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## The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century

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# The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century

Mary C. Daly

## Abstract

This Article accepts globalization as a defining characteristic of the world order of the late twentieth and the early twenty-first centuries and as a *force majeure* on the legal profession. It challenges the professional responsibility academy to explore the incipient structural transformations that are taking place on a macro level and to reconfigure the classic curriculum to acknowledge the ethical implications of the globalization of the legal profession.

# THE ETHICAL IMPLICATIONS OF THE GLOBALIZATION OF THE LEGAL PROFESSION: A CHALLENGE TO THE TEACHING OF PROFESSIONAL RESPONSIBILITY IN THE TWENTY-FIRST CENTURY

*Mary C. Daly\**

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### INTRODUCTION

"Globalization" is a very popular word these days. It is hard to read a newspaper, peruse the business section of a magazine, or watch the nightly news on television without encountering the term as a shorthand expression for the synergistic entwinement of complex economic, cultural, and political phenomena.<sup>1</sup> This Article accepts globalization as a defining characteristic of the world order of the late twentieth and the early twenty-first centuries and as a *force majeure* on the legal profession.<sup>2</sup> It challenges

1. This Article accepts globalization as an active, self-referential, multi-dimensional, economic, political, and cultural force. See *Global Investing*, WALL ST. J., June 26, 1997, at R1-17 (special supplement examining rewards and risks of investment in foreign countries); *World Business*, WALL ST. J., Sept. 26, 1996, at R2-29 (special supplement analyzing strategies conducive to successful global trading and manufacturing); see also Michael M. Phillips, *Foreign Executives See U.S. as Prime Market*, WALL ST. J., Feb. 3, 1997, at A1; Alan Cowell, *Cultural Intrusion is a Blockbuster Intrusion*, N.Y. TIMES, May 11, 1997, at 2 (Week in Review). The most common explanation for its appearance at this particular point in world history is the simultaneous occurrence within a short period of time of unprecedented advances in telecommunications, transportation, and information retrieval systems, and political upheavals that replaced communist and socialist regimes with democratic systems of government and capitalist economic policies. The social cost of globalization is the subject of serious debate. See e.g., PETER DICKEN, *GLOBAL SHIFT: INDUSTRIAL CHANGE IN A TURBULENT WORLD* (1986); WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF CAPITALISM* (1996); Dani Rodrick, *Has Globalization Gone Too Far*, in INSTITUTE FOR ECONOMICS (1997); George Soros, *The Capitalist Threat*, ATLANTIC MONTHLY, Feb. 1997, at 45.

2. For a marvelously concise introduction to globalization and its effect on the legal profession, see John Flood, *The Globalizing World*, 23 INT'L LAW. 509 (1995). For an exhaustive, exceedingly rich exploration, see *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* (Richard L. Abel & Philip S.C. Lewis eds., 1990); *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* (Richard L. Abel & Philip S.C. Lewis eds., 1989); *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* (Richard L. Abel & Philip S.C. Lewis eds., 1988) [hereinafter collectively *LAWYERS IN SOCIETY*]; *PROFESSIONAL COMPETITION AND PROFESSIONAL POWER: LAWYERS, ACCOUNTANTS AND THE SOCIAL CONSTRUCTION OF MARKETS* (Yves Dezalay & David Sugarman eds., 1995) [hereinafter *PROFESSIONAL COMPETITION AND PROFESSIONAL POWER*]. See also Mark J. Osiel, *Lawyers As Monopolists, Aristocrats, and Entrepreneurs*.

the professional responsibility academy to explore the incipient structural transformations that are taking place on a macro level and to reconfigure the classic curriculum to acknowledge the ethical implications of the globalization of the legal profession.

## I. THE IMPACT OF GLOBALIZATION ON LEGAL EDUCATION

Many issues have divided the American Bar Association ("ABA") and the Association of American Law Schools ("AALS"). Globalization is not one of them. The ABA has encouraged law schools to increase their offerings in the international law area, and the AALS has hailed the emergence of the "first generation of global lawyers."<sup>3</sup> The theme of the plenary

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neers, 103 HARV. L. REV. 2009 (1990) (reviewing *LAWYERS IN SOCIETY*). Shorter, but also quite informative, articles include the following: Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994) [hereinafter *Transnational Law Practice*]; H.W. Arthurs, & Robert Kreklewich, *Law Legal Institutions, and the Legal Profession in the New Economy*, 34 OSGOOD HALL L.J. 1 (1996); Peter Goldsmith, *Globalization: The European Experience*, 46 J. LEGAL EDUC. 317 (1996); Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65 (1996); Peter Roorda, *The Internationalization of the Practice of Law*, 28 WAKE FOREST L. REV. 141 (1993); Kenneth S. Kilimnik, *Lawyers Abroad: New Rules for Practice in a Global Economy*, 12 DICK. J. INT'L L. 269 (1994); David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994) [hereinafter *Global Restructuring and the Law*]. See also Lucinda A. Low, *Virtually All Areas of Law Profession Face Globalization*, NAT'L L.J., Aug. 5, 1996, at C9.

3. See Mini-Workshop Materials, AALS Mini-Workshop on Teaching the First Generation of Global Lawyers, 1993 AALS Annual Meeting (on file with the *Fordham International Law Journal*). The Mini-Workshop speakers and materials explored topics as diverse as the substantive content of international environmental law and the process of adjudicative fact finding in different legal systems. Breakout sessions focused on specific subject areas: criminal law, civil procedure, contracts and commercial law, securities regulation, taxation, property, constitutional law (structural) and administrative law, torts, labor and employment law, evidence, bankruptcy, market regulation and antitrust, business organizations, environmental law, constitutional law, civil and human rights, products liability, and intellectual property. The AALS Planning Committee for the Mini-Workshop sponsored a program that represented the highest aspirations of a scholarly community. Not only did the Mini-Workshop bear powerful witness to the pedagogical importance of incorporating international materials into the traditional law school curriculum, but it also made the task of incorporation less daunting by presenting lucid, practical suggestions designed to educate members of the academic community who were unfamiliar with, and possibly afraid of, the material they were being asked to consider. See also W. Michael Reisman, *Designing Law Curricula for a Transnational Industrial and Science-Based Civilization*, 46 J. LEGAL EDUC. 322 (1996). George Washington University National Law Center and the ABA Section of Legal Education and Admissions to the Bar subsequently sponsored a conference entitled "The Internationalization of the Legal Education" to examine the curricular implications of the "'internationalization' of legal practice, from child custody to trade issues." Confer-

session of the AALS's 1998 Annual Meeting was "Thinking and Teaching about Law in a Global Context as an Exercise in Common Enterprise."<sup>4</sup> Scholarly commentators and thoughtful practitioners have called for curriculum reform, urging law schools to expand their international law offerings and professors to adopt a pervasive pedagogy by adding international law perspectives to their substantive courses.<sup>5</sup>

In general, the academic community has responded positively to these calls, and significant developments at the institutional level are regularly occurring at U.S. law schools across the country.<sup>6</sup> The elite law schools have not hesitated to adopt new programs or reinvigorate existing ones. Taking advantage of its significant endowment and the generosity of its alumni, New York University School of Law ("N.Y.U.") has proclaimed itself the "first global law school." It boasts of having reconfigured its curriculum to add an international perspective unmatched by any other law school in the United States.<sup>7</sup> Countering N.Y.U.'s

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ence to Examine International Legal Studies, CONSULTANT'S DIGEST, NOV. 1993, at 1. The need for programs of such high caliber continues undiminished.

4. See 1998 Conference Program Brochure (on file with the *Fordham International Law Journal*).

5. See, e.g., Gloria Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-first Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. Trading Partners*, 34 SAN DIEGO L. REV. 635 (1997) [hereinafter *Teaching, Foreign Law, Culture, and Legal Language*]. Even U.S. News & World Report has jumped on the bandwagon. The headline to the article accompanying its 1994 ranking of law schools proclaimed "Going International: Legal Education Is Discovering At Long Last That It Is A Small World After All." The article noted the increased presence of foreign legal scholars on law faculties, the incorporation of foreign law into substantive courses, and the enormous increase in the number of law schools offering summer and semester abroad programs. Ted Gest, *Going International: Legal Education Is Discovering At Long Last That It Is A Small World After All*, U.S. NEWS & WORLD REPORT, Mar. 21, 1994, at 66.

6. The same political, economic, and cultural changes that are forcing U.S. law schools to add a global perspective to their curricula having a similar effect on non-U.S. law schools. See, e.g., Symposium, *Winds of Change—A Global Look at Legal Education*, 72 OR. L. REV. 941, 941-1018 (1993); see also Peter Goldsmith, *Globalization: The European Experience*, 46 J. LEGAL EDUC. 317 (1996).

7. Through attentiveness to the temporal differences in the academic calendars of foreign law schools and by innovative class scheduling, N.Y.U. has persuaded outstanding foreign legal scholars to join its faculty on a regular, full-time basis. It has also devoted considerable financial resources to enrolling foreign students with stellar academic credentials and leadership potential. See John Edward Sexton, *The Global Law School Program at New York University*, 46 J. LEGAL EDUC. 329 (1996); see also Carl Deal, *NYU Unveils Novel International Law Programs*, N.Y.L.J., July 26, 1994, at A1; James Traub, *John Sexton Pleads (And Pleads and Pleads) His Case*, N.Y. TIMES, May 25, 1997 (Mag.) at 27. Even Columbia University School of Law, N.Y.U.'s traditional arch-rival, does not dispute the importance of globalization on legal education. It has just established a Euro-

feisty assertion of supremacy, Harvard University School of Law has vigorously proclaimed the strength of its International and Comparative Legal Studies programs.<sup>8</sup> It has pledged to renew and deepen its existing commitment to globalization and is convening a special congress of faculty and alumni to assist in developing Harvard's "long-range commitment to internationalization and legal training for the twenty-first century."<sup>9</sup> The global initiatives of schools such as N.Y.U. and Harvard are not surprising in light of the financial and human capital available to them. What is surprising is the number and quality of programs at other law schools across the country. They demonstrate that limited financial and human capital is not an insurmountable barrier to meeting the challenge of globalization. These other law schools have developed creative, less costly responses. At Fordham University School of Law ("Fordham"), for example, our international business law faculty has formed close ties with the present and former officials of the European Union and the Court of Justice. They regularly visit and lecture at the law school.<sup>10</sup> Other schools have successfully implemented similar strategies, frequently involving teaching by U.S. law professors abroad.<sup>11</sup> At least one law school offers a foreign language course for its students, and another offers two substantive law courses taught in Spanish.<sup>12</sup>

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pean Legal Studies Center "to train lawyers for leadership roles in the global economy and in international public affairs." *Columbia to Open European Center*, N.Y.L.J., Apr. 20, 1998, at 2. See also *Toward the Global Law Firm: A Conversation With Isaac Shapiro* '56, COLUMBIA LAW SCHOOL REPORT, Spring 1992, at 4.

8. See *International and Comparative Legal Studies* <<http://www.law.harvard.edu/Administrative...Registrar/catalog/fellowship/stframe.html>>.

9. See *Harvard Law School Worldwide Alumni Congress and Meeting of the Harvard Law School Association* <<http://www.law.harvard.edu/Alumni/Rome/98/index/html>>.

10. See e.g., *The European Union and the United States: Constitutional Systems in Evolution*, Feb. 26-28, 1998 (brochure on file with the *Fordham International Law Journal*); *Sixth Annual Conference on International Property Law and Policy*, Apr. 16-17, 1998 (on file with the *Fordham International Law Journal*).

11. See, e.g., Francis H. Heller & John C. Peck, *American Law Teachers in an Austrian University: Some Observations Gleaned from a Decade of the Kansas-Vienna Exchange Program*, 42 U. KAN. L. REV. 507 (1994); Katalin Kollath, *Teaching Abroad: Or, "What Would That Be In Hungarian?"*, 43 J. LEGAL EDUC. 85 (1993).

12. See, e.g., Vivian Curran, *Developing and Teaching a Foreign Language Course for Law Students*, 43 J. LEGAL EDUC. 598 (1993); *Teaching Foreign Law, Culture and Legal Language*, *supra* note 5, at 644-74. St. Mary's University School of Law regularly offers two courses taught in Spanish. Barbara Aldave, Remarks at the 1998 AALS Annual Meeting (Jan. 8, 1998) (transcript on file with the *Fordham International Law Journal*); see

Two programs in which multiple law schools participate merit particular discussion. The first is the Central and Eastern European Law Initiative ("CEELI"), which has facilitated important collaborations between law schools in the United States and those in Central and Eastern Europe. Established by the ABA, CEELI aims to foster these cross-border partnerships by encouraging the deans of foreign law schools to observe the operation and administration of U.S. law schools and by assisting foreign law professors to study particular areas of U.S. law. It has encouraged U.S. law professors to take their expertise abroad, to lecture at foreign law schools, and on occasion to advise foreign governments.<sup>13</sup> China has also benefitted from similar programs.<sup>14</sup>

CEELI's success prompted the creation of similar programs with law schools in other parts of the world. In 1995, the ABA established the African Law Initiative Sister School Program in which sixteen African law schools are linked with ABA-accredited law schools in "two way partnerships."<sup>15</sup> One of the U.S. law schools has entered into an agreement with its African counterpart for the purpose of organizing "joint research, student summer exchanges [and] providing an African master's law."<sup>16</sup> Reinforcing this initiative is the AALS's establishment of a section on African Law.<sup>17</sup> Latin American law schools and ABA-accredited law schools are now similarly linked.<sup>18</sup> In addition, the AALS has established special ties with law schools in the NAFTA countries, especially Mexico.<sup>19</sup>

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also Isaak Dore, *The International Law Program at Saint Louis University*, 46 J. LEGAL EDUC. 336 (1996);

13. See James P. White, *Law Schools Build Relationships Through CEELI Programs*, 26 SYLLABUS, Summer 1995, at 2. See also Gary A. Hengstler, *The Tale of a Survivor: Despite Bombardments, Law School Refuses to Close*, A.B.A. J., Mar. 1996, at 63; Steven Keeva, *Michal Kovac Thanks U.S. Lawyers for Aiding His Country*, A.B.A. J., Oct. 1995, at 109; William D. Meyer, *Remnants of Eastern Europe's Totalitarian Past: The Example of Legal Education in Bulgaria*, 43 J. LEGAL EDUC. 227, 227-28 (1993); Sanford Levinson, *National Loyalty, Communalism, and the Professional Identity of Lawyers*, 7 YALE J. L. & HUMAN. 49-50 (1995).

14. For a brief description of several law school-China initiatives, see R. Randle Edwards, *Legal Training for China Ventures*, 349 PLI/COMM 295, 300-12 (1985).

15. Robert Fullerton, *Update on African Law Initiative Project*, 26 SYLLABUS, Summer 1995, at 4; Steve N. Keeva, *To Africa, With Law*, A.B.A. J., Feb. 1995, at 89.

16. Fullerton, *supra* note 15, at 4.

17. Sessions of the Section on Africa, 1997 and 1998 AALS Annual Meetings.

18. Telephone conversation with James P. White, ABA Legal Consultant on Legal Education (May 1998).

19. See 1996 AALS Conference Program Brochure, at 17-18 (on file with the Ford-



U.S. law students are keenly interested in the study of foreign law. Over ninety law schools sponsor summer abroad programs and it is estimated that over twenty-nine hundred students enroll in them.<sup>20</sup> The benefit from these programs is enormous. Students have the opportunity to take courses in public and private international law that often are not available at the schools where they are matriculating. Frequently, U.S. and foreign law school faculty members co-teach these courses, providing students with a unique comparative perspective.<sup>21</sup> These co-taught courses benefit the participating professors as much as the students. The courses allow them to exchange highly-nuanced substantive knowledge in face-to-face discussions and greatly facilitate collaborative efforts outside the classroom. Some summer abroad programs even admit foreign law students and/or lawyers lending a true international flavor to the classroom environment and further enriching the U.S. law students' experience.<sup>22</sup> The Fulbright Program also encourages U.S. law professors to teach and pursue their scholarly agenda in foreign countries.<sup>23</sup>

Several schools with summer abroad programs are now offering clinical training through internships with private law offices and government agencies, allowing students an unprece-

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*ham International Law Journal*); see also 1997 AALS Conference Program Brochure, at 87 (on file with the *Fordham International Law Journal*).

20. See *Prepare for Take-off!: Use our annual guide to summer-abroad programs to grant yourself a change of venue*, STUDENT LAW., Jan. 1998, at 25-66; 1998 course descriptions & 1998 foreign programs by country, in American Bar Association 1998 Foreign Summer Program Information <<http://abanet.org/legaled/fspinfo.html>>; *Legal Studies Abroad Headquarters in International Law Students Association* ("ILSA") <<http://kentlaw.edu/ilsa/main/html>>.

21. See, e.g., *Prepare for Take-off!*, *supra* note 20, at 28 (University of Baltimore and University of Maryland Program cotaught with professors from the University of Aberdeen, Aberdeen, Scotland); *id.* at 38 (George Washington University Program cotaught with professors from Oxford University); *id.* at 40 (Ohio State University Program cotaught by "British law professors"); *id.* at 41 (Tulane University Program); *id.* at 48 (College of William and Mary Program cotaught by "British professors"); *id.* at 51 (Indiana University-Indianapolis cotaught by "faculty from law schools in Europe"); *id.* at 58 (Louisiana State University Program cotaught by a Justice of the European Community Court of Justice and a Canadian judge); *id.* at 62 (Tulane University Program in the Netherlands cotaught by "European . . . faculty drawn from universities, law firms, and EU institutions in Brussels").

