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A Worldwide Common Code of Professional Ethics?

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A Worldwide Common Code of Professional Ethics?

John Toulmin Q.C.

Abstract

This Article examines if what the European Economic Community adopted as a common Code of Conduct for Lawyers in the European Community could be the basis for world-wide code of conduct for lawyers. The code of conduct creates a framework of principles of professional conduct that is to be applied to all cross-border activities between lawyers in the EEC, including all professional contacts with lawyers of Member States (and other signatories) other than their own, and also to the professional activities of lawyers in a Member State other than their own.

COMMENTARIES

A WORLDWIDE COMMON CODE OF PROFESSIONAL ETHICS?

*John Toulmin Q.C.**

October 28, 1988 was a landmark day for the Council of the Bars and Law Societies of the European Community ("CCBE").¹ It was on that date in Strasbourg that the twelve Member States of the European Economic Community ("EEC") adopted a common Code of Conduct for Lawyers in the European Community ("CCBE Code" or "Code")² as a framework of principles of professional conduct to be applied to all cross-border activities between lawyers in the EEC, including all professional contacts with lawyers of Member States (and other signatories) other than their own, and also to the professional activities of lawyers in a Member State other than their own.³

This Code was the culmination of over six years work.

* English Barrister Practicing in Gray's Inn London WCI; First Vice President, Council of the Bars and Law Societies of the European Community [hereinafter CCBE]. A version of this Commentary was presented at the Stein Institute of Law and Ethics Conference on the Internationalization of the Practice of Law at Fordham University School of Law on October 10, 1991.

1. The title CCBE represents a compromise. The organization was originally called the Consultative Commission of the Bars and Law Societies of Europe. When the name was changed to Council of the Bars and Law Societies of the European Community it was decided to keep the initial letters by which the organization is best known. In the CCBE the delegations represent the legal professions in the Member States. Voting is by country and not by individual delegates. The CCBE has representative status on behalf of the legal profession before the European Commission, the European Court of Justice, and the European Court of Human Rights.

2. CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY (1988) [hereinafter CCBE CODE]. The CCBE Code is reproduced in the Appendix to this Essay. The Code has been adopted in different ways in the Member States. For example, the English Bar Council has annexed the Code to its detailed rules. See BAR COUNCIL, CODE OF CONDUCT FOR THE BAR OF ENGLAND AND WALES (1990) [hereinafter ENGLISH CODE]. The Law Society of England and Wales has codified articles 2-5 of the CCBE Code in Rule 16 of the SOLICITORS PRACTICE RULES (1990).

3. CCBE CODE, *supra* note 2, Rule 1.5. The CCBE's Deontology Working Party prepared an Explanatory Memorandum and Commentary for the Code. Explanatory Memorandum and Commentary on the CCBE Code of Conduct for Lawyers in the European Community, art. 1.5 [hereinafter Explanatory Memorandum] (on file with the *Fordham International Law Journal*). While it has no binding force, it is useful as a

The work started in Athens in May 1982 when the CCBE resolved to consider the feasibility of the establishment of a code of conduct that would act as a set of principles to be translated into a disciplinary code in each Member State. The first very tentative draft was prepared by Lake Falconer, a distinguished Scottish solicitor, in March 1983. There were times during the discussions when the task of reconciling the firmly held views in different countries was very daunting. There was, of course, the considerable task of reconciling common law and civil law systems. There was also the question of what to put into the Code. It was significant that the drafting of different parts of the Code was the responsibility of lawyers from different Member States, and that as the lawyers worked together they were surprised at the extent to which serious differences could be resolved by careful discussion. In their discussions they were assisted by work that had been done by the International Bar Association and the *Union Internationale des Avocats*, and in particular by work done by the American Bar Association ("ABA") on its codes of conduct.⁴

The CCBE Code has been implemented not only in the twelve Member States but also in the six observer countries to the CCBE: Austria, Cyprus, Finland, Norway, Sweden, and Switzerland, and recently by the newest member, Czechoslovakia.⁵ The hope is to build on what has been done and to develop a code of professional conduct that will apply to the cross-border activities of lawyers from all the countries which

tool of interpretation. The Explanatory Memorandum, with regard to the definition of cross-border activities, stated that such activities would include

contacts in State A even on a matter of law internal to State A between a lawyer of State A and a Lawyer of State B; it would exclude contacts between lawyers of State A in State A on a matter arising in State B, provided that none of their professional activities takes place in State B; it would include any activities of lawyers of State A in State B, even if only in the form of communications sent from State A to State B.

Id.

4. See MODEL RULES ON PROFESSIONAL CONDUCT (Discussion Draft 1983) [hereinafter MODEL RULES]; MODEL CODE ON PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE]. As of December 1990, 34 U.S. states had adopted codes of ethics for lawyers modeled after the Model Rules. See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (BNA) P01:3-4. The other 16 states have either adopted versions of the Model Code, or combined provisions of both the Model Rules and the Model Code. *Id.*

5. Czechoslovakia was admitted into membership at the Plenary Session of the CCBE at The Hague on October 25, 1991.

are signatories to the General Agreement on Tariffs and Trade ("GATT").⁶ Thereafter, if a Belgian lawyer wishes to instruct a lawyer from Brazil, or a Michigan lawyer wishes to instruct a lawyer from Mauritius, each would know that there is a common set of professional principles that would apply. The question "Why now?" is simply answered. There has been such an increase in cross-border activity among lawyers generally, not just among the larger firms or the most powerful legal nations, that such a code is becoming essential.

