CCBE website, or otherwise been made publicly available.

important principles of ethics such as integrity, confidentiality, independence and the corporate spirit of the profession. The CCBE ultimately concluded, however, that the general statements contained in the Declaration of Perugia were insufficient to guide European lawyers tackling the challenges of cross-border practice. This desire for more detailed rules ultimately led to the adoption of the CCBE Code of Conduct.

### a) Nature and Scope of the CCBE Code

The adoption of the CCBE Code of Conduct by the CCBE could not, by itself, make the CCBE Code binding in each of the EU Member States. The CCBE is not an institution of the European Union, nor does it have decision-making power in that context. Rather, the CCBE is the official liaison to the European Union institutions, representing the interests of the lawyers in the EU and EEA Member States. Thus, as is true of the American Bar Association's role in the adoption of the ABA Model Rules of Professional Conduct, the CCBE has no official power to create binding requirements.[544] As a practical matter, however, the CCBE Code of Conduct is now binding in most member states. The CCBE Code in fact proposed that its rules be adopted as enforceable "as soon as possible in accordance with national…procedures in relation to the cross-border activities of the lawyer in the European Union and European Economic Area…."[545]

The CCBE Code applies to lawyers of the European Union and the European Economic Area as they are defined by the Directive 77/249 of 22nd March 1977.[546] Although the CCBE Code originally was intended to apply just to European lawyers practicing in Europe, its reach is even broader. For example, as a result of the ABA-Brussels Agreement, the CCBE Code now applies to certain US lawyers as well as European lawyers. Moreover, one of the original drafters of the CCBE Code has suggested that the CCBE Code should be used not just as a regional code, but as the basis for a true overarching, international code of ethics.[547]

### b) Structure of the CCBE Code

The CCBE Code of Conduct uses a structure that is somewhat similar to the structure used in the ABA Model Rules of Professional Conduct. The CCBE Code consists of black letter rules that set forth the expected conduct for lawyers. These rules are mandatory requirements, similar to the ABA Model Rules. Thus, as stated in the CCBE Code, "[t]he failure of the lawyer to observe these rules must in the last resort result in a disciplinary sanction."[548]

Given the varied languages, histories and cultures of the EU Member States, it should not be a surprise to discover that in the CCBE Code there are many areas where agreement and

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[544] When the CCBE Code of Conduct was first passed in 1988, not every CCBE Member State immediately adopted its provisions as binding rules. In Austria, for example, the CCBE Code was binding only if an Austrian lawyer voluntarily obtained the CCBE Lawyers' Identity Card, which required the lawyer to agree to follow the CCBE Code provisions.

[545] CCBE Code, Article 1.3.2.

[546] CCBE Code, Article 1.4.

[547] *See* John Toulmin Q.C., *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INTERNATIONAL LAW JOURNAL 673 (1991-92).

[548] CCBE Code, Article 1.2.1.

consensus were noted, and other areas where discrepancies and inconsistencies in those countries' ethical and professional standards could not be resolved. As a result, in some areas, although the CCBE Code of Conduct has attempted to eliminate what it refers to double deontology, it has not attempted to provide a harmonized provision that would be acceptable to all CCBE members. In such instances, the CCBE Code might be more accurately described as a "conflicts of law code", stating which state's ethics rules to use, rather than presenting "harmonized legal rules" for all EU countries. Areas where the conflicts of law approach have been taken include, *inter alia*, lawyer advertising, and incompatible occupations.[549]

The CCBE has no authority to discipline lawyers for violation of its Code. Rather, lawyers are subject to discipline in the states in which they are licensed and the states in which they practice. In other words, a lawyer is subject to discipline by both the home and host states. This authority to discipline stems from their role as the entities that actually adopt the CCBE Code. Like the ABA Model Rules of Professional Conduct, the CCBE Code is binding only if it is adopted by CCBE member or observer states.