22. See, e.g., *id.* at 27 (Marquette University Program in Australia); *id.* at 34 (Indiana University-Indianapolis Program in China); *id.* at 52 (Cornell University Program in France).

23. See, e.g., George Critchclow, *Teaching Law In Transylvania: Notes on Romanian Legal Education*, 44 J. LEG. EDUC. 157 (1994).

mented opportunity to observe and participate in a foreign country's legal system.<sup>24</sup> In a related development, some clinicians are pioneering externship programs outside the United States. Their purpose is to encourage the evolution of international human rights law in countries where the law is presently ignored or underused.<sup>25</sup>

Reinforcing the ABA, AALS, and individual law school initiatives are the activities of other providers of legal education. For example, the National Institute of Trial Advocacy ("NITA") has established a formal relationship with Nottingham Law School in England to train solicitors to assume courtroom duties.<sup>26</sup> The American Inns of Court program works actively to promote cross-border learning, especially through judicial exchanges.<sup>27</sup>

The globalization of legal education is certain to continue, and its pace is certain to accelerate.<sup>28</sup> Two sets of forces will op-

24. See, e.g., *id.* at 27 (Southwestern University Program in Argentina); *id.* (College of William and Mary Program in Australia); *id.* at 30 (Detroit College of Law at Michigan State University in Canada); *id.* at 34 (Nova Southeastern University Program in Venezuela); *id.* at 42 (Syracuse University Program in London); *id.* at 47 (Yeshiva University in Israel); *id.* at 48 (College of William and Mary Program in England); *id.* (Tulane University in France); *id.* at 55 (Santa Clara University Program in Hungary); *id.* at 63 (University of Iowa Program in France); *id.* at 66 (Syracuse University Program in Zimbabwe).

25. See *Clinical Conference Will Be Held in Miami in May*, AALS NEWSLETTER, Nov. 1995, at 18; Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2405-09 (1994); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2398-2402 (1991). Syracuse Law School's summer-semester abroad program offers a 6-credit internship with human rights organizations and government law offices in Zimbabwe. See *Prepare to Take-off!*, *supra* note 20, at 66.

26. See NITA (UK): *The Course Structure* (on file with the Fordham International Law Journal).

27. See *The First Worldwide Common Law Jurists Conference*, THE BENCHER, July/Aug. 1995, at 6; *AIC Plays Host to International Guests*, THE BENCHER, May/June 1995, at 9. See also *Pegasus Scholars Begin U.S. Visit*, THE BENCHER, Sept./Oct. 1996, at 8 (describing scholarship program for English barristers jointly administered by Inner Temple in London and American Inns of Court Foundation). Law schools have also encouraged judicial exchanges across national borders. See, e.g., *Ethics Forum and Debate: Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices*, 7 GEO. J. LEGAL ETHICS 865 (1994); *U.S., Foreign Judges Hold Court in Italy*, N.Y.L.J., Aug. 2, 1995, at 2.

28. I am firmly convinced that these exchanges and affiliations will be the genesis for more formal arrangements. The fifth and sixth generations of global lawyers will routinely study at non-U.S. law schools and their students at ours. See Mary C. Daly, *Thinking Globally: Will National Borders Matter to Lawyers a Century from Now?*, 1 J. INST. FOR STUDY LEG. ETHICS 297 (1996).

erate to insure that the first generation of global lawyers is succeeded by a second and third. The first is the marketplace. If employers conclude that lawyers educated with a global perspective bring added value to a transaction or litigation, they will hire disproportionately from law schools offering this training. If students conclude that a global perspective enhances their career opportunities and mobility, they will devalue a law school without such a perspective. The former president of the AALS, Judith Wegner, has challenged law schools to implement curricular reforms to facilitate their graduates' practice in a world in which "information technology makes political boundaries increasingly obsolete."<sup>29</sup> The second is a much needed loosening of the ABA accreditation standards. In the past, in its role as an accrediting institution, the ABA did not look with favor on study-abroad programs. It routinely used faculty and library accrediting standards as weapons to prevent law schools from awarding credit for study outside the United States in foreign law schools and from establishing their own academic-year, semester-abroad programs.<sup>30</sup> The ABA's hostility sprang from the fear that participating students would not receive an adequate grounding in either foreign or domestic law if they were away from the omnipresent, watchful eyes of U.S. law professors and without access to U.S. law libraries. Rather than insisting that rigorous standards be adopted to insure the pedagogic adequacy of foreign study, the ABA opted essentially for a flat ban. Acknowledging the growing importance of cross-border practice, the ABA has recently revised the accrediting standards to facilitate semester abroad and cooperative programs.<sup>31</sup> For reasons that are not en-

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29. See Judith W. Wegner, *The Association of American Law Schools' Role as an International Learning Society*, AALS NEWSLETTER, Aug. 1995, at 1, 2.

30. See generally Roger G. Goebel, *Professional Qualification and Educational Requirements for Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TULANE L. REV. 443, 455-57 (1989) [hereinafter *Bridging the Cultural Gap*].

31. The ABA has approved six academic-year, semester-abroad programs. Their sponsors are Notre Dame University School of Law, Pepperdine University School of Law, Pace University School of Law, University of Detroit Mercy School of Law, Temple University School of Law, and Boston College School of Law. It has also approved a unique program in London, England that is sponsored by a consortium of seven law schools. See List of ABA-Approved Semester Abroad Programs (on file with the *Fordham International Law Journal*). Finally, it has approved 30 cooperative programs between U.S. and non-U.S. law schools. See list of ABA-Approved Cooperative Programs (on file with the *Fordham International Law Journal*). In contrast to the undergraduate accrediting agencies, the ABA will not permit a student to receive credit for attending more

tirely clear, the ABA has regarded summer-semester programs with less hostility and consequently they are flourishing.<sup>32</sup>

The professional responsibility community has responded to the powerful calls for the addition of an international perspective into law school curricula principally through the sponsorship of programs and symposia.<sup>33</sup> Actual integration into assigned readings and classroom discussions has been slow to follow, however, for a variety of reasons. Even the most casual review of the table of contents of commonly adopted casebooks shows the transubstantive character of the course. Mastering professional responsibility entails understanding significant chunks of substantive law in at least six other areas: torts (e.g., malpractice), agency and partnership (e.g., the characteristics of, and the legal obligations flowing from, the principal-agent relationship, the liability of partners inter se, the relationship between limited and general partners, etc.), corporate (e.g., a corporation's independent juridical existence, the role of the board of directors, etc.), securities (e.g., the disclosure requirements under Rule 10-b(5), aiding and abetting liability, RICO), constitutional (e.g., the First Amendment's protection of commercial speech, the Fifth Amendment's guarantee of the right against self-incrimination, the Sixth Amendment's guarantee of the right to effective assistance of counsel, etc.), and evidence (e.g., the attorney-client privilege and the work product doctrine).<sup>34</sup> In addition to these varied and challenging topics, the conscientious professional responsibility teacher must include other complex areas that are generally considered unique to the course such as the history of the profession, the structure and organization of the bar, and the adequacy of existing mechanisms for the delivery of legal services to the poor and the middle class.

In light of the range and complexity of these subject matter areas, most professional responsibility teachers will not respond enthusiastically to a proposal to add still another topic to the

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than a single semester. See American Bar Ass'n, *Criteria for Independent Study, Cooperative Programs, and Semester Programs* <<http://www.abanet.org/legaled/abroad.html>>.

32. *Id.*, 1998 *Foreign Summer Program Information: 1998 course descriptions and 1998 foreign programs by country*, *supra* note 20.

33. See *supra* notes 3-6.

34. STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* (4th ed. 1995); GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* (2d ed. 1994); THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* (6th ed. 1991).

classic curriculum, especially one as unfamiliar as international legal practice. The basis for their resistance is neither difficult to articulate nor entirely without merit. The course is already bursting at the seams. The law of lawyering has become so complex that issues relating to the routine practice of domestic law are regularly shortchanged. There is a perception that relatively few lawyers presently engage in cross-border practice, and those that do are usually associated with elite law firms whose financial resources easily allow them to develop their own in-house programs to deal with ethical issues in cross-border practice.<sup>35</sup>

Despite the legitimacy of these objections, the resistance is distressing and shortsighted. First, law schools owe an ethical obligation to their present students, the first generation of global lawyers, to educate them to meet the professional responsibility challenges they are likely to encounter in providing cross-border legal services. I have far more confidence in the competence and independence of law schools to analyze these issues dispassionately and free from institutional biases than I do in the law firms'. Moreover, contrary to the popular assumption, lawyers practicing in small firms as well as those practicing in mega firms provide cross-border services.<sup>36</sup> Criminal activity does not respect national borders. Prosecutors and defense counsel are increasingly interacting with their foreign counterparts and foreign legal systems.<sup>37</sup> Domestic relations and family law practi-

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35. See Richard I. Beattie, *Business and Lawyers Go Global: International Markets Offer Increased Scope*, NAT'L L.J., Nov. 29, 1993, at S22; see also *Transnational Law Practice*, *supra* note 2, at 738-50; *Global Restructuring and the Law*, *supra* note 2, at 426-46; Timothy Harper, *Going Global: Big Law Firms Expand Overseas*, 75 A.B.A. J., Sept. 1989, at 68; Josh Karlen, *Yanks and Brits Duel*, NAT'L L.J., Mar. 23, 1998, at A1; Ralph C. Ferrara & David L. Darland, *Legal Representation in the International Securities Market: Representing a Party or Witness in an SEC or SRO Proceeding*, 743 PLI/CORP 421 (1991); Joseph P. Griffin, *Counseling the Foreign Client Involved in an SEC Enforcement Proceeding*, 683 PLI/CORP 197 (1990). See generally Kurt Riechenberg, *The Recognition of Foreign Privileges in United States Discovery Proceedings*, 9 NW. J. INT'L L. & BUS. 80 (1988); Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597 (1990).

36. See Mary C. Daly, *Practicing Across Borders: Ethical Reflections for Small-Firm and Solo Practitioners*, THE PROF. L. 123 (1995).

37. See Roger M. Olson, *Compelling Discovery in Transnational Litigation: Discovery in Federal Criminal Investigation*, 16 N.Y.U. J. INT'L L. & POL. 999 (1984). Vividly capturing the differences is this vignette:

During a recent visit to the International Criminal Tribunal for the former Yugoslavia, I met one of the staff lawyers who explained that in discussing preparation of the witnesses for cross-examination during trial several lawyers from different countries expressed opposing views on the ethics questions in-

tioners are also witnessing an increase in foreign law issues, as they provide legal services to a growing population of ethnically diverse immigrants, foreign nationals, and citizens.<sup>38</sup> Furthermore, to some significant extent, there is an unstated assumption in most law school classrooms, including professional responsibility ones, that today's graduates will practice principally in law firm settings or in the public sector. This assumption ignores the unprecedented growth in the numbers, prestige, and power of in-house counsel.<sup>39</sup> It takes no account of a predicted forty-three percent increase in hiring by the offices of general counsel directly related to cross-border practice.<sup>40</sup> It also ignores the demographic reality that in the future more and more law school graduates will pursue non-traditional, non-legal occupations, some of which are certain to be effected by the globalization of both business and the legal profession.

Second, given the dislocation of the domestic economy and the emergence of a global system of exchange in which goods and services are linked irrespective of borders, and building on the observations in the preceding paragraph, very few graduates of law schools in the twenty-first century, the second and third generation of global lawyers, will practice exclusively domestic law. Changing patterns of immigration and relocation are likely to impact on the delivery of legal services in both the individual and entity hemispheres of the profession. Immigrants, even those who eventually become citizens, are retaining financial,

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volved. An Australian lawyer felt that from his perspective it would be unethical to prepare a witness; a Canadian lawyer said it would be illegal; and an American lawyer's view was that not to prepare a witness would be malpractice.

Karen L.K. Miller, *Zip to Nil?: A Comparison of American and English Lawyers' Standards of Professional Conduct*, CA 32 ALI-ABA 199, 204 (1995). For two excellent collections of essays on a broad array of professional responsibility issues in the United Kingdom, see *LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY* (Ross Cranton, ed. 1995) and *LEGAL ETHICS AND LEGAL PRACTICE: CONTEMPORARY ISSUES* (Stephen Parker & Charles Sampford, eds. 1995).

38. For an insightful narrative illustrating how cultural differences are critical in representing foreign clients in personal hemisphere matters, see *The Changing Face of America — How Will Demographic Trends Affect the Courts?*, 72 JUDICATURE 125 (1988).

39. For an extended analysis of the impact of globalization on in-house counsel, see Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057 (1997) [hereinafter *Lawyering for a Global Organization*].

40. See Edward A. Adams, *International Law Tops In-House List of Growth Areas*, N.Y.L.J., Dec. 9, 1996, at 1; see also *Management Wants Alternatives from Its Attorneys*, CORP. LEGAL TIMES, July 1992, at 23.

cultural, and personal ties to their countries of origin.<sup>41</sup> More U.S. companies are bringing foreign personnel to this country for training and concentrated exposure to their financial, marketing, and business infrastructures.<sup>42</sup> They are increasingly implementing extensive rotation programs, transferring foreign and U.S. personnel, including lawyers, to facilities around the globe.<sup>43</sup> U.S. lawyers will poorly serve their clients, if they graduate without an appreciation of the differences in role and status of lawyers in foreign legal cultures or are ignorant of the dissimilarities between U.S. and foreign codes of lawyer conduct. It is educational malpractice to ignore the present and ever growing impact of globalization on the delivery of legal services. Finally, the one course in which most students are likely to ponder the role of lawyers in society is professional responsibility. When students examine the very different, and often diminished, roles played by lawyers in foreign legal systems, their appreciation of the lawyers' role in U.S. society deepens immeasurably.<sup>44</sup>

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41. See Mark Fritz, *Pledging Multiple Allegiances: A Global Blurring of Boundaries Challenges Notions of Nationality. U.S. Analysts Worry About a Rise in Dual Citizenships of Convenience*, L.A. TIMES, Apr. 6, 1998, at A1; Seth Mydans, *The Latest Big Boom: Citizenship*, N.Y. TIMES, Aug. 11, 1995, at A12; Dean Takahashi, *Ethnic Networks Help Immigrants Rise in Silicon Valley*, WALL ST. J., Mar. 18, 1998, at B1; Sam How Verhove, *Torn Between Nations, Mexican Americans Can Have Both*, N.Y. TIMES, Apr. 14, 1998, at A12; P. Pascal Zachary, *Dual Citizenship Is Double-Edged Sword*, WALL ST. J., Mar. 25, 1998, at B1. See generally Symposium: *Global Migration and the Future of the Nation-State*; John A. Scanlan, *A View from the United States — Social, Economic, and Legal Change, the Persistence of the State, and Immigration Policy in The Coming Century*, 2 IND. J. GLOBAL LEGAL STUD. 79 (1994); Richard Sybert, *Immigration Symposium — Population, Immigration and Growth in California*, 31 SAN DIEGO L. REV. 945 (1994).

42. See Michael D. Patrick, *Positive Changes in the Labor Certification Process*, N.Y.L.J., Jan. 27, 1997, at 3; Michael D. Patrick, *Update on Labor Condition Applications*, N.Y.L.J., Mar. 25, 1996, at 3. See generally Margaret C. Makar, *Foreign Entrepreneurship in the United States*, 23 COLO. LAW. 35 (1994); Daphne E. Telfeyan, *Immigration Benefits for Certain Employment-based Preferences under the Immigration Act of 1990: Outstanding Professors and Researchers, Multinational Executives and Managers and Special Immigrant Religious Workers*, 486 PLI/LIT 349 (1993).

43. See Karen Dillon, *Cultivating An International Sensibility at IBM*, AM. LAW., Nov. 1990 (Supplement), at 16; Michael D. Patrick, *Labor Condition Application Rules for Professional Workers*, N.Y.L.J., Jan. 23, 1995, at 3; Leon Wildes, *Update from the Department of State*, 535 PLI/LIT 7, 29-30 (1995); Leon Wildes, *Update from the Department of State: An Overview*, 515 PLI/LIT 345, 375 (1994).

44. See Michael Burrage, *Revolution and the Collective Action of the French, American, and English Legal Professions*, 13 LAW & SOC. INQUIRY 225 (1988).

## II. A PEDAGOGICAL PRIMER

### A. Contextualization: The Fordham Law School Methodology

Urging professional responsibility teachers to expand their syllabi to include more and foreign material without providing curricula assistance is as unfair as it is futile. Fortunately, a sufficient body of accessible material now exists to justify the call for the globalization of the professional responsibility curriculum. This Article grows primarily out of my experience in teaching a three credit course, *Professional Responsibility in Corporate, Business and International Practice*.<sup>45</sup> Several years ago, the Fordham Law School faculty decided to expand its professional responsibility curriculum. Instead of offering only a basic, one-size-fits-all course, the faculty approved a radical curricular overhaul, adding several contextual courses. Their decision acknowledged the importance of the subject matter area, attested to its intellectual complexity, and stimulated greater student interest and class participation. We advise students to enroll in the course that best reflects their anticipated career paths for the first five years following their admission to the bar.<sup>46</sup> My course generally attracts students who are interested in practicing commercial law irrespective of the practice setting (i.e., law firm or in-house), the size of the law firm (i.e., Main Street or Wall Street), or the character of the practice (i.e., litigation or transactional).