The desire that this may be achieved is not primarily to benefit lawyers but to provide a basis of consumer protection for the clients whom they serve. There is little doubt that in many places lawyers are more and more regarded as businessmen rather than as members of a learned profession. It is clear that the speech of U.S. Vice President Dan Quayle to the 1991 ABA convention in Atlanta, which was highly critical of the legal profession, struck a chord with many outside the legal profession.⁷ In Europe there are many who believe that lawyers are an over-privileged group who do not deserve the privileges that as professionals they enjoy. These critics need to be reminded that the lawyer has a vital role to play in the administration of justice and in society. Lawyers for their part have a responsibility to do all they can to improve ethical standards, to reaffirm those values of independence and integrity, which

6. *Opened for signature* Oct. 30, 1947, 61 Stat. (pts. 5 & 6) A3, 55 U.N.T.S. 187 [hereinafter GATT]. Only in the current Uruguay Round are GATT members considering the extension of GATT principles to services, including professional services. See, e.g., Peter Hansen & Victoria Aranda, *An Emerging International Framework for Transnational Corporations*, 14 FORDHAM INT'L L.J. 881, 888 (1990-1991); Terry Smith Labat, *A View of the Single Market: Trade in Services in EC '92*, 22 CASE W. RES. J. INT'L L. 283, 296 (1990).

7. See, e.g., David S. Broder & Sandra Torrey, *ABA President Disputes Quayle on Litigation Proposals*, WASH. POST, Aug. 14, 1991, at A1; Julie Johnson & Ratu Kamlani, *Do We Have Too Many Lawyers?*, TIME, Aug. 26, 1991, at 54; David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, at A1. Vice President Quayle stated that

[t]here are stumbling blocks that we can't make excuses for, because, quite frankly, they're our own fault. . . . Our system of civil justice is, at times, a self-inflicted competitive disadvantage. . . . Let's ask ourselves: Does America really need 70 percent of the world's lawyers? Is it healthy for our economy to have 18 million new lawsuits coursing through the system annually? Is it right that people with disputes come up against staggering expense and delay?

Margolick, *supra*.

are vital to the proper functioning of a free society, and to show that they are fit to enjoy the privileges that come to them as professionals.

Both the aspirations and the concerns of the CCBE are shared by the ABA. Zona F. Hostetler, the Chair of the ABA Special Coordinating Committee on Professionalism, spoke to the ABA Annual Meeting in Chicago in 1990 on the subject of professionalism.⁸ Ms. Hostetler acknowledged the identity of interest between the ABA and the CCBE in emphasizing the independence of the lawyer to act free of the interests of other clients or the lawyer's own monetary, business, or other personal interests. She also noted that the ABA's Committee on Professionalism was trying to cope with the present realities of practice by "adopting new programs such as mandatory professionalism courses, voluntary counseling, and monitoring programs, and inns of court programs modelled after the English system."⁹ It is in the same spirit that the CCBE seeks with others to develop a uniform code of conduct that could be adopted worldwide. A process of synthesis has already taken place in the CCBE Code, which is an attempt to incorporate the best of existing codes and to resolve problems resulting from the different approaches of the civil law and common law systems.

What subjects does the CCBE Code address? The preamble sets out the function of the lawyer in society. The function

lays on him a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

- the client;
- the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf;
- the legal profession in general and each fellow member of it in particular; and
- the public for whom the existence of a free and independent profession, bound together by 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

8. Zona F. Hostetler, *Professionalism in the American Bar in the 1990's*, Remarks at the Annual Meeting of the American Bar Association (Aug. 4, 1990) (transcript on file with the *Fordham International Law Journal*).

9. *Id.* at 7.

other interests in society.¹⁰

The Code emphasizes that these principles apply not only to lawyers' conduct in court cases, but also to their conduct when they provide legal advice to clients. It recognizes that it is, on occasion, extremely difficult to maintain independence, particularly in times of economic difficulty to give the client the advice that the client does not want to hear, with the risk that the lawyer may lose that client. It also addresses "the nature of rules of professional conduct" and makes it clear that the particular rules in a jurisdiction arise from the traditions of each bar or law society.¹¹

They are adapted to the organisation and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that they should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application.¹²

The purpose of the Code and its scope of application are set out in Rule 1.3. The Code emphasizes that after enforceable rules are adopted in relation to lawyers' cross-border activities, the lawyer remains bound to observe the rules of the bar or law society to which he or she belongs to the extent that they are consistent with the Code.¹³

The second section of the Code concerns general principles—independence,¹⁴ trust and personal integrity,¹⁵ confidentiality,¹⁶ and respect for the rules of other bars and law societies.¹⁷ It emphasizes that a lawyer must not compromise his independence to please his client, a court or third parties,¹⁸ and that this necessity for independence is just as important in non-contentious as in contentious matters.¹⁹ It also deals with

10. CCBE CODE, *supra* note 2, Rule 1.1.

11. *Id.* Rule 1.2.

12. *Id.* Rule 1.2.2.

13. *Id.* Rule 1.3.2.

14. *Id.* Rule 2.1.

15. *Id.* Rule 2.2.

16. *Id.* Rule 2.3.

17. *Id.* Rule 2.4.

18. *Id.* Rule 2.1.1.

19. *Id.* Rule 2.1.2.

incompatible occupations,²⁰ personal publicity,²¹ and the client's best interests.²² Some of these sections caused much debate. There are different rules among Member States with respect to confidentiality, incompatible occupations, particularly the ability to take on directorships in companies, and personal publicity.