### 3. The Role of European Union Legislation Regarding Lawyers

When the CCBE Code of Conduct was first adopted, the EU had passed the Lawyers' Services Directive (77/249), but had not yet adopted the Lawyers' Establishment Directive (98/5) or the Diplomas Directive (89/48). Because the EU directives are binding, whereas the CCBE Code is not, EU lawyers obviously must be familiar with these directives as well as the CCBE Code. Some of the provisions in the EU directives specify the rules of conduct that apply to certain transnational lawyering situations.

Article 4 of the Lawyers' Services Directive,[550] for example, subjects the transient lawyer who represents a client in legal proceedings or before public authorities to the rules of professional conduct of the host Member State, without prejudice to obligations in his home Member State.[551] When the lawyer pursues activities other than the representation of client in legal proceedings or before public authorities, he will remain subject to the rules of professional conduct of the home Member State without prejudice to respect the professional rules in the host Member States, especially those concerning incompatibilities, professional secrecy, relations with other lawyers, conflict of interest, and publicity.[552] Under the Lawyers' Establishment Directive, lawyers practicing their profession in the host state under home title are subject to the professional rules of the host state.[553]

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[549] For a detailed discussion of the CCBE Code's ethical provisions, and their comparison with the ABA Model Rules, *see* Section III.

[550] The Lawyers' Services Directive authorizes lawyers from one EC country to offer temporary legal services in another EC country. This happens on the basis of a system of "mutual recognition" whereby each EC country agrees to recognize the qualifications of lawyers from another EC country. Directive 77/249/EC, Article 2 and 3.

[551] *Id*., Article 4 (1) & (2).

[552] *Id*., Article 4 (4).

[553] Lawyers' Establishment Directive 98/5/EC, Article 6 (1).

The CCBE is currently reviewing its Code of Conduct with a view toward evaluating its consistency with the EU directives, and is likely to consider any recommended changes at its December 2002 Plenary Session.

## VI. Conclusion

Lawyers in most countries are currently confronted with new challenges. Growing economic development fostered by democratization and its associated need for increased access to justice require more legal services. Cultural and social changes at the national level create new opportunities for the role of lawyers. Moreover, the process of globalization and the consequent increase in cross-border practice is opening new markets for the legal profession. It is in this new scenario that the public demands more competence, openness, and honesty from lawyers.[554] Now, more than ever, it is of the utmost importance that lawyers be guided by clear ethical and professional standards conceived to address the many challenges and conflicting responsibilities they face in their daily activities.

This paper has explored and addressed the main issues surrounding the topic of professional legal ethics, by drawing, where possible, comparisons between ethical standards in the United States, and selected countries in Europe. Such differences, where they occur, may be explained on the basis of different cultural and ethical perceptions, as well as in light of the variations existing in the legal systems and organization of the legal profession in different countries. As it has been observed:

> It is not surprising that the law of lawyering, even though it has common elements, is highly variable across national lines. Details of judicial process vary from state to state, and the local creation of bar norms and its later embodiment in codes of conduct grows out of historical developments that have many unique aspects…. Moreover, those professionals who are labeled "lawyers" perform somewhat different functions in different countries.[555]

Although it was not purpose of this paper to identify and indicate "best ethical standards", it has tried to provide an understanding of the main issues in the debate surrounding professional and ethical dilemmas and the approaches taken by different legal systems.

Despite the many differences, the core values of the legal profession in the United States and European countries stem from the same roots and are based on similar central principles: professional competence, protection of the client's confidences, avoidance of conflicts of interests that would impair the impartiality of the lawyer and independent professional judgment.

In a time of rapid change and new challenges facing the legal profession, it is important to reaffirm the core common values and principles that establish the role of lawyers not only towards their clients, but also in the maintenance of an impartial legal system that can be trusted by people. In this regard, it is clear that the "existence of a legal profession bound together by

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[554] David S. Clark, *Comparing the Work and Organization of Lawyers Worldwide*, in John J. Barcelo' III & Roger C. Cramton, LAWYERS' PRACTICE & IDEALS: A COMPARATIVE VIEW 154-55 (Kluwer Law International, 1999).
[555] Cramton, *supra* note 2, at 268.

respect for rules made by the profession itself is an essential means of safeguarding human rights, in face of the power of the state and other interests in the society".[556]

[556] CCBE Code, Article 1.1.