I had little difficulty in creating a syllabus that addressed the significant ethical issues likely to arise in representing business organizations such as partnerships, corporations, or joint ventures. The difficulty was in deciding what to leave out! There was an abundance of material on conflicts between lawyers and

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45. I also teach a seminar entitled *Ethics in Regulatory, Tax, and International Practice*. The precise subject matters covered in the seminar vary from year to year, depending principally on the students' interests and paper topics. For example, in the Spring 1996 semester, there was almost no discussion of cross-border practice issues; in the Spring 1997 semester, they were discussed in at least one-third of the seminar classes. This past summer, I taught a one-credit course, *The Internationalization of the Legal Profession*, at the Institute on World Legal Problems sponsored by St. Mary's University School of Law in Innsbruck, Austria. The course materials I assembled would certainly be adequate for a two-credit course. I would be delighted to share the syllabi for these courses and seminars with any interested reader.

46. For a comprehensive description of the "contextualization" pedagogy that Fordham Law School has championed, see Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMPORARY PROBS. 193 (1995).



their corporate clients, conflicts among present and former corporate clients, conflicts between parent and subsidiary organizations, confidentiality, internal investigations, and the ethical dilemmas of in-house counsel and securities lawyers.

Much to my surprise when I discussed the tentative syllabus with lawyers in the corporate bar, unanimous criticism focused on the inattention to cross-border practice. Correcting this deficiency proved particularly challenging on two levels. First, there was the problem of locating up-to-date materials. Deciding to confine my search to English-language publications was an easy one. I do not read or write any other language fluently! Fortunately, there is a very active group of sociologists of the legal profession who write in English.<sup>47</sup> Because U.S. and U.K. law firms generally dominate cross-border practice and because English is the language of most cross-border transactions, I also discovered an abundance of materials in the popular legal press.<sup>48</sup>

Second, there was the problem of formally incorporating the material into the syllabus. After a process of trial and error, I have opted for a partially-integrated methodology. The structure of the course is fairly straightforward. It begins with an introduction to the legal profession, emphasizing Heinz and Laumann's conclusions regarding the structure of the corporate

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47. For a provocative sampling of these writings, see *LAWYERS IN SOCIETY*, *supra* note 2; *PROFESSIONAL COMPETITION AND PROFESSIONAL POWER*, *supra* note 2; Osiel, *supra* note 2; *Transnational Legal Practice*, *supra* note 2; *Global Restructuring and the Law*, *supra* note 2; Flood, *supra* note 2; Friedman, *supra* note 2. Attesting to the importance of, and interest in, the sociology of cross-border practice is the recent publication of a scholarly review devoted entirely to the subject, *The International Journal of Legal Profession*.

48. The *National Law Journal* and the *American Lawyer* regularly publish articles on cross-border practice. There are several U.K. publications which provide broader coverage, *Legal Business*, *The In-House Lawyer*, and *European Counsel*. See *supra* note 47. The *International Financial Times* and the *International Lawyer's Newsletter* are also quite informative. Selections from both publications can be found at <<http://www.lawmoney.com>> and <<http://www.ljx.com/practice/internat>>. The web site of Lex Mundi, a global legal network often provides interesting data on cross-border practice. See HGI, *HGI* <<http://www.hg.org>>. On occasion, the following web sites have helpful information: <<http://www.asil.org>>, maintained by the American Society of International Law, <<http://www.lawlib.wuacc.edu/forint/noframes.htm>>, maintained by the Washburn University School of Law Library, <<http://www.lcweb2.loc.gov/glin/glin/html>>, maintained by the Global Legal Information Network, a database of national laws from contributing countries, and accessed from the World Wide Web server of the U.S. Library of Congress, and <<http://www.erols.com/iaba>>, maintained by the Inter-American Bar Association.

bar in Chicago.<sup>49</sup> Cases supplemented with excerpts from law review articles follow, organized around the topics of confidentiality and conflicts of interest. With this grounding, the students then proceed to chapters focused on particular practice areas (e.g., ethical issues of concern to securities law practitioners, to in-house counsel, etc.). Cross-border practice is the subject matter of one of these chapters. In assigning this material, I emphasize the traditional understanding of the lawyer's role as a "translator" whose function it is to "bridge the cultural gap."<sup>50</sup> However, I also discuss more controversial topics such as the legal imperialism of the U.S. and U.K. mega law firms and question whether U.S.-style lawyering with its emphasis on adversariness and due process is really a service that foreign legal systems should import so casually.<sup>51</sup> The course concludes with a chapter devoted to the future of the mega law firm, emphasizing a law and economics analysis.<sup>52</sup>

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49. See JOHN P. HEINZ & EDWARD O. LAUMAN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319-85 (1982).

50. See, e.g., *Bridging the Cultural Gap*, *supra* note 30; Arthur T. von Mehren, *The Significance of Cultural and Legal Diversity for International Transactions*, 1 IUS PRIVATUM GENTUM 247 (1969). For specific descriptions of the types of ethical dilemmas that arise frequently in cross-border practice, see Bryant G. Garth, *Transnational Legal Practice and Professional Ideology*, 7 MICH. Y.B. INT'L LEGAL STU. 3 (1985); Roger J. Goebel, *Professional Responsibility Issues in International Law Practice*, 29 AM. J. COMP. L. 1 (1981); Olga M. Pina, Note, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797 (1988) [hereinafter *Systems of Ethical Regulation: An International Comparison*]. Furthermore, to practice competently students must appreciate the "dual translation problem." They must be able to translate their clients' needs not only into a different language, but also into different legal concepts. See Thomas J. Klitgaard, *Counselling A Multinational: The Problems of Communication, Document Control, and Antitrust Compliance*, in 25th Annual Antitrust Seminar: *Antitrust Laws And International Trade*, at 433, 436 (502 PLI/CORP. 1985).

51. See, e.g., *Transnational Law Practice*, *supra* note 2, at 420-57; *Global Restructuring and the Law*, *supra* note 2, at 750-63. Japan's system of alternative dispute resolution and its avoidance of U.S.-style litigation are frequently praised in the legal and business community. See Dan Quayle, *Too Much Litigation: True Last Year, True Now*, NAT'L L.J., Aug. 10, 1992, at 17. Ironically, in urging that Japan adopt a U.S. model for its products liability laws, supporters claimed that is real benefit would be

as a means to more substantial reform of the Japanese legal system whereby access to courts and lawyers is liberalized, and Japanese lawyers are freed to integrate their practices with their counterpoints in America and the European Community . . . . [This] would clearly be a positive step for international trade and the legal profession as it would acknowledge the inevitable movement toward professional integration among American, European Community and Japanese lawyers.

Robert C. Weber, *Japanese Law Edges Westward*, NAT'L L.J., Apr. 6, 1992, at 13.

52. Although I do not specifically approach cross-border practice from a law and

At the beginning of each semester, I briefly introduce the students to the history of the legal profession in the United States and to the structure of the New York Code of Professional Responsibility and the Model Rules of Professional Conduct ("Model Rules").<sup>53</sup> At the same time, I introduce them to the Code of Conduct for Lawyers in the European Community ("CCBE Code").<sup>54</sup> Whenever I assign sections of the Model

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economics approach, there is no reason not to. One question for fruitful discussion might be how competition from non-lawyer providers such as accounting firms and banks effect law firm fees and market strategies in the United Kingdom and civil law countries and how its absence affects them in the United States where the unauthorized practice of law statutes may act as powerful barriers to entry. For an interesting discussion of these issues, see Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules*, 40 HASTINGS L.J. 577 (1989); John Gibeaut, *Squeeze Play*, A.B.A. J., Feb. 1998, at 42; Ward Bower, *Multidisciplinary Practice-The Future* 155 (1997) in GLOBAL LAW IN PRACTICE 155 (J. Ross Harper ed., 1997); John Flood, *The Cultures of Globalization: Professional Restructuring for the International Market*, in PROFESSIONAL COMPETENCE AND PROFESSIONAL POWER, *supra* note 2, at 139-69; Chris Klein, *Gold Rush, Thin Stakes: U.S. Branches Face Fierce Competition from U.K. Solicitors, Accountants*, NAT'L L.J., Aug. 12, 1996, at A1; Wade Lambert, *Overseas, Lawyers Face Surprising Competitor: Big-Six Accounting Firms*, WALL ST. J., Apr. 17, 1995, at 1; Larry Smith, *New Adversaries: Big-6 Accounting Firms Encroach Foreign Legal Turf*, OF COUNSEL, Mar. 6, 1995, at 1; Karen Dillon & Catrin Griffiths, *KPMG Fidal the Largest Law Firm on the Continent*, LEGAL BUS., Jul.-Aug. 1991, at 26. *Big Six Count on Legal Work*, LEGAL TIMES, Feb. 9, 1998, at S44. Two other potential topics are fees and the entry into the marketplace of new types of lawyers and law firm competitors such as foreign legal consultants and networks.

53. Throughout the remainder of this Article, I will refer only to the Model Rules. My syllabus includes the New York Code only because a large number of the students intend to practice within the state.

54. There are two major advantages to using the CCBE Code. First, an official English-language version exists and there are informative articles about the Code in English. Second, it reflects a long tradition of ethical understandings in civil law countries, many of which were not reduced to formal writings or never translated. For a comprehensive and enlightening study of the CCBE Code, see Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 (1993) [hereinafter Terry, *Legal Code of Ethics Part I*]. The Text of the CCBE Code and the Explanatory Memorandum are published as Exhibits B and C, respectively, to the Terry article. They are also published in RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICE 380 (Mary C. Daly & Roger J. Goebel eds., 1995) [hereinafter RIGHTS, LIABILITY AND ETHICS]. See also Laurel S. Terry, *Legal Ethics Code Part II: Applying the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 345 (1993) [hereinafter Terry, *Legal Code of Ethics Part II*]. The International Bar Association ("IBA") has also promulgated a lawyer code of ethics. See LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW (Edwin Godfrey ed. 1995) [hereinafter LAW WITHOUT FRONTIERS]. The IBA Code consists of twenty-one general rules. Unlike the CCBE Code, it does not supersede any domestic code. Nor is it directly enforceable against an individual lawyer. The IBA brings complaints of alleged violation to the attention of domestic regulators. There is no history of any complaint ever being filed.

Rules during the semester, to the extent possible I also assign the corresponding articles in the CCBE Code. I immediately follow this introductory lecture with a lecture outlining in very general terms the differences among the common, civil, and socialist legal systems.<sup>55</sup> The lecture makes passing reference to the law as an undergraduate course of study and the legal profession as a stratified or divided one outside the United States. It provides a nuanced rather than oppositional perspective on the distinction between the common law's "adversarial" system of justice and the civil law's "inquisitorial" system.<sup>56</sup> From the very beginning, I try to have the students appreciate that lawyers trained in the civil law tradition "see" and "feel" the law differently.

What is really distinctive about civil law education grows out of its methodology, which perpetuates the tradition of scholar-made law, just as our 'case-method' emerged from and contributes to the maintenance of the common law tradition of judge-made law. . . . [I]t is not surprising that one of the greatest differences in the two systems appears in the manner in which the student is initiated into the study of law. . . . [A] student of the civil law is provided at the outset with a systematic overview of the framework of the entire legal system. . . . [T]he civil law student is kept at a certain distance from the facts and starts out with a ready-made version of the organization, methods, and principles of the system.<sup>57</sup>

The method of instruction is also radically different. Classes are extremely large. Several hundred students can be enrolled

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55. For a general introduction to the contemporary study of comparative law, see MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* (2d ed. 1994) [hereinafter *COMPARATIVE LEGAL TRADITIONS*]; RENE DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (3d ed. 1985); RUDOLPH B. SCHLESINGER ET AL., *COMPARATIVE LAW* (5th ed. 1988); KONRAD ZWIEGERT & HEINZ KOTZ, 1 *INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., 2d ed. 1987). For other useful, but somewhat outdated materials, see JOHN HENRY MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* (1978); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (1969).

56. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, (1985). But see John Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L.REV. 987 (1990).

57. *COMPARATIVE LEGAL TRADITIONS*, *supra* note 55, at 130-33. See also Mirjan Damaska, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363 (1968). See also Philippe Brunno, *The Common Law from a Civil Lawyer's Perspective* (1994) in RICHARD A. DANNER & MARIE-LOUISE H. BERNAL, *AN INTRODUCTION TO FOREIGN LEGAL SYSTEMS* 1 (1994).

in a single course. The Socratic method is unknown.<sup>58</sup> Professors employ a lecture format almost exclusively with the stated goal of introducing their students to the grammar of the civil law, consisting of a "network of precise interrelated concepts, broad principles and classificatory ideas."<sup>59</sup>

The benefit to the course's organization is two-fold. In the early part of the semester when the class is focusing on confidentiality and conflicts of interest, I am able to make general references to specific provisions in the CCBE Code and supplement the students' understanding with brief comments drawn from my own readings in comparative legal ethics and from the readings they will subsequently be assigned in the separate chapter devoted to cross-border practice. The material in the separate chapter allows them to focus directly and more completely on professional responsibility issues.

#### B. *How to Integrate Cross-Border Practice Materials into the Traditional Curriculum*

For a variety of reasons generally involving faculty resources, many law schools cannot reconfigure their professional responsibility curriculum to offer contextual courses such as the one described above. Limitations on faculty resources is not, however, a valid reason for ignoring the ethical implications of the globalization of the legal profession. Once convinced of the need to add a global perspective to his or her course, a professional responsibility teacher must still address the daunting questions of how to integrate the subject matter and what materials to select. The answer to the "how" question requires an honest self-appraisal of the professor's pedagogical approach to the course's subject matter and teaching style. The first crucial task consists of ascertaining the course's *raison d'être*. Two ambitions are usu-

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58. See 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 999-1000 (Richard L. Abel & Philip S.C. Lewis eds., 1988); COMPARATIVE LEGAL TRADITIONS, *supra* note 55, at 133; Jutta Brunnee, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 J. LEGAL EDUC. 399, 400-26 (1992); Jurgen R. Ostertag, *Legal Education in Germany and the United States — A Structural Comparison*, 26 VAND. J. TRANSNAT'L L. 301, 332-39 (1993). See also John H. Merryman, *Legal Education: There and Here: A Comparison*, 27 STAN. L. REV. 859, 865-75 (1975).

59. See Damaska, *supra* note 57, at 1366. For a rich analysis of how foreign legal education and culture affects the law-school learning of students from other countries, see Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive International Approach to the U.S. Classroom*, 47 J. LEG. EDUC. 157 (1997).

ally presented in counterpoint to one another: to familiarize the students with the specific codes that govern the conduct of lawyers (e.g., the Model Rules), and to explore a broad range of professionalism issues, often against the backdrop of philosophic reasoning (e.g., the role of lawyers in society, the nature of the search for truth in an adversarial system of justice, the delivery of legal services, etc.). For most teachers neither goal is exclusive.<sup>60</sup> For some parts of the course, it is important that the students know the precise language of a particular norm (e.g., MR 1.6 allows a lawyer to disclose information gained in the professional relationship only to protect a third-party from imminent death or substantial bodily harm, not to prevent economic injury regardless of its severity.) For other parts, it is important that the students reflect on the professional culture underlying a norm, but the norm's linguistic expression is inconsequential (e.g., MR 5.5 governing the unauthorized practice of law).

Integrating cross-border practice materials into the traditional professional responsibility curriculum will not disrupt either aim. Just as professors currently explore with their students specific provisions of the Model Code, the Model Rules, the draft Restatement, and the decisions of the United States Supreme Court, they can explore key articles in the CCBCE Code of Conduct or decisions of the European Court of Justice. Other cross-border topics, such as the diminished status of in-house counsel, the divided structure of the bar, and the cultural understandings of the role of lawyers in foreign legal systems, can be explored in precisely the same fashion as analogous issues in the U.S. legal profession.

As noted above, trial and error has persuaded me that the

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60. A survey of some of the most popular professional responsibility textbooks demonstrates the authors' "mixed" intention. Presumably, they have adopted this approach because the market demands it. See NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* xxv-xxvi (1996); HAZARD, ET AL., *supra* note 31, at v; PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS* xxi-xxii (1988); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 1-2 (2d ed. 1995). Certain authors, however, have deliberately chosen to emphasize one goal over the other. Compare TERESA S. COLLETT & ROBERT F. COCHRAN, JR., *CASES AND MATERIALS ON THE RULES OF THE LEGAL PROFESSION* v (1996); ROY D. SIMON, JR. & MURRAY L. SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS* vii-viii (3d ed. 1994) with DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 1-15 (1973); HOWARD LESNICK, *BEING A LAWYER: INDIVIDUAL CHOICE AND RESPONSIBILITY IN THE PRACTICE OF LAW* 1-3 (1992); THOMAS L. SCHAFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS AND DISCUSSION TOPICS* xxi (1985).

most efficient way to teach cross-border materials is to "front load" at the very beginning of the semester with a brief comparative overview, intersperse general comments during the discussions of confidentiality and conflicts of interest, and devote a unit to specific issues pertinent to globalization.<sup>61</sup> The traditional curriculum can easily accommodate this approach. All that is required is an additional document supplement with the cross-border readings.

### C. *Accessible Topics for Integration*

The remainder of this Article identifies ten subject matter areas that generally form the core of the traditional curriculum and illustrates how cross-border materials can be integrated into discussions of these subject matter areas and/or treated separately. It will not analyze the identified areas. Its purpose is to point the way, commenting on specific materials within the selected topics, citing some relevant secondary sources, and leaving the reader to decide how much material to integrate and which material best corresponds to the reader's classroom interests wherever possible hypotheticals are provided. Because few readers are familiar with the ethical implications of the globalization of the legal profession and because many courses are only two-credit courses, the hypotheticals are straightforward.<sup>62</sup> In general, their purpose is to "tease" the students, alerting them to the necessity of thinking about ethical issues in cross-border practice rather than demanding a precise, analytically complete response.