The next section concerns lawyers' relations with clients, including acceptance and termination of instructions,²³ conflicts of interest,²⁴ contingency fees,²⁵ fee sharing with non-lawyers,²⁶ clients' funds,²⁷ and professional indemnity insurance.²⁸ The provisions relating to contingency fees caused considerable discussion. Those relating to clients' funds²⁹ and professional indemnity insurance,³⁰ which respectively require that clients' funds be kept separate from those of lawyers and that lawyers be insured at all times against claims for professional negligence, are significant advances in client protection.

The fourth section concerns lawyers' relations with courts, including applicable rules of conduct and demeanor in court, and the fair conduct of proceedings in court.³¹ It extends these rules to arbitrators.³²

The fifth section addresses relations between lawyers, including co-operation among lawyers of different Member States,³³ correspondence between lawyers,³⁴ communications with opposing parties,³⁵ changes of lawyers,³⁶ responsibility for fees,³⁷ the training of young lawyers,³⁸ and the resolution

20. *Id.* Rule 2.5.

21. *Id.* Rule 2.6.

22. *Id.* Rule 2.7.

23. *Id.* Rule 3.1.

24. *Id.* Rule 3.2.

25. *Id.* Rule 3.3.

26. *Id.* Rule 3.6.

27. *Id.* Rule 3.8.

28. *Id.* Rule 3.9.

29. *Id.* Rule 3.8.

30. *Id.* Rule 3.9.

31. *Id.* § 4.

32. *Id.* Rule 4.5.

33. *Id.* Rule 5.2.

34. *Id.* Rule 5.3.

35. *Id.* Rule 5.5.

36. *Id.* Rule 5.6.

37. *Id.* Rule 5.7.

38. *Id.* Rule 5.8.

of disputes between lawyers.³⁹ The drafting committee had the task of reconciling the differing rules in common law and civil law jurisdictions concerning questions of confidentiality of correspondence.⁴⁰ It had considerable discussion about the rules relating to the change of lawyer⁴¹ and the extent of the responsibility (if any) for a lawyer to ensure that the lawyer previously representing⁴² a client had been paid before the succeeding lawyer undertook the client's work. Finally, there was discussion as to how disputes among lawyers from different Member States should be resolved.⁴³

Some topics disappeared from the discussions. One concerned the rule of *unicité de cabinet* (preventing a lawyer from having an office in more than one Member State), which was made unlawful by the European Court of Justice in *Ordre des Avocats au Barreau de Paris v. Onno Klopp*.⁴⁴

The most difficult questions are also ones that have been raised by our U.S. colleagues in our discussions on specific provisions of the Code. The first is *secret professionnel* (professional secrecy).⁴⁵ The purpose of this rule is to emphasize the importance of retaining confidentiality between a lawyer and his client and to alert the public and the profession to the danger that state authorities may seek to erode it. The general rule is that a lawyer must not disclose confidential information

39. *Id.* Rule 5.9.

40. *Id.* Rule 5.3.

41. *Id.* Rule 5.6.

42. *Id.* Rule 5.7.

43. *Id.* Rule 5.9.

44. Case 107/83, [1984] E.C.R. 2971, [1985] 1 C.M.L.R. 99. The Court held that

[e]ven in the absence of any directive coordinating national provisions governing access to and the exercise of the legal profession, Article 52 *et seq.* of the EEC Treaty prevents the competent authorities of a Member State from denying, on the basis of the national legislation and the rules of professional conduct which are in force in that State, to a national of another Member State the right to enter and to exercise the legal profession solely on the ground that he maintains chambers simultaneously in another Member State.

Id. at 2991, [1985] 1 C.M.L.R. at 115; *see* Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 52, 54, 57, 59, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958). Article 52, which concerns the freedom of establishment of nationals in foreign Member States, applies to the legal profession. *Jean Reyners v. Belgium*, Case 2/74, [1974] E.C.R. 631, 656, [1974] 2 C.M.L.R. 305, 330.

45. CCBE CODE, *supra* note 2, Rule 2.3.1.

given by his client. This principle was recognised by the European Court of Justice in *AM & S Europe Ltd. v. Commission*.⁴⁶ It is well understood that this general principle may have to be subject to the right of a court in the most exceptional circumstances to require the disclosure of information given by a client in confidence. The general principle is regarded, however, as being of the greatest importance.

Another difficult question relates to incompatible occupations.⁴⁷ The rules are:

2.5.1 In order to perform his functions with due independence and in a manner which is consistent with his duty to participate in the administration of justice a lawyer is excluded from some occupations.