#### 1. Codes of Conduct and Cultural Understandings of a Lawyer's Role

Most courses, and especially those that take a law-of-lawyer-ing approach, begin with a general discussion of the normative framework regulating lawyers' conduct: the common law of agency and fiduciary relationships, malpractice liability, the Model Code, and the Model Rules. Depending upon individual

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61. See *supra* notes 49-55 and accompanying text.

62. American Bar Association Section of Legal Education and Admissions to the Bar, Report of the Professionalism Committee, Teaching and Learning Professionalism 40 (1996). A wonderfully provocative set of hypotheticals can be found in Goebel, *Bridging the Cultural Gap*, *supra* note 30, at 45-57.

pedagogical preferences, there may be passing references to, or a more complete discussion of, the ALI's draft Restatement of the Law of Lawyering, and the constitutional guarantees of the first, fifth, and sixth amendments. The preeminent document to include in this section of the course is the CCBE Code and its accompanying Explanatory Memorandum.<sup>63</sup> It is a "statement of common rules which apply to all lawyers . . . in relation to their cross-border activities."<sup>64</sup> The CCBE is an umbrella organization of the bar associations of the European Union Member States and other "Observer States."<sup>65</sup> The legal and regulatory status of the CCBE within the Member States of the European Union resembles the ABA's within the United States. In order for the CCBE Code to have any legal effect it had to be adopted by the Member States, just as the Model Rules had to be adopted by the individual states. Fifteen Member States and four observer states to the CCBE have now adopted the CCBE Code.<sup>66</sup> The Code applies only to lawyers admitted in the CCBE states

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63. See *supra* note 54 and accompanying text. The IBA recently performed an invaluable service by publishing a detailed overview of the ethical regimes of selected European countries, the European Union, Japan, Canada, and Australia. See LAW WITHOUT FRONTIERS, *supra* note 54, at 360-64.

64. Council of The Bars And Law Societies of The European Union, CCBE Code of Conduct For Lawyers in The European Union, art. 1.3.1, *reprinted in* RIGHTS, LIABILITY, AND ETHICS, *supra* note 54, at 380. It is also reprinted in Terry, *Legal Ethics Code Part I*, *supra* note 54, at 63-75.

65. For a full and rich examination of the CCBE Code, see Terry, *Legal Ethics Code Part II*, *supra* note 54, at 345. For a detailed description of the organization of the CCBE and the history of the Code of Conduct, see CCBE CROSS BORDER PRACTICE COMPENDIUM 3-1 to 3-44 (Dorothy M. Donald-Little ed., 1991) [hereinafter CROSS-BORDER PRACTICE COMPENDIUM]. For a briefer history, see Roger J. Goebel, *Lawyers in the European Community: Progress Toward Community-Wide Rights of Practice*, in RIGHTS, LIABILITY, AND ETHICS, *supra* note 54, at 239; John Toulmin, *A Worldwide Common Code of Professional Ethics?*, in RIGHTS, LIABILITY, AND ETHICS, *supra* note 54, at 207.

66. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573, *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957; 292 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741, in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off' Pub. Off. 1987). Until 1995, the twelve European Union Member States were Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. TEU, *supra*, pmbl. On January 1, 1995, Austria, Finland, and Sweden became European Union Member States. See Hugh Carney, *Sweden Gives Clear Yes to EU: Vote in Favour of Membership Keeps Enlargement Timetable on Course*, FIN. TIMES, Nov. 14, 1995, at 1 (reporting accession of new Member States). The observer states are: Cyprus, Czechoslovakia, Norway, and Switzerland. *Id.*



and only to their cross-border activities. It does not apply, by its own terms, to U.S. lawyers.<sup>67</sup> There is a distinct possibility that the CCBE Code in amended form will one day govern the conduct of all lawyers who provide cross-border legal services.<sup>68</sup>

Before introducing the CCBE Code, I explain that, in many countries a lawyer's "code of conduct" does not have the same legal and cultural force that it does in the United States. As Professor Hazard has noted, "English barristers thought it quaint that American lawyers felt in need of legal rules for their governance, but they recalled that Americans seemed to need legal rules for everything."<sup>69</sup> In Mexico, there is no code that governs the conduct of all the lawyers admitted to practice in that country. Nor is there a disciplinary system similar to that found in the United States or in the CCBE member states. Although the Mexican Bar Association has adopted a code of professional ethics, it governs only the conduct of the lawyers who join that voluntary organization and does not have the force of law.<sup>70</sup> The countries of Eastern Europe are struggling to establish a truly independent profession within each of their borders. The drafting of their lawyer codes of conduct is an important part of that effort. But the newness of the codes and their animating ideology means

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67. See also Laurel S. Terry, *A Case Study of the Hybrid Mode For Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bar*, 21 FORDHAM INT'L L.J. 1382 (1998) [hereinafter *A Case Study of the Hybrid Model*]. While I stress the non-applicability of the CCBE Code to U.S. lawyers at the beginning of the course, I do not develop any of the problems that flow from it (e.g., what is a U.S. lawyer to do, if the CCBE Code imposes ethical obligations on the lawyer's partner that are inconsistent with, or contrary to, the U.S. lawyer's, and the two lawyers are working together on an EU transaction?) While I mention these problems in passing, I develop them in more detail at a later point in the course where I discuss the future of the modern law firm.

68. See Toulmin, *supra* note 65, at 675 & n.6; Kilimnik, *supra* note 2, at 296-302. See generally Michael J. Chapman & Paul J. Tauber, Note, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, 958-60 (1995); Annie Eun-ah Lee, *Toward Institutionalization of Reciprocity in Transnational Legal Services: A Proposal for a Multilateral Convention under the Auspices of GATT*, 13 B.C. INT'L & COMP. L. REV. 91, 117-24 (1990).

69. See Geoffrey C. Hazard, *Ethics*, NAT'L L.J., Mar. 30, 1992, at 13; H. Patrick Glenn, *Professional Structures and Professional Ethics*, 35 MCGILL L.J. 424, 428 (1990); Miller, *supra* note 37, at 217. See also Ralph C. Ferrara & Thomas Carroll, *Different Customs from the Same Tradition: U.K. Lawyers Penetrating the U.S. Legal System*, PLI/CORP. 9 (1987).

70. Rona R. Mears, *Ethics and Due Diligence: A Lawyer's Perspective on Doing Business with Mexico*, 22 ST. MARY'S L.J. 605, 611 (1991).

that they are not yet integrated into the local legal culture.<sup>71</sup>

In introducing the CCBE Code, I begin by noting the correspondence of the topics addressed. Despite differences in the substantive attributes of the attorney-client relationship in the United States and the Member States of the European Union, the CCBE Code and the U.S. norms show a striking overlap in subject-matter (e.g., confidentiality, client/client conflicts, attorney/client conflicts, etc). Professor Laurel Terry has painstakingly put together a chart that shows the precise correspondence between individual provisions of the Model Rules and the CCBE Code.<sup>72</sup>

Comparing the Preamble of the CCBE Code and the Preamble and Scope section of the Model Rules serves as an effective device for directing the students' attention to the respective drafters' fundamental assumptions about the role of lawyers in society. As the history of the Model Rules reveals, its adoption prompted great debate within the profession over the duties owed by lawyers to clients and the duties owed by lawyers to society. Controversy erupted when critics accused the early drafts of weakening the traditional guarantees of confidentiality in favor of disclosure to regulators, prosecutors, and defrauded third parties. The ABA House of Delegates ultimately rejected the drafters' proposed liberalization, approving disclosure restrictions more severe than those permitted by the Model Code.<sup>73</sup> The Preamble to the Model Rules emphasizes a lawyer's obliga-

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71. For a fascinating account of the drafting of such a code, see Ronald D. Rotunda, *Legal Ethics, The Czech Republic and the Rule of Law*, 7 PROF. LAW., Aug. 1996, at 1. There are a number of excellent articles describing the turbulent and often difficult transformation of the legal profession in Eastern Europe. See, e.g., Michael Burrage, *Advohatura: In Search of Professionalism and Pluralism in Moscow and Leningrad*, 15 L. & SOC. INQUIRY 433 (1990); William D. Meyer, *Facing the Post-Communist Reality: Lawyers in Private Practice in Central and Eastern Europe and the Republics of the Former Soviet Union*, 26 LAW & POL'Y INT'L BUS. 1019 (1995); Andras Sajó, *The Role of Lawyers in Social Change: Hungary*, 25 CASE W. RES. INT'L L. 137 (1993). Some articles focus specifically on legal education. See, e.g., George A. Critchlow, *Teaching Law in Transylvania: Notes on Romanian Legal Education*, 44 J. LEGAL EDUC. 157 (1994); Francis A. Gabor, *Legal Education in Hungary*, 72 OR. L. REV. 957 (1993); Lisa A. Granik, *Legal Education in Post-Soviet Russia and the Ukraine*, 72 OR. L. REV. 963 (1993); Zbigniew Gostynski & Alan Garfield, *Taking the Other Road: Polish Legal Education During the Past Thirty Years*, 7 TEMP. INT'L & COMP. L.J. 243 (1993); William D. Meyer, *Remnants of Eastern Europe's Totalitarian Past: The Example of Legal Education in Bulgaria*, 43 J. LEGAL EDUC. 227 (1993).

72. See Terry, *Legal Ethics Code Part I*, *supra* note 54, at 60-62.

73. For a comprehensive bibliography on the history of the Model Rules, see CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 60-64 (1986). Of particular note is Ted

tion to the client. The Preamble to the CCBE Code, on the other hand, emphasizes a lawyer's obligation to society.<sup>74</sup> With some pedagogical direction from the teacher, exploring the images of the legal profession projected by the two codes of conduct can lead to a discussion of their alignment or misalignment with the students' individual and collective images.<sup>75</sup> If all else fails, reference to the very different concept of the role of a lawyer in the Chinese legal system is certain to catch their attention. The 1980 Lawyers' Regulations in China defined lawyers as "state legal workers" and required aspiring lawyers to be a citizen who "warmly loves" China and supports the socialist system.<sup>76</sup> The founding partner of a major law firm boasted of his firm's commitment to the "four fundamental principals . . . the leadership of the Chinese Communist Party, Marxist-Leninist-Mao Zedong thought, the people's democratic leadership, and the socialist road."<sup>77</sup>

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Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).

74. Thus, the first article of the CCBE Code states:

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 . . . .

CCBE Code, in RIGHTS, LIABILITY, AND ETHICS, Art. 1.1, *supra* note 54, at 375. See also Terry, *Legal Ethics Code Part I*, *supra* note 54, at 64 & 76. Even more striking is the first provision of the Federal Attorneys Act in the Federal Republic of Germany. It describes an attorney as an "independent body of the judicature" who does not merely represent private interests. Wolfgang Kuhn, *New Professional Rules for Attorneys in the Federal Republic of Germany: The European Court and the Federal Constitutional Court Shake the Profession*, 14 INT'L LEGAL PRAC. 48, 48 (1989).

75. Professor Laurel Terry's article is particularly helpful for guiding the discussion in this direction. See Terry, *Legal Ethics Code Part I*, *supra* note 54, at 45-59.

76. See Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751, 756 (1991); see also SYDNEY M. CONE, III, INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND LAW FIRMS IN GLOBAL PRACTICE 15:1-12 (1996); Wu Jianfan, *Building New China's Legal System*, 22 COLUM. J. TRANSNAT'L L. 1, 38 (1983). China has only recently repealed the 1980 Lawyers' Regulations and adopted a new code of regulation. (An English-language version of the new law is on file with the *Fordham International Law Journal*). Although the new law avoids the socialist system rhetoric expressed in the text, it is hard to imagine that China has truly embraced the ideology of independent professional judgment that the common and civil law traditions so greatly cherish. It is far more likely that China issued the new law to reassure skittish investors from the Western nations about its commitment to the rule of law. See Tung-Pi Chen, *The Chinese Notariat: An Overlooked Cornerstone of the Legal System of the People's Republic of China*, 35 INT'L & COMP. L.Q. 63, 63-66 (1986).

77. See Gelatt, *supra* note 76, at 791.

Comparing the relevant provisions of the CCBE Code, on the one hand, and those of the Model Rules, on the other, can serve as a springboard for a variety of different discussions pertinent to cross-border lawyering. Almost without exception, the CCBE Code provisions are shorter and less detailed. For example, Article 2.3 governing the lawyer's duty of confidentiality is thirteen lines in length. Although its U.S. counterpart, MR 1.6 entitled "Confidentiality of Information," consists of only fifteen lines, that number is deceptive. First, MR 1.6 cannot be read in isolation. At a minimum, the comments (one hundred twenty-six lines) must be read as well. Second, the lawyer's obligation of confidentiality cannot be fully understood without reference to MR 3.3 entitled "Candor Toward the Tribunal" (one hundred fifty-two lines of text and comments). This difference in drafting style provides a valuable opportunity to reflect on a phenomenon which foreign lawyers regard with amusement, and often with irritation: the preference of U.S. lawyers for extended formal commentary and a corresponding dislike of short, ambiguous text.<sup>78</sup>

A further advantage of the incorporation of this material is that it can quite nicely trigger the so-called "law as a profession v. law as a business" debate in which the students examine some of the economic forces that are reshaping the legal profession in the United States today.<sup>79</sup> The perceived need to offer clients an expanded range of services, including nontraditional ones provided by nonlawyers (e.g., economists, engineers, trade consultants, etc.) has provoked a heated debate over ancillary businesses.<sup>80</sup> Nonlawyers (e.g., accountants, pension experts, finan-

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78. See Goebel, *Bridging the Cultural Gap*, *supra* note 30, at nn.14-16 and accompanying text; William S. Lipsman, *American Corporate Counsel Can Be Effective In-House Advisers Overseas*, 9 No. 2 ACCA DOCKET 18, 22 (1991); see also Elliot Pinsley, *Japan, Law Firms Still A World Apart*, NAT'L L.J., Jan. 27, 1992, at 17 (contrasting "minimalist role adopted by Japanese lawyers" and "simpler, less-agonized course of contract negotiations" with "exquisite detail" of contracts crafted by American lawyers.).

79. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1233-76 (1995).

80. See L. Harold Levinson, *Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 OHIO ST. L.J. 229, 240-55 (1990); Randall Samborn, *Dues, Ancillaries Debated*, NAT'L L.J., Feb. 21, 1994, at 3; Randall Samborn, *ABA Ethics Rule Proposal: Ancillary Business Debate Returns*, NAT'L L.J., Nov. 29, 1993, at 3; Thom Weidlich, *Ancillary Businesses Prospering Quietly: The Most Successful Subsidiaries Are Those That Play on Their Firms' Strengths*, Experts Say, NAT'L L.J., Dec. 21, 1992, at 1;

cial planners, etc.) have entered into the legal services marketplace and are competing for the same business as law firms. Within the European Union, this financial pressure is even more intense. Services that would be characterized as "legal" in this country are often offered by accounting firms, securities firms, and banks outside the United States and increasingly in the United States as well.<sup>81</sup> Observing this phenomenon can lead students to an enriched debate on the question of the future of the legal profession. Provocative questions include: Does the EU experience suggest that the legal profession in the United States has little to fear, although individual lawyers may have much to lose? Has the stratification of the legal profession facilitated the growth of lay competitors in the EU Member States? Does stratification lead to parochialism and indifference, giving way to activism only if a lawyer perceives a threat to the livelihood of the lawyer's particular practice segment? Still another approach to the role of the lawyer and professionalism in cross-border practice is to examine the impact that U.S. law firms have had on the legal economy and culture of other countries when they open branch offices outside the United States or

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*Ancillary Businesses of the Nation's 250 Largest Law Firms*, NAT'L L.J., Dec. 21, 1992, at 31; Lawrence J. Fox, *Restraint is Good in Trade*, NAT'L L.J., Apr. 19, 1991, at A17; James W. Jones, *Law Firm Diversification*, A.B.A. J., Sept. 1989, at 52. Pennsylvania is the only state to date that has specifically adopted a rule of professional conduct to govern ancillary businesses. It differs in some significant respect from the ABA's version. See Laurel S. Terry, *Pennsylvania Adopts Ancillary Business Rule*, THE PROFESSIONAL LAWYER, Nov. 1996, at 10.

81. Lawyers in many civil law systems, especially those in Europe, encounter keen competition from "non-lawyer" providers of legal services such as accountants. See Bower, *supra* note 52; Bernard Greer, Jr., *Professional Services in the Global Economy: The Implications of 'One-Stop Shopping'*, INT'L BUS. LAW., Mar. 1996, at 12; Smith, *supra* note 52. Because of territorial restrictions on the establishment of branch offices and the principle of localization, German law firms in particular have faced heavy competition from non-lawyer providers: "national and international accounting firms and the legal departments of companies provide a growing percentage of legal advisors. With the exception of some large law firms, the activities of most German attorneys primarily consists [sic] of litigation." Wolfgang Kuhn, *New Professional Rules for Attorneys in the Federal Republic of Germany: The European Court and the Federal Constitutional Court Shake the Profession*, 14 INT'L LEGAL PRAC. 48, 51 (1989) [hereinafter *New Professional Rules for Attorneys in Germany*]. In the United Kingdom, the Thatcher government proposed permitting solicitors to form interdisciplinary partnerships with nonlawyers. Courts and Legal Services Act, 1990 (Eng.) For a history of the Legal Services Act, see Michael Zander, *The Thatcher Government's Onslaught on the Lawyers: Who Won?*, 24 INT'L LAW. 753 (1990); Patrick Stewart, *Multinational Partnerships or Alien III?*, INT'L FIN. L. REV., May 1991, at 19. The proposal appears to have become bogged down as the result of opposition from the Law Society.

affiliate with local lawyers in a significant way.<sup>82</sup> Finally, the beginning part of the course offers a wonderful opportunity to discuss the pro-active style of lawyering that distinctly sets the U.S. lawyer apart from the lawyer's civil law colleagues.<sup>83</sup>

## 2. Admission, Legal Education, and the Structure of the Bar

Admission, legal education, and the structure of the bar are inextricably intertwined and the subjects for fruitful discussion, especially at the beginning of the course. *In re Griffiths*<sup>84</sup> is the obvious point of departure for a discussion of the unconditional admission of foreign lawyers to a state bar. Related topics include the licensing of foreign legal consultants,<sup>85</sup> partnership and employment relationships between U.S. and foreign lawyers,<sup>86</sup> and affiliations between U.S. and foreign law firms.<sup>87</sup>

Foreign jurisdictions condition admission to the bar on prerequisites superficially similar to those of U.S. jurisdictions. Both require proof of a candidate's moral integrity and insist on the satisfactory completion of a specialized course of study and the successful passage of a bar examination. There are enor-

82. See, e.g., *Transnational Law Practice*, *supra* note 2, at 426-48; *Global Restructuring and the Law*, *supra* note 2, at 738-50.