2.5.2 A lawyer who acts in the representation or defence of a client in legal proceedings or before any public authorities in a host Member State shall there observe the rules regarding incompatible occupations as they are applied to lawyers of the host Member State.⁴⁸

What is behind this rule is the question of whether a lawyer may serve as a director of a company at the same time that he or his firm represents that company in legal proceedings. In many parts of Europe this is simply not possible, but in the United States it happens all the time. What happens in a large firm is that the litigation department handles the litigation on behalf of the client while one of the partners, who does not handle any of the litigation at all, may very well be on the board of the client company. The CCBE Code tries to reconcile the European and U.S. systems. First, it provides that incompatibility relates to the lawyer rather than to the lawyer's firm. The lawyer who is himself representing the client in legal proceedings must not be involved in incompatible occupations such as acting as a director of the client company. Second, the Code reflects the need for the lawyer to respect the rules relating to incompatible occupations of the jurisdiction where the litigation is taking place.⁴⁹

46. Case 155/79, [1982] E.C.R. 1575, 1610-14, [1982] 2 C.M.L.R. 264, 322-25.

47. CCBE CODE, *supra* note 2, Rule 2.5.

48. *Id.*

49. *See id.* Rules 2.5.1, 2.5.2, 2.5.3. The Explanatory Memorandum states that [t]he general purpose of rules excluding a lawyer from other occupations is

The third question relates to lawyers' advertising or personal publicity. In many jurisdictions the rules on lawyers' advertising have been transformed in the last ten years. In England and Wales, for instance, while barristers were once prohibited from personally advertising their practices, they may now do so subject only to rules of good taste.⁵⁰ The CCBE Code seeks to respect the rules of those countries where it is still prohibited and at the same time make it clear that in the case of advertising in books and journals the test should be whether publication is permitted in the place where it is primarily intended, and that a lawyer should not be disciplined because of an unavoidable incidental publication in a place where it is prohibited.⁵¹

Fourth, although the rules of professional conduct in the United States relating to conflicts of interest and imputed disqualification are among the strictest in the world,⁵² the Code

to protect him from influences which might impair his independence or his role in the administration of justice

Articles 2.5.2 and 3 make provision for different circumstances in which a lawyer of one Member State is engaging in cross-border activities (as defined in Article 1.5) in a host Member State when he is not a member of the host State legal profession.

Article 2.5.2 imposes full observation of host State rules regarding incompatible occupations on the lawyer acting in national legal proceedings or before national public authorities in the host State. This applies whether the lawyer is established in the host State or not.

Article 2.5.3, on the other hand, imposes "respect" for the rules of the host State regarding forbidden or incompatible occupations in other cases, but only where the lawyer who is established in the host Member State wishes to participate directly in commercial or other activities not connected with the practice of law.

Explanatory Memorandum, *supra* note 3, § 2.5.

50. See generally ENGLISH CODE, *supra* note 2. Advertising by barristers must conform to British Code of Advertising Practice. See *id.* ¶ 307. English solicitors' advertising must also be in good taste. See SOLICITORS' PUBLICITY CODE ¶ 1(b) (1990) (Eng.).

51. See CCBE CODE, *supra* note 2, Rule 2.6.

52. See MODEL RULES, *supra* note 4, Rules 1.7-1.9; MODEL CODE, *supra* note 4, Canon 5. Model Rule 1.7 states a general rule concerning conflict of interest:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

requirement, which provides that where the lawyer is acting for two clients whose interests are in conflict he must cease to act for either of them (without a possibility of waiver),⁵³ causes difficulty. It may be that in a code of universal application, this matter can be resolved by adding a clause permitting waiver by the client, provided that such waiver is freely given after the issues have been fully explained to the client.

Devising the rules relating to contingency fees⁵⁴ caused a great amount of difficulty. Many in Europe are opposed to the idea that payment of a fee should depend on whether or not a lawyer is successful.⁵⁵ Many believe that this compromises the lawyer's independence of judgment, but a number of Member States permit a form of contingency fee. In France, for example, the Paris Bar permits a lawyer to charge a larger fee if the client's litigation is concluded successfully. A similar provision prevails in Portugal.⁵⁶ Since the Courts and Legal Services Act

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES, *supra* note 4, Rule 1.7.

53. CCBE CODE, *supra* note 2, Rule 3.2.

54. *Id.* Rule 3.3. The Explanatory Memorandum states that the CCBE Code's position on contingency fees reflects "the common position in all Member States that an unregulated agreement . . . is contrary to the proper administration of justice because it encourages speculative litigation and is liable to be abused." Explanatory Memorandum, *supra* note 3, § 3.3.

55. *E.g.*, Manfred Caspari, *EEC Enforcement Policy and Practice: An Official View*, 54 ANTITRUST L.J. 599, 609 (1985); Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 59 (1984). In his dissent in a *forum non conveniens* case, Lord Denning in the Court of Appeal criticized the extent to which lawyers can take advantage of the relatively permissive U.S. rules on contingency fees. *Castanho v. Brown & Root (U.K.) Ltd.*, [1980] 1 W.L.R. 833, 857 (C.A.) (Lord Denning, dissenting), *aff'd*, [1981] A.C. 557. In the leading British case, *Spiliada Maritime Corp. v. Cansulex Ltd. ("The Spiliada")*, [1987] A.C. 460, Lord Goff gave the leading speech, where he said that a court should not take into account in *forum non conveniens* cases differences in juridical advantages in different legal systems, such as the more liberal discovery rules in the United States including the taking of pretrial depositions and the availability of contingency fees or treble damages, none of which is available in England. *Id.* at 482; *cf. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842 (S.D.N.Y. 1986) (Keenan, J.), *aff'd in part and rev'd in part*, 809 F.2d 195 (2d Cir.), *cert. denied sub nom. Executive Comm. Members v. Union of India (Union Carbide Corp.)*, 484 U.S. 871 (1987).