83. I have explored this topic elsewhere at great length. See Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1068-84 (1997). Entrepreneurial lawyering is a related topic that also fits in quite nicely here.

84. 413 U.S. 717 (1973).

85. See American Bar Ass'n, *Section on International Law & Practice, Report to The House of Delegates, Model Rule for the Licensing of Legal Consultants*, 28 INT'L LAW. 207 (1994).

86. See Ass'n of the Bar of the City of New York Comm. on Professional and Judicial Ethics, Form. Op. 1995-3 (1995) (identification of foreign lawyers on letterhead); N.Y. St. Bar Ass'n, Comm. on Prof. Ethics, Op. 658 (1994) (partnership with Swedish lawyers); *id.*, Op. 646 (1993) (partnership with a Japanese *bengoshi*). Both Indonesia and India have recently taken exception to the provision of legal services by U.S. law firms in those countries. See *Morgan Lewis to face Indonesian Litigation*, INT'L FIN. L. REV., Mar. 1998, at 3; Edward A. Adams, *Indian Government Balks at Firms' Operations There*, N.Y.L.J., June 17, 1996, at 1.

87. See N.J. Adv. Comm. Prof. Eth., Op. 681 (1995) (affiliation with foreign law firm based in part upon referral of clients with pooling and distribution of the firms' respective profits); Ass'n of the Bar of the City of New York Comm. on Professional and Judicial Ethics, Form. Op. 1994-4 (1994) (description of an affiliation with a foreign law firm creates misleading impression of partnership relationship). For a general overview of some of the ethical issues arising in the context of global networks of law firms, see Mary C. Daly, *Preliminary Reflections on Ethical and Liability Issues in Comparative Law* YEARBOOK OF INTERNATIONAL BUSINESS at 250-51 (1995).

mous differences in the substance of the education and its career relatedness, purpose, length, and practice orientation, however.<sup>88</sup>

With respect to legal education outside the United States, several points of distinction capture the students' attention. Pre-eminent is that in the United States law is a graduate course of study. Law is an undergraduate major almost everywhere else in the world.<sup>89</sup> The general absence of skills training is also noted, an observation that generally leads to a discussion of the formative role of the university in civil law countries in contrast to the formative role played by the bar in the United States and the United Kingdom. Because civil law regulatory regimes frequently include an apprenticeship requirement for admission to the bar, this discussion can also provoke an interesting debate on the question whether the states should impose a similar requirement.<sup>90</sup> Moreover, the goals of legal education in the United States and in the civil law countries can be quite different. For example, "United States law schools seek 'to educate [individuals] for becoming lawyers' and German law schools seek to prepare students for judicial office. . . . The focus of the training of the United States lawyer is on advocacy skills whereas the focus of the German model is on adjudicative skills."<sup>91</sup> Career mobility has long been a hallmark of the U.S. legal profession. Lawyers, in theory, at least, have been able to move with relative ease from law firms to organizational employers and from the private sector to the public sector and back again. The judiciary is selected from members of the practicing bar. Career paths outside the United States are remarkably different. Students often have to choose irrevocably in their third or fourth year of law school between public and private sector career

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88. See Jutta Brunnee, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 J. LEGAL EDUC. 399, 400-22 (1992); Juergen R. Ostertag, *Legal Education in Germany and the United States—A Structural Comparison*, 26 VAND. J. TRANSNAT'L L. 301, 302-40 (1993); *Winds of Change*, *supra* note 6, at 941-1018; Sandra R. Klein, Comment, *Legal Education in the United States and England: A Comparative Analysis*, 13 LOY. L.A. INT'L & COMP. L.J. 601, 602-41 (1991). See also John H. Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 865 (1975).

89. But see Ostertag, *supra* note 88, at 302-03, 317 n.91.

90. See Burnele Venable Powell, *Diagnosis and Prescription: Illusory Lawyer Disciplinary Reform and the Need for A Moratorium*, 1 J. INST. FOR STUDY LEG. ETHICS 263, 275-79 (1996).

91. *Id.* at 324.

paths. They may also have to choose what type of private sector lawyer they wish to become (e.g., one who has rights of audience in the courts, one who drafts and solemnizes documents relating to the transfer of real and personal property, or one who counsels clients in non-litigious matters).<sup>92</sup> Most students agree that these are pretty heady decisions for nineteen- or twenty-year olds!

The career choices that foreign law students must make obviously reflect the organization of the divided or stratified legal profession they will enter. While most U.S. students possess a nodding familiarity with the barrister/solicitor distinction,<sup>93</sup> the formal allocation of legal services to different providers, such as conveyancers, notaries, the former conseil juridique, etc., usually catches them unaware.<sup>94</sup> Empirical and anecdotal evidence suggests that the legal profession in the United States is becoming *de facto* divided as more and more lawyers enter specialized practice areas. The trend toward specialization is especially manifesting itself in mega law firms through a deliberate compartmentalization of assignments to young associates that is without historical precedent, in the emergence of boutique firms whose members provide sophisticated legal services in discrete areas,

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92. See Dominique Lefort, *Recent Trends in the French Legal Professions*, 14 INT'L LEGAL PRAC. 53 (1989).

93. See MICHAEL ZADER, CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM 626-30 (7th ed. 1993); RICHARD L. ABEL, THE LEGAL PROFESSION IN ENGLAND AND WALES (1988); Edwin Godfrey & Anne Damerell, *England and Wales*, in LAW WITHOUT FRONTIERS, *supra* note 50, at 51. The Courts and Legal Services Act of 1990 has softened some of the traditional distinctions between barristers and solicitors. See Hamish Adamson, *The English System*, in RIGHTS, LIABILITY AND ETHICS, *supra* note 62, at 43. For a fascinating sociological analysis building on Professor Mark Galanter's work and comparing the U.S. and U.K. megafirms, see John Flood, *Megalaw in the U.K.: Professionalism or Corporatism? A Preliminary Report*, 64 IND. L.J. 569 (1989); Stephanie B. Goldberg, *The British Go Global And Sometimes Head-to-Head With Americans*, A.B.A. J., Apr. 1993, at 50.

94. For especially helpful insights and information from a comparative legal professions' perspective, see, e.g., COMPARATIVE LEGAL TRADITIONS, *supra* note 55, at 152-59; THE LEGAL PROFESSIONS IN THE NEW EUROPE (Allan Tyrrell & Zahd Yaqub eds., 1993) [hereinafter THE LEGAL PROFESSIONS IN THE NEW EUROPE]; CROSS-BORDER PRACTICE COMPENDIUM, *supra* note 65; Lefort, *supra* note 89, at 53; Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 HASTINGS INT'L & COMP. L.REV. 389 (1996); Ronald P. Sokol, *Reforming the French Legal Professions*, 26 INT'L LAW. 1025, 1033 (1992); see also Stewart Baker & Theodore Barassi, *The International Notarial Practitioner*, A.B.A. INT'L LAW NEWS, Fall 1995, at 1. For additional materials, although they are not entirely up-to-date, see LINDA S. SPEDDING, TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES (1987) and TRANSNATIONAL LEGAL PRACTICE: A SURVEY OF SELECTED COUNTRIES (Dennis Campbell ed. 1982).



such as securities offerings and white collar criminal law, and in the expansion of market-driven organizations such as prepaid legal service groups. Specialization in the U.S. legal system is based on knowledge, as opposed to function in the civil law system.<sup>95</sup> Most students do not consider whether specialization has the potential to diminish the independence of the profession over the course of their careers. In their view, specialization is an efficient adaptation to the demands of the marketplace. Specialization enables lawyers to learn complex areas of the law quickly and to make better use of technology. Ideally, these accomplishments lead to greater lawyer competence and reduced fees.

Discussions of specialization take on a different tone, however, when they occur against backdrop of the structure of the bar in foreign countries. These discussions raise the possibility that specialization will lead to fragmentation and stratification of the bar, which, in turn, will compromise the legal profession's independence and lead to a diminished role for lawyers in society as a whole. Although its reputation is not unblemished, the legal profession has played a vital role in the United States in maintaining respect for the rule of law. Especially in the last twenty-five years, it has championed the cause of equality and individual rights. Lawyers in the civil law system in general, and especially in the former Communist countries of Eastern Europe, have not assumed comparable responsibilities as guardians of liberty or catalysts for social change.<sup>96</sup> Furthermore, as early as de Tocqueville, it was recognized that all great issues of social importance come before U.S. courts.<sup>97</sup> In the civil law countries, especially, the legislative organ is the branch of government most likely to have the final say over fundamental issues involving the social fabric. Almost invariably, the legislative branch will have greater prominence and importance than the judiciary.

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95. See Glenn, *supra* note 69, at 429. On a related note, students often enjoy comparing how lawyers from different legal systems perform the same skills or debating the advantages of lawyering in one system over another. Compare Langbein, *supra* note 56 with Reitz, *supra* note 56; see also Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995).

96. See Critchlow, *supra* note 71, at 162 (commenting "there is little discussion of ethics, and almost no understanding of the role of the lawyer as an instrument of legal change.").

97. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 284-85 (Henry Reeve trans.) (1862).

While specialization of the legal profession in the United States may be an economic necessity and a beneficial development for lawyers and clients alike, the phenomenon legitimately raises the question whether specialization will have the unintended consequence of weakening the moral authority of the profession and ultimately the courts, especially if it leads to a formal division characterized by distinct educational requirements, distinct professional training, and distinct licensing.

Still another note of comparison starts off with de Tocqueville's conclusion that lawyers "form the highest political class and the most cultivated circle of society" and proceeds to observe how the legal profession in the United States has traditionally attracted a large number of ambitious and intelligent applicants of limited financial means who correctly perceived it as a vehicle for social advancement.<sup>98</sup> In contrast, in the civil law countries, "the brightest and the best" have not traditionally sought careers in the law, especially if their socio-economic background was not upper-class. Their path of advancement lay in procuring a degree from one of the prestigious "*grandes ecoles*."<sup>99</sup> Because the legal profession was not a vehicle for social mobility, lawyers tended to come from financially secure families, thereby diminishing the association of law and social change, familiar to the United States.<sup>100</sup>

Finally, a comparison of legal education and the structure of the bar will most certainly lead to a correction of the famous and erroneous perception that the United States has more lawyers than any other nation!<sup>101</sup> Students are always startled to

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98. *Id.* at 283-84.

99. See Sokol, *supra* note 94, at 1033.

100. This observation also appears to hold true for licensed lawyers in Japan, the *bengoshi*. Because the bar examination is so difficult, the failure rate is quite high (e.g., 2.68% passed in 1991). Candidates often repeat the examination for several years before they pass. The average age of successful candidates is 29. To persevere through the arduous process candidates need significant financial support from their families. "The result . . . is a class of lawyers drawn primarily from those of wealth and privilege." Marcia Chambers, *Sua Sponte*, NAT'L L.J., Mar. 15, 1993, at 17.

101. Compare Dan Quayle, *Too Much Litigation: True Last Year, True Now*, NAT'L L.J., Aug. 10, 1992, at 17 with Ray August, *The Mythical Kingdom of Lawyers: America Doesn't Have 70 Percent of the Earth's Lawyers*, A.B.A. J., Sept. 1992, at 72; Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GEO. L. REV. 633, 645-47 (1994); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DEN. U. L. REV. 77, 77-83 (1993); Marc Galanter, *Re-entering the Mythical Kingdom: Numbers on the World's Lawyers Are Hard to Come By*, A.B.A. J., Nov. 1992, at 118; David Margolick, *Address by Quayle*

learn how many functions that are exclusively the province of lawyers in the United States are performed in foreign jurisdictions by persons who majored in law as undergraduates, but were never formally admitted to the bar.<sup>102</sup> This knowledge gives them a whole new perspective on the popular and contentious question of whether the United States has too many lawyers.

### 3. The Role of the U.S. Supreme Court and the European Court of Justice in Eliminating Barriers to Practice by Non-Residents

Still another valuable area of comparison involves the role of the courts in the admission process and their use of constitutional norms to strike down local barriers to practice. To the extent that a professional responsibility course includes the *Piper-Friedman-Thorstenn*<sup>103</sup> trilogy of cases, decisions of the European Court of Justice addressing the same issue in the context of Member State barriers to the provision of services by lawyers in other Member States are particularly relevant. In most discussions of the admissions process, attention is directed to the problems created by the federal structure of the U.S. legal system. Generally speaking, a lawyer may not advise a client regarding the law of a jurisdiction in which the lawyer is not admitted.<sup>104</sup> Most states effectively discouraged out-of-state lawyers from establishing law offices or practicing within the state by imposing a residency requirement as a condition precedent to sitting for the bar examination. Beginning with *Piper*, the Supreme Court struck down residency requirements as violative of the

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on Justice Proposals Irks Bar Association, N.Y. TIMES, Aug. 14, 1991 at A1; Isaac Shapiro, *Japan: Land of Law Graduates, If Not Lawyers . . .*, N.Y. TIMES, July 4, 1983, at 18.

102. See Jim Gibson, *In Japan, Lawyers Are Elite Professionals*, NAT'L L.J., Mar. 16, 1992, at 16; Elliot Pinsley, *Japan, Law Firms Still A World Apart*, NAT'L L.J., Jan. 27, 1992, at 17.

103. *Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). See also *Frazier v. Heebe*, 482 U.S. 641 (1987) (relying on its inherent supervisory authority, Supreme Court invalidated district court rule denying admission to members of state bar whose residences and offices were outside state).

104. See *Birbrower, Montalbano, Condon & Frank, P.C., v. Superior Court of Santa Clara County*, 70 Cal. Rptr. 304 (1998), modified on other grounds, 1998 WL 81551 (1998); *Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 666, (1995). See generally *Symposium: Ethics and Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 657, 657-1105 (1995).

Privileges and Immunities Clause of Article IV.<sup>105</sup> Like the U.S. Constitution, the Treaty of Rome which established the European Community anticipated the free flow of goods and services through Member States.<sup>106</sup> Similar to lawyers in the United States, lawyers in the EU Member States were hostile to increased competition and actively opposed the provision of legal services by lawyers who were not admitted in the particular Member State. Like the U.S. Supreme Court, the European Court of Justice struck down the barriers, thereby significantly altering the delivery of legal services to commercial organizations.

Discussing European Court of Justice jurisprudence has two advantages. First, it allows the students to observe from a comparative perspective how the evolution of the legal profession, which purports to be self-regulating, can be dramatically impacted by an institution over which the legal profession has no direct control. Second, it exposes students to the very different way the legal profession is structured outside the United States. In the United States, once a lawyer is licensed, the lawyer is free to practice in all the courts of the state, to provide legal services in all parts of the state, and to offer a full range of services (i.e., no stratification). In contrast, in the EU Member States,<sup>107</sup> a

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105. Article IV, section 2 provides that the "Citizens of each state shall be entitled to all the Privileges and Immunities of Citizens in the several States." The clause "builds a bridge between federalism and personal rights." LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 528, § 6-34 (2d. ed. 1988). In *In re Griffiths*, 413 U.S. 717 (1973), the Supreme Court held that a state's blanket denial of admission to a resident alien violated the Equal Protection Clause of the Fourteenth Amendment. It is generally believed that *Griffiths* influenced the decision of the European Court in *Reyners*. *Bridging the Cultural Gap*, *supra* note 30. See also Spedding, *supra* note 94, at 211-13 (discussing relationship between two cases). *Griffiths* may also have played a role in the decision to amend the United Kingdom Solicitors Act in 1974. *Id.* at 213.

106. Treaty Establishing the European Economic Community, Feb. 7, 1992 [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], incorporating changes made by Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

107. On occasion, a domestic court has played a significant role in striking down barriers. See generally Wolgan Kuhn, *Dramatic Developments in the Legal Profession in the Federal Republic of Germany*, 14 INT'L LEG. PRAC. 94 (1989); see also NEW PROFESSIONAL RULES FOR ATTORNEYS IN GERMANY, *supra* note 81. For a detailed description of the changes in Germany, see Goebel, *supra* note 65, at 244-45, 259-61; Chris Darbyshire, *Frankfurt: The Next Outpost of Anglo-Saxon Empire*, INT'L FIN. L. REV., Feb. 1991 at 17.

lawyer was admitted to a particular bar (e.g., the bar of Frankfurt, the bar of Paris, the bar of Brussels). That admission permitted the lawyer to provide legal services within the geographic boundary of the bar, but not beyond. A lawyer admitted to the bar of Frankfurt, for example, could not provide legal services in Dusseldorf; a lawyer admitted to the bar of Paris could not provide legal services in Lyon, etc. Furthermore, these and other restrictions often made it impossible for a law firm to establish a partnership with offices in more than one bar. Consequently, law firms in Member States were quite small by U.S. standards and the economic incentives associated with growth such as leverage, enlarged client base, and more practice areas were nonexistent.