56. *See* EC LEGAL SYSTEMS: AN INTRODUCTORY GUIDE (Maurice Sheridan & James Cameron eds. & John Toulmin Q.C. consulting ed., 1992) (discussing article

1990,⁵⁷ it is permissible in England and Wales to charge a conditional fee⁵⁸ under which in civil cases the advocate or litigator, by written agreement, may receive a percentage above the normal fee in the event of success, but no fee in the event of failure. The Code provides that the general prohibition on contingency fees does not apply where there is an agreement that the fee to be charged is in proportion to the value of the matter handled by the lawyer and is in accordance with an officially-approved fee scale or under the control of the competent authority having jurisdiction over the lawyer.⁵⁹ It may be necessary to go a stage further and say that contingency fees are only permissible when they are in accordance with an officially-approved fee scale and under the ultimate supervision of the competent authority having jurisdiction over the lawyer. A rule in this form may be acceptable to jurisdictions in the United States and provide a proper balance by making contingency fees available subject to officially recognized safeguards, thereby ensuring that the client's position is properly safeguarded.

The provisions relating to clients' money and professional indemnity insurance are among the most important in the Code. Rule 3.8 now sets out clear requirements that clients' funds should at all times be kept separate from the lawyers' funds.⁶⁰ Likewise, in Rule 3.9, there is a requirement that lawyers should be properly insured at all times against claims of professional negligence.⁶¹ If a lawyer is unable to obtain reasonable coverage he shall take reasonable steps to draw this to the attention of his clients.⁶² It is noteworthy that our U.S. colleagues had no difficulty with these provisions. It is to be observed that the imposition of a rule for lawyers in host Member States must imply that coverage is available on reasonable terms and that, where applicable, existing arrangements must be taken into account. It is important that the lack of availabil-

65(1) of rules of Portuguese Bar Association, as well as fee charging in other Member States).

57. Courts and Legal Services Act, 1990 (Eng.).

58. *Id.* § 58.

59. CCBE CODE, *supra* note 2, Rule 3.3.3.

60. *Id.* Rule 3.8.

61. *Id.* Rule 3.9.

62. *Id.* Rule 3.9.2.4.

ity of coverage should not be used as an excuse to prevent a foreign lawyer from establishing an office in the host Member State.

The problems in formulating rules relating to correspondence between lawyers are similar to those for *secret professionnel* in that there are significant differences in the rules in different Member States. In Denmark, Germany, the Netherlands, and the United Kingdom (and in the United States), "without prejudice" communications cannot be withheld from the client unless the client agrees.⁶³ In other jurisdictions such communications must be withheld from the client.⁶⁴ The rule in the Code emphasizes the need for a communication to be clearly marked as confidential and imposes the duty on a recipient who cannot guarantee its confidentiality to return it to the sender without revealing its contents to others.⁶⁵

There was much discussion on the rules relating to the change of lawyer and responsibility for the fees of the lawyer who has been replaced. In some jurisdictions a lawyer has a duty before he takes on a case to ensure that a previous lawyer has been paid.⁶⁶ In the common law jurisdictions no such duty exists. The compromise is that the lawyer should have some duty to ascertain that arrangements have been made for the settlement of the former lawyer's account.⁶⁷

The provisions relating to responsibility for fees reaffirm provisions contained in the Declaration of Perugia.⁶⁸ The provisions make clear that where work is being referred by one lawyer to another it is important that the fee arrangements should be clear at the outset. The rules follow the principle familiar to common lawyers that where a lawyer instructs a colleague to give him advice that will be passed on to the client, the lawyer making the request is liable to pay the fees of the

63. For further discussion on laws concerning correspondence between lawyers, see SERGE-PIERRE LAGUETTE, *LAWYERS IN THE EUROPEAN COMMUNITY* 151-52 (1987).

64. See Explanatory Memorandum, *supra* note 3, § 5.3. The Explanatory Memorandum states that "[t]his principle is recognised in Belgium, France, Greece, Italy, Luxembourg, Portugal and Spain." *Id.*

65. CCBE CODE, *supra* note 2, Rules 5.3.1, 5.3.2.

66. See Explanatory Memorandum, *supra* note 3, § 5.6.

67. CCBE CODE, *supra* note 2, Rule 5.6.1.

68. See CCBE, Declaration of Perugia on the Principles of Professional Conduct (Sept. 16, 1977), discussed in LAGUETTE, *supra* note 63, at 255-58; see also CCBE CODE, *supra* note 2, Rules 5.6, 5.7.

second lawyer.⁶⁹ Where the lawyer simply refers his client to another lawyer, he is not liable.

It will have become clear that the Code is the product of discussion both on general principles and on difficult practical questions. A code of general application will need to build on the work that has been done. From helpful and constructive discussions with my U.S. colleagues I am satisfied that there is no fundamental question that will prevent the CCBE Code of Conduct from providing a basis for a cross-border code of universal application.

I know that the U.S. federal system of government poses a particular problem for the United States to adopt such a code. It is the individual states that adopt their own rules of conduct and not the ABA, or the federal government. The ABA is not in a position to deliver the agreement of all fifty states. My proposal is that an international code should be agreed upon as a set of general principles to which individual jurisdictions would be invited to subscribe. In this respect the position is no different to the implementation of the CCBE Code, which has been voluntarily adopted throughout the EEC by jurisdictions no less independent than the states of the United States.

69. CCBE CODE, *supra* note 2, Rule 5.7; *see* MODEL RULES, *supra* note 4, Rule 1.5 comment (discussing division of fees).

APPENDIX

CCBE CODE OF CONDUCT FOR LAWYERS IN THE
EUROPEAN COMMUNITY1 *PREAMBLE*1.1 *The Function of the Lawyer in Society*

In a society founded on respect for the rule of law the lawyer fulfils a special role. His duties do not begin and end with the faithful performance of what he is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend and it is his duty not only to plead his client's cause but to be his adviser.