When the European Court of Justice removed the barriers to practice by lawyers from other Member States,<sup>108</sup> foreign lawyers had a distinct advantage. A German-national lawyer admitted to the bar of Frankfurt, for example, could provide legal services in Paris and Lyon, but a French-national lawyer could only provide services within the boundaries of the lawyer's bar of admission (i.e., either Paris or Lyon). This reverse discrimination prompted the modification of the admission process to allow lawyers to be admitted to more than one jurisdiction in a single Member State. It had the complementary effect of encouraging the rapid expansion of law firms within the original member state of admission and across borders into other member states.

A related topic worth considering is how the Court of Justice has interpreted the right to provide services. After the Court

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108. See *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, Case 33/74, [1974] E.R.C. 1299, [1975] 1 C.M.L.R. 298 (holding that lawyers could directly rely on the EC Treaty provisions relating to establishment (Article 52) and services (Article 59) without need for implementing legislation); *Jean Reyners v. Belgium*, Case 2/74, [1974] E.C.R. 631, [1974] 2 C.M.L.R. 305 (holding that Article 55's exception for activities relating to "the exercise of official authority" does not permit Member States to deny right of establishment without exception to lawyers from other Member States); *Ordre des Avocats au Barreau de Paris v. Onno Klopp*, Case 107/83, [1984] E.C.R. 2971, [1985] 1 C.M.L.R. 99 (holding invalid France's limiting lawyer's right of establishment to single Member State). For an excellent discussion of the French rule that was struck down, see Jeffrey Mendelsohn, *Recent Development, European Court of Justice: Paris Bar Rule Violates Right of Establishment*, 26 HARV. INT'L L.J. 562, 562-68 (1985). See also Philippe Watson, *Case 107/83 Ordre des Avocats au Barreau de Paris v. Onno Klopp*, Judgment of 12 July, 1984, 22 COMMON MKT. L. REV. 736 (1985).

handed down *van Binsbergen and Reyners*, the Commission issued a directive that is now the primary authority governing the right of Member State lawyers to provide legal services on a temporary basis in states other than those where they are formally admitted to practice.<sup>109</sup> The European Court has broadly construed the Lawyers Directive. Twice it struck down Member State legislation designed to protect domestic lawyers' market for the provision of legal services by requiring foreign lawyers to collaborate with domestic lawyers in certain types of proceedings.<sup>110</sup>

Also demonstrating the Court of Justice's commitment to the elimination of barriers is a separate line of cases involving the Diploma Directive.<sup>111</sup> The Directive is intended to force Member States to treat as equivalent the diplomas granted by other Member States. If there is a substantial difference in legal education or training the state can mandate either an "aptitude test" or an "adaptation period not exceeding three years," however. In 1991, the Court, in a case involving a Greek applicant with an extensive background in German law, struck a forceful blow for cross-border practice by rejecting the limitations the German authorities had imposed on the applicant.<sup>112</sup>

#### 4. Discipline

Incorporating an international perspective on discipline presents little difficulty provided the basis has been laid in dis-

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109. Council Directive No. 77/249 to facilitate the effective exercise by lawyers of freedom to provide services, O.J. L 78/17 (1977) [hereinafter *Lawyers Directive*]. For an extensive discussion of the Lawyers Directive, see SERGE-PIERRE LAGUETTE, *LAWYERS IN THE EUROPEAN COMMUNITY* 241-48 (1987); SPEDDING, *supra* note 94, at 185-200; Peter S. Wilson, *Recent Development, EEC: Freedom to Provide Services for EEC Lawyers*, 19 HARV. INT'L L.J. 379, 379-84 (1978).

110. *Commission v. Germany*, Case 427/85, [1988] E.C.R. 1123, [1989] 2 C.M.L.R. 677 (for discussion of this case, see Horst Eidenmuller, *Deregulating the Market for Legal Services in the European Community: Freedom of Establishment and Freedom to Provide Services for EC Lawyers in the Federal Republic of Germany*, 53 MOD. L. REV. 604, 604-07 (1990)); *Commission v. France*, Case 427/85 [1988] E.C.R. 1123, 1989 2 C.M.L.R. 677. See Julian Lonbay, *Picking Over the Bones: The Right of Establishment Reviewed*, 16 EUR. L. REV. 507, 507-15 (1991); Julian Lombray, *Cross-Frontier Provision of Services by Lawyers*, 13 EUR. L. REV. 347, 347-50 (1989); Valerie Pease, *Commission v. Germany*, 22 INT'L LAW. 543, 543-54 (1988).

111. Council Directive No. 89/48 of Dec. 21, 1988, O.J. L 19/16 (1989). For a general discussion of the Diploma Directive as it relates to the legal profession, see *Bridging the Cultural Gap*, *supra* note 30, at 595-601.

112. *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten*, Case C-340/89, [1991] I. E.C.R. 2357, [1993] 2 C.M.L.R. 221.

cussion of the admission process.<sup>113</sup> The disciplinary process in other countries, like the admission process, is usually controlled by the bar not the government.<sup>114</sup> Its structure resembles that commonly found in the United States prior to the Supreme Court's decision in *Goldfarb v. Virginia*<sup>115</sup> and the professionalization of the disciplinary process prompted by the Clarke Report.<sup>116</sup> For example, complaints about a lawyer's behavior ranging from conflicts of interest to fee disputes are made to the president of the bar, the "battonier."<sup>117</sup> The president adjudicates the merits. While in most countries, the president's decision is considered "state action" and can be appealed to the courts, judicial review is almost unheard of.

An important comparative understanding for students is that discipline is in effect controlled by the private bar which shares the characteristics of homogeneity and extreme local control. It takes on real "bite," however, later on in the course in

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113. Two simple hypotheticals dramatically illustrate the disciplinary perils of cross-border practice for U.S. lawyers. They were used with great success during a panel discussion sponsored by the Section on International Law and Practice at the 1997 ABA Annual Meeting.

1. Alice represents a Washington toy maker, which is selling a product line to a Canadian toy company. Both parties want Alice to come to Canada to write up a simple 2-3 page agreement covering what the parties have decided. Alice complies with Washington's Rule 2.2 on acting as an intermediary, including obtaining the required written consents from each company for the common representation. Unknown to Alice, the rules of the provincial Law Society where Alice drew up the agreement prohibit the two companies from interpreting a term of the agreement which is ambiguously drafted. The Canadian firm files a complaint with the Washington State Bar. Should the Washington State Bar discipline Alice, and if so, what sanction is appropriate?

2. While Alice was in her drafting meetings in Canada, the parties asked Alice to act as escrow for a \$5,000 deposit from the Canadian company. Two days after she got the deposit, the check was stolen from her hotel room and negotiated. Washington's Rule 1.14 requires deposit of client fund in a Washington trust account. The provincial rule where Alice got the check makes it a misdemeanor not to deposit escrow funds within one bank day of receipt. As part of its bar complaint, the Canadian toy company cites this violation. Should the Washington State Bar discipline Alice, and if so, what sanction is appropriate?

114. For a country-by-country breakdown, see *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra* note 94.

115. 421 U.S. 773 (1975).

116. American Bar Association Special Comm. on the Evaluation of Disciplinary Enforcement: Problems and Recommendations (1970).

117. See *THE LEGAL PROFESSION IN THE NEW EUROPE*, *supra* note 94, at 125, 256-57; Christian Raoult, *The French System*, in *RIGHTS, LIABILITY, AND ETHICS*, *supra* note 54, at 55-56; Geoffrey Hazard, *Taking French Lessons*, NAT'L L.J., Apr. 17, 1995, at A21.

discussing conflict of interest. The notion of judicial intervention in a litigation to enforce ethical restrictions on conflict of interests is a uniquely U.S. phenomenon. In other legal systems, lawyers are not as sensitive to conflicts issues. Conflicts are not resolved in courts, moreover, they are brought to the president of the bar instead. The president's decision is accepted almost without exception. The power wielded by the president may explain the importance that is attached to this position. The culture of the bars of the individual EU Member States attaches great importance to the integrity and moral demeanor of the office holder.

Note can also be taken of the similar problems created by the federal character of the European Union and the United States on disciplinary regimes.<sup>118</sup> As originally adopted in 1983, MR 8.5 made a feeble effort to deal with the predicament of lawyers who are admitted in two or more jurisdictions whose ethical norms are inconsistent on a given issue.<sup>119</sup> Comment 2 suggested applying conflict of laws principles to resolve the inconsistency.<sup>120</sup> In 1993, the ABA amended MR 8.5 to adopt explicitly a "territorial" approach.<sup>121</sup> The drafters specifically exempted transnational practice from the application of MR 8.5 noting that "[c]hoice of law in this context should be the subject of agreements between jurisdictions or of appropriate interna-

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118. For a general discussion of the need for an enforcement regime in cross-border practice, see Kilimnik, *supra* note 2, at 275-77; *Systems of Ethical Regulation: An International Comparison*, *supra* note 50. The regime's structure is, of course, a separate question from its substantive content. See Malini Majumdar, Note, *Ethics in the International Arena: The Need for Clarification*, 8 GEO. J. LEGAL ETHICS 439, 444-53 (1995).

119. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1983). Captioned "Jurisdiction," Rule 8.5 originally provided that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in the practice of law elsewhere." *Id.*

120. Comments 2 and 3 provided:

[2] If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

[3] Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation.

*Id.*

121. I have severely criticized the amendment elsewhere. See Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice — Is Model Rule 8.5 The Answer, An Answer or No Answer At All?*, 36 S. TEX. L. REV. 715, 715-98 (1996).



tional law."<sup>122</sup> It remains to be seen if the amendment will prove as beneficial as its supporters claim. In contract, the conflict provisions in the recently adopted Directive on the Right of Establishment apply to international, albeit, intra-EU, cross-border practice.<sup>123</sup>

### 5. The Attorney-Client Privilege and the Status of In-House Counsel

Both the common and civil law systems respectfully acknowledge the fundamental duty of a lawyer to maintain the confidentiality of client information. Article 2.3 of the CCBE Code of Conduct nicely illustrates the tone of respect found in civil law texts:

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.<sup>124</sup>

Unfortunately, it is mostly impossible to understand the scope of the obligation without a complete and thorough understanding of a large body of foreign substantive law and procedural rules.<sup>125</sup> Hindering access to this body of law are faulty transla-

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122. American Bar Association, Model Rules of Professional Conduct, Rule 8.5 cmt. 5 (1993).

123. See Council Directive No. 98/5, O.J. L 77/36 (1998). Professor Terry has critiqued the directive. See *A Case Study of the Hybrid Model*, *supra* note 67, at n.19. See also Terry, *Legal Ethics Code Part I*, *supra* note 54, at nn.56-67 and accompanying text.

124. See CCBE Code of Conduct reprinted in *RIGHTS, LIABILITY AND ETHICS*, *supra* note 54, at 382.

125. For an excellent overview of the ethical and evidentiary rules governing the disclosure of client information in the Member States of the European Union, see *LEGAL PROFESSION IN THE NEW EUROPE*, *supra* note 94; see also LAGUETTE, *supra* note 109, at 139-51; Carsten R. Eggers & Tobias Trautner, *An Exploration of the Difference Between the American Notion of "Attorney-Client Privilege" and the Obligations of "Professional Secrecy" in Germany*, 7 INT'L PRACTICUM 23 (1994); Louis Lafili & Nicole van Crombrughe, *Professional Secrecy of Lawyers in Belgium*, 7 INT'L PRACTICUM 18 (1994); Kurt Riechenberg, *The Recognition of Foreign Privileges in United States Discovery Proceedings*, 9 N.W. L. INT'L L. & BUS. 80 (1988); see also Helena M. Tavares, *The United States Perspective on Travelling with the Attorney-Client Privilege: Checked or Carry-On Baggage?*, 7 INT'L PRACTICUM 9 (1994); Professor Terry has specifically commented on the differences among the CCBE member states regarding issues of confidentiality. See Terry, *Legal Ethics Code Part I*, *supra* note 54, at 27-29; *Are Your Internal Communications Protected?*, 1 EUROPEAN COUNSEL, Sept. 1996, at 27. The divided structure of the bar in the civil law countries additionally

tions, ignorance of the law and rules' broader political underpinnings, and profoundly embedded cultural differences that in some instances are almost impossible to identify. For example, "in Denmark, the privilege is modest and circumscribed. In [other countries], as in Greece, for reasons readily understandable with knowledge of recent history, the privilege is elevated to a duty, breach of which is punishable by criminal sanctions."<sup>126</sup> I have, therefore, decided not to explore the contours of either the ethical obligation of confidentiality or the evidentiary privilege commonly referred to as "professional secret."<sup>127</sup>

Confidentiality is best approached in discrete, manageable subtopics. One such easy subtopic falling into an information-conveying category involves the ownership of the privilege. In the United States, the privilege exists for the client's benefit and can be waived by the client over the attorney's objection. The reverse is true in many civil law countries: the attorney controls the exercise of the privilege and can assert the privilege over the client's objection.<sup>128</sup> The richest subtopic, in my view, is the denial of the attorney-client privilege for communications made by a corporate client to in-house counsel. The denial raises issues of professional culture that are far more important than the simple information conveyed. The European Court of Justice has

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complicates endeavors to study the concept of "professional secret." See Malavet, *supra* note 94, at 488 nn.457-62. Invocation of the professional secret can cause serious delays in discovery proceedings, especially in criminal investigations. See Olsen, *supra* note 37, at 1003-05.

126. THE LEGAL PROFESSIONS IN THE NEW EUROPE, *supra* note 94, at 3.

127. Material respecting the scope of the attorney-client privilege in the United Kingdom is generally more accessible. See, e.g., *Ethics Forum and Debate: Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices*, 7 GEO. J. LEGAL ETHICS 865 (1994); Aubrey Roberts, *Legal Professional Privilege in the United Kingdom*, 7 INT'L PRACTICUM 15 (1994). See also Miller, *supra* note 37; D.F. Partlett, *Attorney-Client Privilege, Professions and the Common Law Tradition*, 10 J. LEGAL PROF. 9 (1985). See generally Ferrara & Carroll, *supra* note 69; Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1 (1986). Readers should approach U.S./U.K. comparisons with hesitation. Despite the similarities in substance and procedure that exist in the two countries' legal systems, there remain significant differences. See e.g., P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 1-42 (1987); RICHARD A. COSGROVE, *OUR LADY OF THE COMMON LAW: AN ANGLO-AMERICAN COMMUNITY, 1870-1930* (1987).

128. See Riechenberg, *supra* note 35, at 108-09. This reverse of authority is also reflected in Article 5.3.1 of the CCBE Code authorizing "without prejudice" communications between member state lawyers. If lawyer A sends lawyer B a "without prejudice" communication, lawyer B may not reveal the contents of that communication to lawyer B's client. See Terry, *Legal Ethics Code Part I*, *supra* note 54, at 39-40.

squarely held that the privilege may not be invoked by in-house counsel.<sup>129</sup> In addition, it has held that only communications with lawyers whose professional status is recognized by the European Union are protected, thereby excluding lawyers who are admitted to practice law solely in the United States.<sup>130</sup> What is worse still is that the Court has permitted the Commission to use documents prepared by U.S. in-house counsel, that clearly would have been protected in this country,<sup>131</sup> as a basis for aggravating damages in an antitrust investigation!<sup>132</sup> At the heart of these decisions is a deep-seated suspicion of the independence of in-house counsel. The Court, like the drafters of the Model Rules, has highly valued a lawyer's obligation to render advice independent of the lawyer's own interests or those of another client. In the Court's perspective, independence was impossible because of the inevitable monetary dependence on the corporate employer and the absence of a regulatory framework.<sup>133</sup>

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129. *AM & S Europe Ltd. v. Commission*, Case 155/79, [1982] 2 C.M.L.R. 264. See John Boyd, *Protecting the Attorney-Client Privilege in EC Transactions: Current Perspectives on Client Communications with Foreign and In-House Lawyers* in *RIGHTS, LIABILITY AND ETHICS*, *supra* note 50, at 175; Peter H. Burkard, *Attorney-Client Privilege in the EEC: The Perspective of a Multinational Corporate Counsel*, 20 INT'L LAW. 677 (1986); Sandý Ghandi, *Legal Professional Privilege in European Community Law*, 7 EUR. L. REV. 308 (1982); Helmut W. Kreis, *The AM & S Judgment of the European Court of Justice and Its Consequences Within and Outside the Community*, SWISS REV. INT'L ANTITRUST L., Feb. 1984, at 3; Richard Wainwright, *Protecting the Lawyer-Client Privilege in EC Transactions: Future Perspectives on Client Communications with Foreign and In-House Lawyers*, in *RIGHTS, LIABILITY AND ETHICS*, *supra* note 50, at 179; Alison Hill, Note, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community*, 27 CASE W. RES. J. INT'L L. 145 (1995).

130. *AM & S* at 1612, [1982] 2 C.M.L.R. 264 at 324. For the response of the ABA, see ABA International Law and Practice Section, Report from the European Law Committee (Feb. 1983).