A lawyer's function therefore lays on him a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

- the client;
 - the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf;
 - the legal profession in general and each fellow member of it in particular; and
- the public for whom the existence of a free and independent profession, bound together by 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 society.

1.2 *The Nature of Rules of Professional Conduct*

1.2.1 Rules of professional conduct are designed through their willing acceptance by those to whom they apply to ensure the proper performance by the lawyer of a function which is recognised as essential in all civilised societies. The failure of the lawyer to observe these rules must in the last resort result in a disciplinary sanction.

1.2.2 The particular rules of each Bar or Law Society arise from its own traditions. They are adapted to the organisation and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that they should be taken out of their context nor that an

attempt should be made to give general application to rules which are inherently incapable of such application.

The particular rules of each Bar and Law Society nevertheless are based on the same values and in most cases demonstrate a common foundation.

1.3 *The Purpose of the Code*

1.3.1 The continued integration of the European Community and the increasing frequency of the cross-border activities of lawyers within the Community have made necessary in the public interest the statement of common rules which apply to all lawyers from the Community whatever Bar or Law Society they belong to in relation to their cross-border practice. A particular purpose of the statement of those rules is to mitigate the difficulties which result from the application of "double deontology" as set out in Article 4 of the E.C. Directive 77/249 of 22nd March 1977.

1.3.2 The organisations representing the legal profession through the CCBE propose that the rules codified in the following articles:

—be recognised at the present time as the expression of a consensus of all the Bars and Law Societies of the European Community;

—be adopted as enforceable rules as soon as possible in accordance with national or Community procedures in relation to the cross-border activities of the lawyer in the European Community;

—be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation.

They further express the wish that the national rules of deontology or professional practice be interpreted and applied whenever possible in a way consistent with the rules in this Code.

After the rules in this Code have been adopted as enforceable rules in relation to his cross-border activities the lawyer will remain bound to observe the rules of the Bar or Law Society to which he belongs to the extent that they are consistent with the rules in this Code.

1.4 *Field of Application Ratione Personae*

The following rules shall apply to lawyers of the European Community as they are defined by the Directive 77/249 of 22nd March 1977.

1.5 *Field of Application Ratione Materiae*

Without prejudice to the pursuit of a progressive harmonisation of rules of deontology or professional practice which apply only internally within a Member State, the following rules shall apply to the cross-border activities of the lawyer within the European Community. Cross-border activities shall mean:

- (a) all professional contacts with lawyers of Member States other than his own; and
- (b) the professional activities of the lawyer in a Member State other than his own, whether or not the lawyer is physically present in that Member State.

1.6 *Definitions*

In these rules:

“Home Member State” means the Member State of the Bar or Law Society to which the lawyer belongs.

“Host Member State” means any other Member State where the lawyer carries on cross-border activities.

“Competent authority” means the professional organisation(s) or authority(ies) of the Member State concerned responsible for the laying down of rules of professional conduct and the administration of discipline of lawyers.

2 *GENERAL PRINCIPLES*

2.1 *Independence*

2.1.1 The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the court or third parties.

2.1.2 This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to his client has no value if it is given only to ingratiate himself, to serve his personal interests or in response to outside pressure.

2.2 *Trust and Personal Integrity*

Relationships of trust can only exist if a lawyer's personal honour, honesty and integrity are beyond doubt. For the lawyer these traditional virtues are professional obligations.

2.3 *Confidentiality*

2.3.1 It is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.

2.3.2 A lawyer shall accordingly respect the confidentiality of all information given to him by his client, or received by him about his client or others in the course of rendering services to his client.

2.3.3 The obligation of confidentiality is not limited in time.

2.3.4 A lawyer shall require his associates and staff and anyone engaged by him in the course of providing professional services to observe the same obligation of confidentiality.

2.4 *Respect for the Rules of Other Bars and Law Societies*

Under Community Law (in particular under the Directive 77/249 of 22nd March 1977) a lawyer from another Member State may be bound to comply with the rules of the Bar or Law Society of the host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.

2.5 *Incompatible Occupations*

2.5.1 In order to perform his functions with due independence and in a manner which is consistent with his duty to participate in the administration of justice a lawyer is excluded from some occupations.

2.5.2 A lawyer who acts in the representation or the defence or [sic] a client in legal proceedings or before any public authorities in a host Member State shall there observe the rules regarding incompatible occupations as they are applied to lawyers of the host Member State.

2.5.3 A lawyer established in a host Member State in which he wishes to participate directly in commercial or other activities not connected with the practice of the law shall respect the rules regarding forbidden or incompatible occupations as they are applied to lawyers of that Member State.

2.6 Personal Publicity

2.6.1 A lawyer should not advertise or seek personal publicity where this is not permitted.

In other cases a lawyer should only advertise or seek personal publicity to the extent and in the manner permitted by the rules to which he is subject.

2.6.2 Advertising and personal publicity shall be regarded as taking place where it is permitted, if the lawyer concerned shows that it was placed for the purpose of reaching clients or potential clients located where such advertising or personal publicity is permitted and its communication elsewhere is incidental.

2.7 The Client's Interests

Subject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of his client and must put those interests before his own interests or those of fellow members of the legal profession.

3 RELATIONS WITH CLIENTS

3.1 Acceptance and Termination of Instructions

3.1.1 A lawyer shall not handle a case for a party except on his instructions. He may, however, act in a case in which he has been instructed by another lawyer who himself acts for the party or where the case has been assigned to him by a competent body.

3.1.2 A lawyer shall advise and represent his client promptly [sic] conscientiously and diligently. He shall under-

take personal responsibility for the discharge of the instructions given to him. He shall keep his client informed as to the progress of the matter entrusted to him.

3.1.3 A lawyer shall not handle a matter which he knows or ought to know he is not competent to handle, without cooperating with a lawyer who is competent to handle it.

A lawyer shall not accept instructions unless he can discharge those instructions promptly having regard to the pressure of other work.

3.1.4 A lawyer shall not be entitled to exercise his right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client.

3.2 *Conflict of Interest*

3.2.1 A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

3.2.2 A lawyer must cease to act for both clients when a conflict of interest arises between those clients and also whenever there is a risk of a breach of confidence or where his independence may be impaired.

3.2.3 A lawyer must also refrain from acting for a new client if there is a risk of a breach of confidences entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

3.2.4 Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

3.3 *Pactum de Quota Litis*

3.3.1 A lawyer shall not be entitled to make a pactum de quota litis.

3.3.2 By "pactum de quota litis" is meant an agreement between a lawyer and his client entered into prior to the final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of

money or by any other benefit achieved by the client upon the conclusion of the matter.

3.3.3 The pactum de quota litis does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of competent authority having jurisdiction over the lawyer.

3.4 Regulation of Fees

3.4.1 A fee charged by a lawyer shall be fully disclosed to his client and shall be fair and reasonable.

3.4.2 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.

3.5 Payment on Account

If a lawyer requires a payment on account of his fees and/or disbursements such payment should not exceed a reasonable estimate of the fees and probable disbursements involved.

Failing such payment, a lawyer may withdraw from the case or refuse to handle it, but subject always to paragraph 3.1.4 above.

3.6 Fee Sharing with Non-Lawyers

3.6.1 Subject as after-mentioned a lawyer may not share his fees with a person who is not a lawyer.

3.6.2 The provisions of 6.1 above shall not preclude a lawyer from paying a fee, commission or other compensation to a deceased lawyer's heirs or to a retired lawyer in respect of taking over the deceased or retired lawyer's practice.

3.7 Legal Aid

A lawyer shall inform his client of the availability of legal aid where applicable.

3.8 *Clients [sic] Funds*

3.8.1 When lawyers at any time in the course of their practice come into possession of funds on behalf of their clients or third parties (hereinafter called "client's funds") it shall be obligatory:

3.8.1.1 That client's funds shall always be held in an account in a bank of similar institution subject to supervision of Public Authority and that all clients' [sic] funds received by a lawyer should be paid into such an account unless the client explicitly or by implication agrees that the funds should be dealt with otherwise.

3.8.1.2 That any account in which the client's funds are held in the name of the lawyer should indicate in the title or designation that the funds are held on behalf of the client or client's [sic] of the lawyer.

3.8.1.3 That any account or accounts in which client's funds are held in the name of the lawyer should at all times contain a sum which is not less than the total of the client's funds held by the lawyer.

3.8.1.4 That all client's funds should be available for payment to clients on demand or upon such conditions as the client may authorise.

3.8.1.5 That payments made from client's funds on behalf of a client to any other person including

a) payments made to or for one client from funds held for another client and

b) payment of the lawyer's fees, be prohibited except to the extent that they are permitted by law or have the express or implied authority of the client for whom the payment is being made.

3.8.1.6 That the lawyer shall maintain full and accurate records, available to each client on request, showing all his dealings with his client's funds and distinguishing client's funds from other funds held by him.

3.8.1.7 That the competent authorities in all Member States should have powers to allow them to examine and investigate on a confidential basis the financial records of lawyer's client's funds to ascertain whether or not the rules which they make are being complied with and to impose sanctions upon lawyers who fail to comply with those rules.

3.8.2 Subject as aftermentioned, and without prejudice to the rules set out in 3.8.1 above, a lawyer who holds clients [sic] funds in the course of carrying on practice in any Member State must comply with the rules relating to holding and accounting for client's funds which are applied by the competent authorities of the Home Member State.

3.8.3 A lawyer who carries on practice or provides services in a Host Member States [sic] may with the agreement of the competent authorities of the Home and Host Member State concerned comply with the requirements of the Host Member State to the exclusion of the requirements of the Home Member State. In that event he shall take reasonable steps to inform his clients that he complies with the requirements in force in the Host Member State.

3.9 *Professional Indemnity Insurance*

3.9.1 Lawyers shall be insured at all times against claims based on professional negligence to an extent which is reasonable having regard to the nature and extent of the risks which lawyers incur in practice.

3.9.2.1 Subject as aftermentioned, a lawyer who provides services or carries on practice in a Member State must comply with any Rules relating to his obligation to insure against his professional liability as a lawyer which are in force in his Home Member State.

3.9.2.2 A lawyer who is obliged so to insure in his Home Member State and who provides services or carries on practice in any Host Member State shall use his best endeavours to obtain insurance cover on the basis required in his Home Member State extended to services which he provides or practice which he carries on in a Host Member State.

3.9.2.3 A lawyer who fails to obtain the extended insurance cover referred to in paragraph 3.9.2.2 above or who is not obliged so to insure in his Home Member State and who provides services or carries on practice in a Host Member State shall in so far as possible obtain insurance cover against his professional liability as a lawyer whilst acting for clients in that Host Member State on at least an equivalent basis to that required of lawyers in the Host Member State.