131. The U.S. Courts, in adopting a functional approach, have honored the privilege even though the lawyer to whom the communication was made was not a member of a U.S. bar. *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442 (D. Del. 1982) (protecting communications between offices of French parent-company's in-house counsel and its U.S. subsidiary, even though French law did not recognize privilege). This issue has been particularly nettlesome for patent lawyers. *Mitts & Merrill, Inc. v. Shred Pax Corp.*, 112 F.R.D. 349 (N.D. Ill. 1986) (protecting communications with German patent agent); *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951 (N.D. Ill. 1982) (protecting communications among U.S., British, and Canadian patent agents). The draft Restatement takes the position that the attorney-client privilege protects communications with foreign counsel. *RESTATEMENT OF THE LAW GOVERNING LAWYERS* § 122 cmt. c, at 381-82 (Proposed Final Draft No. 1, 1996).

132. *John Deere*, O.J. L 35/58 (1985), [1985] 2 C.M.L.R. 554. See 11 EUR. L. REV. 85 (1986); Burkard, *supra* note 129, at 677-81.

133. *AM & S* [1982], 2 C.M.L.R. 279-80, 324.

The U.S. courts have, of course, reached precisely the opposite conclusion.<sup>134</sup> The debate over the issue of independence of in-house counsel in the United States raised the same concerns as those expressed in the *AM & S* case. Placing the U.S. and European Court of Justice decisions side-by-side gives the students a wonderful window of comparison and adds a new dimension to the standard debate on the issue. Furthermore, there is a real-world dynamic to the discussion that invites participation by those students who generally sit in the back of the classroom unmoved unless there is a practical application to the subject under discussion. The practical application is answering the question of how U.S. enterprises with operations in the European Union can protect their communications with in-house lawyers.<sup>135</sup>

Attempting to arrive at practical solutions, moreover, has an added advantage because it leads to another illustration of the importance of understanding a foreign jurisdiction's legal culture. One might well expect that after *AM & S* and *John Deere* the European Commission would have bombarded U.S. companies with subpoena for legal memoranda prepared by in-house counsel. It did not. The Commission recognized that seeking the release of such memoranda would have serious political repercussions. It made a calculated decision that the fall-out was not worth the potential gain. Therefore, it proceeded cautiously. It initially asked the Council of Ministers to negotiate a treaty with the United States providing for a reciprocal recognition of the privilege. When the Council showed no interest, it then effectively shelved the question of the privilege by not issuing subpoena for memoranda prepared by in-house counsel.<sup>136</sup> Leading students to the understanding that the Commission's self-discipline has defused the issue opens their eyes to a political dynamic that can easily be overlooked.

The *AM & S* decision can also be used profitably at a later

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134. See 3 WEINSTEIN'S FEDERAL EVIDENCE § 503.06[c], at 503-18 (Joseph M. McLaughlin ed., 1997).

135. Practical suggestions include restricting communications to oral advice and having an EC-qualified lawyer prepare any written reports summarizing it. See Boyd, *supra* note 129, at 177. See generally *Are Your Internal Communications Protected?*, 1 EUR. COUNS., Sept. 1996, at 27-31.

136. For a more detailed history of the Commission's response, see Burkard, *supra* note 129, at 683-85; Wainwright, *supra* note 129, at 179-80.

point in the course, if the teacher assigns securities law cases such as *National Student Marketing*<sup>137</sup> or *Carter & Johnson*.<sup>138</sup> These cases raise significant issues regarding the preventive or prophylactic function of lawyers for large corporate clients. *In re Gutfreud*,<sup>139</sup> raises a similar issue, but in an in-house context. Increasingly, foreign regulators are coming to appreciate the "policing" function of business lawyers in the United States, especially those employed in corporate law departments.<sup>140</sup> Vigorous enforcement actions relying on *AM & S* and demanding the release of non-privileged communications may be self-defeating if they discourage clients from confiding in salaried lawyers or seeking their advice.

*AM & S* also lends itself to a discussion of a second, more subtle issue. The last decade has witnessed a significant reallocation of power between general counsels' offices and outside law firms. Not only is more legal work being done in-house, but the work is more complex, challenging, and innovative than ever before. The strangle-hold of outside counsel on major corporate initiatives in real estate, securities, commercial financing, etc. has lessened and, in some cases, entirely disappeared.<sup>141</sup> In-house counsel in the United States have adopted an aggressive, pro-active style of lawyering in which they entwine business and legal advice.<sup>142</sup>

The second-class status of in-house counsel portrayed in the *AM & S* decision reflects a very different expectation of the role and competence of salaried lawyers. As the decision makes clear, a common perception exists, especially within the civil law system, questioning the ability of in-house counsel to exercise independent judgment. In some jurisdictions, suspicion of an

137. *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682 (D.C. Cir. 1978).

138. *In re Carter & Johnson*, Exchange Release No. 17597 (Feb. 28, 1981).

139. *In re Gutfreud*, Strauss & Meriweather, Release No. 34-31554 (1992).

140. For an insightful analysis of the anticipatory/preventive function, see Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 *EMORY L.J.* 1113 (1997). See also Carole Basri & Julia Rosen, *Effective Corporate Compliance Programs: An Owners' Guide*, 13 *ACCA DOCKET* 58 (1995). I have speculated elsewhere on the increasing likelihood that civil law lawyers will assume a similar function. See Daly, *supra* note 37, at 1088-89.

141. See Audrey Duff, *Chiquita Flies Solo in Stock Sale*, *AM. LAW.*, Mar. 1991, at 46; Alison Frankel, *J.C. Penney's Inside Out Litigation*, *AM. LAW.*, Sept. 1992, at 42; Gary Taylor, *Coastal's Crusaders*, *NAT'L L.J.*, May 4, 1992, at 1.

142. I have explored this phenomenon elsewhere at great length. See *Lawyering for a Global Organization*, *supra* note 39, at 1068-84.

in-house counsel's independence is so severe that a lawyer must either resign from the bar or place his or her license "in suspense" before accepting salaried employment.<sup>143</sup> This pernicious and pervasive distrust puts U.S. companies in a cultural bind. Accustomed to a proactive model of lawyering, these companies must now contemplate the distinct possibility that they cannot successfully transplant that model outside the United States and possibly the United Kingdom. For example, foreign officers and employees of U.S. companies in civil law countries are likely to resist taking legal and business advice from in-house counsel to a significantly greater extent than their U.S. counterparts. Foreign customers, suppliers, and distributors may also dismiss in-house counsel's stature and not appreciate in-house counsel as an authoritative voice on legal and business matters.

#### 6. Assisting in Illegal Conduct: Bribery of Foreign Officials and Corporate Employees, Compliance with the U.S. Antiboycott Law

The tension between the duty of zealous representation and the duty not to assist a client in illegal conduct is a perennial topic of discussion and debate in professional responsibility classrooms around the country.<sup>144</sup> Most students yawn at the

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143. See Majda Barazzuti, *Italy*, in *LAW WITHOUT FRONTIERS*, *supra* note 54, at 96; MAURO CAPPELLETTI & JOSEPH M. PERILLO, *CIVIL PROCEDURE IN ITALY* 60 (Hans Smit ed., Martinus Nijhoff 1965); Kilimnik, *supra* note 2, at 308; Bela Maheshwari, *Professional Responsibility*, 2 N.Y. ST. B. ASS'N 753, 759-60 (1995) (on file with the *Fordham International Law Journal*); Terry, *Legal Ethics Code Part I*, *supra* note 54, at 46-51 & 55.

144. The following hypotheticals developed by the ABA Section on International Law and Practice generally trigger heated student debate on the general issue of assisting in illegal conduct.

##### 1. *Compliance with foreign tax laws*

Ms. Brown is a senior associate with a New York law firm specializing in mergers and acquisitions. This M & A firm has a major U.S. client, Acme Industries, for whom it has done a lot of work in the past and whom it hopes to serve often in the future. The M&A firm has done a couple of acquisitions in the U.K., but not elsewhere in Europe. Ms. Brown is helping Mr. Collins, a junior partner, in the negotiation and drafting of a medium-sized acquisition of a family-owned corporation in Sudeuropa, a southern European country, where it is well known that many businessmen evade in part the national tax laws.

After a critical negotiating conference at which Mr. Collins has helped Acme, Ms. Brown is told that several key deal points have now been resolved. Mr. Collins instructs her to draft a confidential side agreement to pay 25% of the purchase price into a Swiss account for the sellers.

Ms. Brown further learns from a junior Acme executive that the sellers

self-evident proposition that they may not assist a client in bribing a government official to obtain a contract. Change the location of the contemplated bribe to a foreign country where payments to government officials or their relatives are a matter of accepted custom and the student discussion moves from the ho-hum to the excited. Intimate familiarity with the Foreign Corrupt Practices Act ("FCPA") is not needed to provoke debate.<sup>145</sup>

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have traditionally kept two sets of books in order to evade Sudeuropa income tax and that the sellers have insisted that Acme agree not to disclose this to Sudeuropa's authorities. Acme's executive vice-president, who negotiated the deal, has already signed (without benefit of counsel and without informing Mr. Collins) a confidential side letter promising this to the sellers.

Should Ms. Brown follow Mr. Collins' instructions to draft the side agreement on the part purchase payment in Switzerland? What should Mr. Collins and/or Ms. Brown do about the side letter on non-disclosure to Sudeuropa of the seller's past tax evasion? Should Mr. Collins advise Acme to change the acquired company's policies and pay full Sudeuropa income tax on future operations?

Would it affect the answers to the above questions if the M&A firm's local Sudeuropean counsel advises that 1) many family-owned enterprises customarily evade income tax and even the tax authorities regard tax collection as something of a bargaining process, 2) on the other hand, local counsel would never himself draft the side agreement on the part purchase payment, but would leave such documents to a special Swiss counsel?

2. *Issues of dubious but not necessarily illegal conduct.*

May an American international lawyer assist an American client in the sale in foreign countries of pesticides, food products or cosmetics whose sale is forbidden by the FDA in the United States, when the laws of the foreign countries do not prohibit the sale of these products?

Does it make a difference whether the foreign country in question has its own elaborate consumer protection legislation and good laboratory test capacity, or whether the country is economically disadvantaged with limited capacity to appraise the safety of similar products?

May the lawyer assist such sales if the results of the FDA analyses and the text of the findings are annexed to the contract of sale?

May he do so if the product is an effective pesticide and the country in which the product is to be sold has severe pest infestation creating health problems, such as malaria, which are not serious in the United States?

Does it make a difference if the lawyer's client is a foreign distributor who is buying the products at a discount price for resale?

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145. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 1 Stat. 1494 (1977) as amended, Pub. L. No. 105-15, 102 Stat. 1415 (1988) (codified at 15 U.S.C.A. §§ 78dd-1 & 78dd-2). See, e.g., Don Zarin, *Doing Business Under the Foreign Corrupt Practices Act: Compliance Programs*, in CORPORATE LAW & PRACTICE HANDBOOK, at 943 (PLI/CORP. 525 1996); Jeffrey P. Bialos & Gregory Husisian, *The Foreign Corrupt Practices Act: Coping with Corruption in Russia and Other Transnational Economies*, in COMMERCIAL LAW & PRACTICE COURSE HANDBOOK, at 726 (PLI/COMM. 735 1995); James W. Chang, *Legal Issues Relating to Transacting Business Abroad: What Every Lawyer Should Know about the Foreign Corrupt Practices Act*, 35 Hous. Law., July-Aug. 1997, at 16; Stuart H. Deming, *Foreign Corrupt Practices*, 31 INT'L LAW. 695 (1997); David A. Gantz, *The Foreign Corrupt Practices Act*:

A real-life quality is added to the course by using the hypothetical in the footnote.<sup>146</sup> It was one of several that was used with great success during a panel discussion on legal ethics at a meeting of the ABA Section on International Law and Practice several years ago. Hypotheticals based on violations of the U.S. Antiboycott Law are also provocative, especially because the General Counsel of Baxter International, Inc. was forced to resign as a result of his "leading Baxter's attempt to avoid an Arab blacklist" in violation of the statute.<sup>147</sup> A hypothetical based on the facts reported in the wake of the company's guilty plea also pro-

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*Professional and Ethical Challenges for Lawyers*, 14 ARIZ. J. INT'L & COMP. LAW. 97 (1997); Michael D. Nilsson, *Foreign Corrupt Practices Act*, 33 AM. CRIM. L. REV. 803 (1996); Delia Poon, Note, *Exposure to the Foreign Corrupt Practices Act: A Guide for U.S. Companies with Activities in the People's Republic of China to Minimize Liability*, 19 HASTINGS INT'L & COMP. L. REV. 327 (1996); Wendy C. Schmidt & Jonny J. Frank, *FCPA Demands Due Diligence in Global Dealings with Antibribery Enforcement on the Rise, U.S. Firms Are Wise to Devise Due Diligence Plans*, NAT'L L.J., Mar. 3, 1997, at B16. The discussion becomes even more animated if recent international initiatives to limit corruption are examined. American Bar Ass'n, Section on International Law and Practice, Report, *Corrupt Practices in the Conduct of International Business*, 30 INT'L LAW. 193 (1996); Stephen Muffler, *Proposing A Treaty On the Prevention of International Corrupt Payments: Cloning the Foreign Corrupt Practices Act Is Not the Answer*, 1 ILSA J. INT'L & COMP. L. 3 (1995); Marianne Lavelle, *Nations Try to Match U.S. On Biz Bribe Law But Lawyers Still Argue Over the Meaning of the FCPA*, NAT'L L.J., Jan. 20, 1997, at B1; Robert S. Leiken, *An End to Corruption*, WASH. POST, Apr. 16, 1996, at A15; John Zarocostas, *WTO Urged to Take on Battle Against Corruption*, J. COM., Feb. 6, 1996, at 1A; Catherine Yannaca-Small, *Battling International Bribery*, OECD OBSERVER, Feb. 1995, at 16.

146. Oilco, a large U.S. petroleum company, badly wants to secure an oil extraction concession and petroleum refinery in East Arabia Emirate. Oilco makes contact with Col. Jones, a retired British army officer, who is a trusted advisor and close friend of the Emir. Col. Jones owns a mining concession in Zimbabwe, acquired as a gift some years ago, and not currently exploited. Col. Jones offers to insure that Oilco will secure its desired concession and refinery in return for Oilco's purchase of his mining concession for US\$10 million. Adams, a mid-level attorney in Oilco's international house counsel staff (or else a junior partner in Oilco's outside international counsel) engages in negotiation with Col. Jones' Swiss legal representative and drafts all the documents for Oilco's purchase of the Zimbabwe mining concession. After the agreements have been signed, Adams learns for the first time that: Oilco's own mining experts have provided studies valuing the Zimbabwe concession as worth only US\$300,000, that the purchase of the mining concession was intended to be the quid pro quo for the Emirate's oil concession, that Col. Jones' status in the Emirate is that of a "foreign official" for purposes of the FCPA, and that Oilco estimates the Emirate concession to be worth at least US\$30 million. In short, Adams has learned that senior executives at Oilco have used his legal skills to further a definite, but disguised, violation of the FCPA. What are Adams' ethical responsibilities? What, as a practical matter, should Adams do at this point (depending on whether he is house counsel or outside counsel)?

147. See *Baxter Counsel Resigns*, NAT'L L.J., May 3, 1993, at 19; *Corporate Counsel Moves*, NAT'L L.J., May 3, 1993, at 19; Karen Donovan, *Baxter Shareholders Protest Quiet Settlements*, NAT'L L.J., Jul. 5, 1993, at 20. See also Harvey Berkman, *Bill Would Allow Suits*



vides an opportunity to review MR 1.13 and to explore what remedies, if any, the General Counsel could have pursued if the company terminated him for refusing to assist in the unlawful conduct.

I often supplement the FCPA hypothetical with two others that are based on separate conversations with two U.S. lawyers practicing abroad. One had developed a thriving practice in an Eastern European country. Like many civil law countries, it required government stamps or seals for just about every transaction. The lawyer had negotiated a very important deal for a major client and the only remaining step was to procure the appropriate stamp. The responsible government official flatly refused to carry out his responsibility without a significant, illegal payment. The U.S. lawyer explained his predicament to the client's local agent. The agent took the documents and returned the next day with the stamps! The lawyer candidly admitted that he had no doubt that the agent had bribed the government official. The character of the client's business is such that the client will need to have these sorts of documents stamped on a regular basis. Is the lawyer ethically free to call in the agent, hand him the documents and ask no questions? Does the lawyer discharge his responsibility if he advises senior management of his suspicions and is told to ignore them or that the company is willing to run the risk of being charged at a later date with illegal conduct?<sup>148</sup>

The second hypothetical involves the crowded docket of a court which supervises litigation of commercial disputes in a foreign country. Within that court system, it is customary for lawyers to pay modest sums to the judges to decide motions or to put cases on the trial calendar. The money is not paid to obtain a particular result. The payment violates the country's penal code. It is, however, the only way to get a motion "to the top of the judge's pile" or secure a trial date. The local lawyers shrug at

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on *Boycott Compliance*, NAT'L L.J., Oct. 16, 1995, at A13. See generally Dexter M. Price, *U.S. Antiboycott Law and Regulations*, 675 PLI/COMM 627 (1993).

148. A conversation I subsequently had with a senior law enforcement official of the country in question confirmed the reoccurring nature of the lawyer's predicament. The official advised that organized crime controlled the lower echelons of the particular ministry in question. With no embarrassment or apology, he explained that the country's political and economic disarray was so great that bribery and/or extortion were of no prosecutorial interest. As long as new capital kept pouring into the country for investment, the criminal activities would continue unchallenged. "They were," he advised, "just the cost of doing business."

the U.S. lawyer's concern about the illegality of the payment. From their perspective, it is no different than having to pay formally a filing fee to bring on a motion or to put a case on the trial calendar. Should a U.S. lawyer who pays such a sum to a judge be disciplined?