3.9.2.4 To the extent that a lawyer is unable to obtain the

insurance cover required by the foregoing rules, he shall take reasonable steps to draw that fact to the attention of such of his clients as might be affected in the event of a claim against him.

3.9.2.5 A lawyer who carries on practice or provides services in a Host Member State may with the agreement of the competent authorities of the Home and Host Member States concerned comply with such insurance requirements as are in force in the Host Member State to the exclusion of the insurance requirements of the Home Member State. In this event he shall take reasonable steps to inform his clients that he is insured according to the requirements in force in the Host Member State.

4 RELATIONS WITH THE COURTS

4.1 *Applicable Rules of Conduct in Court*

A lawyer who appears, or takes part in a case, before a court or tribunal in a Member State must comply with the rules of conduct applied before that court or tribunal.

4.2 *Fair Conduct of Proceedings*

A lawyer must always have due regard for the fair conduct of proceedings. He must not, for example, make contact with the judge without first informing the lawyer acting for the opposing party or submit exhibits, notes or documents to the judge without communicating them in good time to the lawyer on the other side unless such steps are permitted under the relevant rules of procedure.

4.3 *Demeanour in Court*

A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of his client honourably and in a way which he considers will be to the client's best advantage within the limits of the law.

4.4 *False or Misleading Information*

A lawyer shall never knowingly give false or misleading information to the court.

4.5 *Extension to Arbitrators Etc.*

The rules governing a lawyer's relations with the courts apply also to his relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.

5 *RELATIONS BETWEEN LAWYERS*

5.1 *Corporate Spirit of the Profession*

5.1.1 The corporate spirit of the profession requires a relationship of trust and co-operation between lawyers for the benefit of their clients and in order to avoid unnecessary litigation. It can never justify setting the interests of the profession against those of justice or of those who seek it.

5.1.2 A lawyer should recognise all other lawyers of Member States as professional colleagues and act fairly and courteously towards them.

5.2 *Co-operation Among Lawyers of Different Member States*

5.2.1 It is the duty of a lawyer who is approached by a colleague from another Member State not to accept instructions in a matter which he is not competent to undertake. He should be prepared to help his colleague to obtain the information necessary to enable him to instruct a lawyer who is capable of providing the service asked for.

5.2.2 Where a lawyer of a Member State co-operates with a lawyer from another Member State, both have a general duty to take into account the differences which may exist between their respective legal systems and the professional organisations [sic] competences and obligations of lawyers in the Member States concerned.

5.3 *Correspondence Between Lawyers*

5.3.1 If a lawyer sending a communication to a lawyer in another Member State wishes it remain confidential or without prejudice he should clearly express this intention when communicating the document.

5.3.2 If the recipient of the communication is unable to ensure is [sic] status as confidential or without prejudice he

should return it to the sender without revealing the contents to others.

5.4 *Referral Fees*

5.4.1 A lawyer may not demand or accept from another lawyer or any other person a fee, commission or any other compensation for referring or recommending a client.

5.4.2 A lawyer may not pay anyone a fee, commission or any other compensation as a consideration for referring a client to himself.

5.5 *Communication with Opposing Parties*

A lawyer shall not communicate about a particular case or matter directly with any person whom he knows to be represented or advised in the case or matter by another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications).

5.6 *Change of Lawyer*

5.6.1 A lawyer who is instructed to represent a client in substitution for another lawyer in relation to a particular matter should inform that other lawyer and, subject to 5.6.2 below, should not begin to act until he has ascertained that arrangements have been made for the settlement of the other lawyer's fees and disbursements. This duty does not, however, make the new lawyer personally responsible for the former lawyer's fees and disbursements.

5.6.2 If urgent steps have to be taken in the interests of the client before the conditions in 5.6.1 above can be complied with, the lawyer may take such steps provided he informs the other lawyer immediately.

5.7 *Responsibility for Fees*

In professional relations between members of Bars of different Member States, where a lawyer does not confine himself to recommending another lawyer or introducing him to the client but himself entrusts a correspondent with a particular matter or seeks his advice, he is personally bound, even if the client is insolvent, to pay the fees, costs and outlays which are due to the foreign correspondent. The lawyers concerned

may, however, at the outset of the relationship between them make special arrangements on this matter. Further, the instructing lawyer may at any time limit his personal responsibility to the amount of the fees, costs and outlays incurred before intimation to the foreign lawyer of his disclaimer of responsibility for the future.

5.8 *Training Young Lawyers*

In order to improve trust and co-operation amongst lawyers of different Member States for the clients' benefit there is a need to encourage a better knowledge of the laws and procedures in different Member States. Therefore, when considering the need for the profession to give good training to young lawyers, lawyers should take into account the need to give training to young lawyers from other Member States.

5.9 *Disputes Amongst Lawyers in Different Member States*

5.9.1 If a lawyer considers that a colleague in another Member State has acted in breach of a rule of professional conduct he shall draw the matter to the attention of his colleague.

5.9.2 If any personal dispute of a professional nature arises amongst lawyers in different Member States they should if possible first try to settle it in a friendly way.

5.9.3 A lawyer shall not commence any form of proceedings against a colleague in another Member State on matters referred to in 5.9.1 or 5.9.2 above without first informing the Bars or Law Societies to which they both belong for the purpose of allowing both Bars or Law Societies concerned an opportunity to assist in reaching a settlement.