## 7. Malpractice Liability and the Ethical Duty of Competence

The selection and/or monitoring of foreign counsel is a re-occurring dilemma in cross-border practice. It entails serious risk of both malpractice liability and disciplinary sanctions. Two situations arise with regular frequency. In the first, a U.S. client is conducting a business transaction or is being sued in a foreign jurisdiction and consults a U.S. lawyer for assistance. The client may need the lawyer simply to identify potential foreign counsel or may retain the U.S. lawyer to work with the foreign counsel in a collaborative or supervisory role. In the second, the client, either a U.S. or foreign national, has retained a U.S. lawyer in connection with a transaction, and the lawyer determines that an opinion letter from foreign counsel is necessary. Typical subject matters include the observance of the required formalities for juridical existence or authorization to enter into the transaction.<sup>149</sup>

Selecting foreign counsel can be a daunting task. While there are a number of international law directories, evaluating

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149. There is an abundance of material providing the perspective of U.S. lawyers on the drafting and issuance of opinions in connection with foreign transactions. See, e.g., *ACQUISITION OF SHARES IN A FOREIGN COUNTRY—SUBSTANTIVE LAW AND LEGAL OPINIONS* (Michael Gruson & Stephan Hutter eds., 1993); Nicolas Grabar & Albert S. Pergam, *International Opinions*, in 2 *DRAFTING LEGAL OPINION LETTERS* 107, 110 (M. John Sterba, Jr., ed., 2d ed. 1992); Michael Gruson, *The Remedies Opinion in International Transactions*, 27 *INT'L LAW.* 911 (1993) Michael Gruson, *Legal Opinions of New York Counsel in International Transactions*, 1989 *COLUM. BUS. L. REV.* 365 (1989). Lawyers trained in foreign legal systems have also made their views known. See e.g. Michael Gruson et al., *Legal Opinions in International Transactions—Foreign Lawyers' Response to U.S. Opinion Requests* (Report of the Subcommittee on Legal Opinions of the Committee on Banking Law of the Section on Business Law of the International Bar Association) (2d ed. 1989) [hereinafter *IBA Opinion Report*]. For a discussion of the IBA Opinion Report, see Stephan Hutter, *Symposium: The Corporate Opinion in International Transactions*, 1989 *COLUM. BUS. L. REV.* 427 (1989); Michael Gruson & Stephan Hutter, *International Bar Association Project on Legal Opinions in International Business Transactions*, 10 *U. PA. J. INT'L BUS. L.* 71 (1988); Michael Gruson & Michael Kutschera, *Opinion of Counsel on Agreements Governed by Foreign Law*, 19 *VAND. J. TRANSNAT'L L.* 515 (1986).

the competence of the lawyers is not an easy task.<sup>150</sup> Law firms with established cross-border practices face less of a malpractice or disciplinary threat than those with fledgling practices because over the years they have compiled a list of foreign lawyers and law firms in whom they repose confidence.

This Article will not dwell on the development of issues relating to malpractice liability or disciplinary sanctions because a rich literature already exists.<sup>151</sup> I would, however, urge those

150. See *The American Bar, The Canadian Bar, and The International Bar in THE PROFESSIONAL DIRECTORY OF LAWYERS OF THE WORLD* (S. Livermore ed. 1983); VI MARTINDALE-HUBBELL LAW DIRECTORY (1996). Any combination of the following hypotheticals work wonderfully in exploring competence issues in the context of cross-border practice. They were used with great success during a panel discussion sponsored by the Section on International Law and Practice at the 1997 ABA Annual Meeting.

1. Buzz, a Seattle attorney, represents a Washington toy maker. His client wants him to help set up a manufacturing joint venture near Beijing with a Chinese firm. He collects copies of P.R.C. Investment and Intellectual property laws, and does a first draft of a joint venture agreement — and tells his client this appears to comply with Chinese laws on these topics, but that a Chinese lawyer ought to look this over before the final version is signed.

2. After sending out his drafts for the China joint venture, Buzz turns to their matters. A couple of months later he learns that his drafts have been signed and, by the way, his client was running short of time and budget and didn't get around to having a Chinese lawyer look over the papers.

3. It turns out that the Chinese partner of Buzz's toy maker client was, at the time the joint venture agreements were signed, under investigation for pirating software. The investigation was relatively well publicized in China as a response to U.S. trade initiatives. The Chinese partner copied the client's leading toy design and counterfeit copies were soon being made in another part of China. The Chinese partner has just been made the subject of a decree of the Ministry of Trade, dissolving the partner's charter. The toy maker's investment has been substantially diminished.

4. Cass, Buzz's colleague, is asked to help the toy maker client firm up negotiated deal points with potential distributors in Europe, beginning with Belgium. She asks the clients if she can get Belgian counsel involved, and is told this would be fine but to keep the client up to date. Cass knows a Brussels-based lawyer, Wolfgang, from a bar group, and refers the matter to him. Wolf does a draft and Cass immediately forwards it to the client, who gets the Belgian distributor's prompt signature. A year later, the relationship goes sour and the client finds there is a high price to pay to terminate the distributor. Wolf says he assumed Cass knew about Belgium's distributor protection law, since they are so notorious.

5. It turns out Wolf is with the Brussels office of a German law firm that only practices European Union law. At the same time, Belgian distributor and agent protection laws are well known to most practitioners in Europe, including Wolf.

151. See Robert E. Lutz, *American Perspectives on the Duty of Competence: Special Problems and Risks in Advising on Foreign Law* in RIGHTS, LIABILITY AND ETHICS, *supra* note 50, at 81; M. W. Janis, *The Lawyer's Responsibility for Foreign Law and Foreign Lawyers*, 16

professional responsibility teachers who are hesitant to integrate cross-border materials into the traditional curriculum to consider this topic quite seriously. It is the least "foreign" of all the subject areas this Article discusses. It calls for little more than the application of classic malpractice and competence doctrines to a fact pattern involving some aspect of a foreign legal system.<sup>152</sup>

## 8. Conflicts of Interest

Like the Model Rules, the codes of conduct in foreign legal systems acknowledge the centrality of a lawyer's obligation to avoid conflicts of interest in the representation of a client.<sup>153</sup> Independence of judgment is a virtue held in high esteem in both the common and civil law traditions.<sup>154</sup> Here, again, the CCBE Code provides immediate access to the civil law sensibility. Article 2.1.1. warns lawyers to avoid conflicts between their personal interests and their clients'.<sup>155</sup> Articles 3.2.1 and 3.2.2 warn them

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INT'L LAW. 693 (1982); see also Roorda, *supra* note 2, at 141. For a practitioner's perspective, see Robert W. Hillman, *Proving Effective Legal Representation in International Business Transactions*, 19 INT'L LAW. 3, 11-17 (1985); David Rubenstein, *Selecting Foreign Counsel Is An Art in Itself*, CORP. LEGAL TIMES, Dec. 1992, at 1; John Skogland, *Does Your Client Need Foreign Counsel?*, 24 A.B.A. J. INT'L NEWS, Fall 1995, at 1, 6-7; Paul H. Vishny, *Employing Foreign Counsel*, C395 ALI-ABA 817 (1989); Donald T. Wilson, *International Business Transactions: A Primer for the Selection of Assisting Foreign Counsel*, 10 INT'L LAW. 325 (1976).

152. See *Tormo v. Yormark*, 398 F. Supp. 1159, 1173-74 (D. N.J. 1975); *Wilderman v. Wachtell*, 267 N.Y.S. 840 (N.Y. Sup. Ct. 1933), *aff'd mem.*, 271 N.Y.S. 954 (1st Dep't 1934); *Degen v. Steinbrink*, 195 N.Y.S. 810 (1st Dep't 1922), *aff'd per curiam*, 236 N.Y. 669 (1923). See also *In re Disciplinary Action David L. Curl*, 803 F.2d 1004 (9th Cir. 1986).

153. There is a growing body of secondary literature discussing conflicts of interest in the practice of public and private international law. See Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT'L L. 250 (1996); Martin Hunter, *Ethics of the International Arbitrator*, 53 ARB. 219 (1987). Of particular note is a recent study of international commercial arbitration in which the influence of U.S. style lawyering is discussed at length. See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANS-NATIONAL LEGAL ORDER* (1996).

154. For a U.K. perspective, see Lois Moore, *English Perspectives on the Duty of Loyalty: Comparisons with the American View in RIGHTS, LIABILITY AND ETHICS*, *supra* note 54, at 19. For a Canadian perspective, see PAUL M. PERELL, *CONFLICTS OF INTEREST IN THE LEGAL PROFESSION* (1995).

155. Article 2.1.1 provides that "[t]he many duties to which a lawyer is subject requires his absolute independence, free from all other influence, specially such as may arise from his personal interests or external pressure." CCBE Code *reprinted in* RIGHTS,

to avoid representing clients with conflicting interests.<sup>156</sup>

While the concerns of the drafters of the Model Rules and the CCBE Code appear similar at least at the level of text, there are numerous differences, making conflicts of interest a particularly rewarding area for classroom exploration. For example, the CCBE Code does not contain a provision for client consent to, or waiver of, conflicts. Relying strictly on the language of a text in explicating foreign norms of legal ethics is as risky as it is in explicating U.S. norms.<sup>157</sup> The less attentive students are likely to conclude that its absence means client consent or waiver is impossible. The more attentive students are likely to respond from a cultural perspective, however, and inquire whether lawyers from EU Member States interpret the term "conflicts of interest" as broadly as their U.S. counterparts. If the answer to that question is "no" (and it is), then client consent may not be a real issue. The conflicts of interest contemplated in foreign codes of lawyer conduct mostly resemble the sorts of direct adversity in relationships that even clients in the United States cannot generally waive. The absence of a waiver provision in the CCBE Code reflects a sustained confidence in a lawyer's ability to identify a conflict and a willingness to decline a representation through an exercise of self-discipline.

Analyzing conflict of interest norms from this comparative perspective can lead to significant insights into the underlying philosophical assumptions about the nature of the attorney-client relationship. The United States has essentially adopted an

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LIABILITY AND ETHICS, *supra* note 54, at 382; Terry, *Legal Ethics Code Part I*, *supra* note 54, at 66.

156. Article 3.2.1 provides "[a] lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, between the interests of those clients." CCBE Code *reprinted in* RIGHTS, LIABILITY AND ETHICS, *supra* note 54, at 384; Terry, *Legal Ethics Code Part I*, *supra* note 54, at 69. Article 3.2.2 provides "[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." CCBE Code *reprinted in* RIGHTS, LIABILITY AND ETHICS, *supra* note 54, at 382; Terry, *Legal Ethics Code Part I*, *supra* note 54, at 69.

157. My personal favorite example of the danger is DR 4-101 which is phrased in the permissive "may" and allows a lawyer to reveal client confidences or secrets to the extent necessary to prevent the commission of a crime. ABA Formal Op. 314 turns the "may" into a "shall" if "the facts in the attorney's possession indicate beyond a reasonable doubt that a crime will be committed." ABA Comm. on Professional Ethics, Formal Op. 314 (1965). A close second is the Formal Opinion 92-366 of the ABA Standing Committee on Ethics and Professional Responsibility that approves of a "noisy withdrawal" in spite of the unambiguous wording of MR 1.6.

autonomy model. It defines conflicts broadly, imposes on a lawyer the duty to inform the client fully of the conflict, and leaves the decision on consent or waiver to the client. Outside the United States, the model is one of paternalism. It leaves the evaluation of a conflict to the lawyer and makes no provision for informing the client or obtaining consent. As noted earlier,<sup>158</sup> enforcement mechanisms are limited and in extreme cases, the president of the bar may intervene.<sup>159</sup> An economic analysis based on historical and geographical restrictions on practice can also shed light on the difference between the autonomy and paternalism models. Law firms in the civil law countries have tended to be much smaller than in the United States. Until very recently, lawyers in civil law systems were admitted to a particular bar, usually defined in territorial terms (e.g., the bar of Paris, the bar of Dusseldorf, etc.). Rights of practice in other parts of the country were limited. This limitation necessarily constricted a lawyer's potential client-base, as did the divided character of the legal profession and the doctrine of incompatible professions.<sup>160</sup> A generous interpretation of the concept of conflicts of interest would have added an even greater economic burden.

Enforcement is a rich area for comparative exploration. Of all the ethical norms in the United States governing lawyer conduct, those relating to conflicts of interest have triggered the most judicial oversight. Conflicts of interest is the most "judicialized" area of professional responsibility.<sup>161</sup> Within the EU Member States and in other legal systems as well, judicial intervention is unheard of. The power to resolve alleged conflicts of interest generally rests with the president of the local bar whose decision is accepted almost always without further review. This discussion will often lead to a fruitful analysis of a more general comparative character in which the students reflect on some of the fundamental differences in common and civil law litigation, such as the adversarial and inquisitorial models of truth searching

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158. See also Terry, *Legal Ethics Code Part I*, *supra* note 54, at 45-51 (discussing differences and similarities in conception of role of lawyers expressed in CCBE Code, on one hand, and Model Rules of Professional Conduct and Model Code of Professional Responsibility on other).

159. See *supra* note 117 and accompanying text.

160. See *Lawyering for a Global Organization*, *supra* note 39, at 1097-99.

161. See WOLFRAM, *supra* note 73, at 312-486.

and the effectiveness of self-regulation.<sup>162</sup> It can tie in quite nicely with references in prior classroom discussions on the corporatism of the organized bar in civil law countries.

A different, but equally successful, discussion of conflicts of interest turns on the workability of the current conflict provisions in the Model Rules in the context of cross-border practice.<sup>163</sup> Lawyers in large firms frequently rail against the rules, arguing that because of structural changes in the marketplace, loyalty is a waning virtue in the attorney-client relationship. They label the prohibition against simultaneous adverse representation a vestige of a distant past in which law firms rarely maintained offices in more than one state and employed only a handful of lawyers. In contrast, law firms with established cross-border practices frequently operate offices in multiple U.S. states and in foreign countries. Their clients are global enterprises with numerous subsidiaries and are frequent joint venturers with non-U.S. companies. Lawyers from such firms cham-

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162. For helpful insights into the role of lawyers in the criminal justice system outside the United States, see Michael Chesterman, *OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury Is Dealt with in Australia and America*, 45 AM. J. COMP. L. 109 (1997); Dirk Marcus, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547 (1997); Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527-83 (1997); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441 (1997); Michael E. Tigar, *A French White-Collar Trial: Quelle Difference!*, NAT'L L.J., Jan. 20, 1997, at A15; Carol A. Chase, *Hearing the "Sounds of Silence" in Criminal Trials: A Look at Recent British Law Reforms with an Eye Toward Reforming the American Criminal Justice System*, 44 U. KAN. L. REV. 929 (1996); Johannes F. Nijboer, *The American Adversarial System in Criminal Cases: Between Ideology and Reality*, 5 CAROZO J. INT'L & COMP. L. 79 (1997); William T. Pizzi, *DISCOVERING WHO WE ARE: AN ENGLISH PERSPECTIVE ON THE SIMPSON TRIAL*, 67 U. COLO. L. REV. 1027 (1996). See also Nathalie Gadola-Duerler & Jennifer E. Payne, *The Different Interdependencies and Connections in Criminal Procedure Law, Specifically Between Pretrial Detention and Bail from a Civil and a Common Law Point of View: A Swiss and American Comparative Law Analysis*, 3 TULSA J. COMP. & INT'L L. 205 (1996); Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury*, 79 JUDICATURE 249 (1996). For similar insights into the civil justice system, see Peter F. Schlosser, *Lectures on Civil-law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9 (1996); Solomon M. Fulero & Dennis Turner, *Using British Trial Procedures in American Cases: A More Civil Trial?*, 21 LAW & HUM. BEHAV. 439 (1997); Gerald Walpin, *Civil Justice Systems in Other Democratic Countries Provide Means to Torpedo the Litigation Explosion Here*, 27 CUMB. L. REV. 993 (1996/97). See also Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, 31 TEX. INT'L L.J. 181 (1996).

163. The comment to MR 8.5 specifically notes that "[t]he choice of law provision is not intended to apply to transactional practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law." American Bar Ass'n, Model Rules of Professional Conduct MR 8.5, cmt. (1993)

pion extending the substantial relationship test now limited to resolving conflicts involving former clients to those involving simultaneous representations.<sup>164</sup> Multiple conflicts issues can be discussed in the context of a law firm's representation of a global organization, its subsidiaries, and the organization's owners in their individual capacity.<sup>165</sup>

A second possibility is to relate the conflicts issue to structural changes in the legal profession. In response to the globalization of the goods, services, and capital markets, many medium- and small-size law firms have recognized that their fiscal survival is tied to their ability to deliver legal services to their clients regardless of location. At the same time, these firms have concluded that monetary restrictions or personal preference for limited growth rule out the establishment of branch offices. Such firms have found a middle ground by joining "networks."<sup>166</sup>

While some clients will prefer to retain a U.S. or U.K. global law firm with local law capabilities,<sup>167</sup> others will prefer to retain local, foreign counsel directly. A number of factors may influence this decision including the client's evaluation of the quality of services that the U.S. or U.K. firm has previously provided or

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164. See Jonathan J. Lerner, *An Overview of the Law Governing Legal Conflicts of Interest*, 403 PLI/LIT 9, 27-28 (1990); Jonathan J. Lerner, *Current Issues in Legal Conflicts of Interest*, 368 PLI/LIT 297 at 309-310 (1988). Thomas D. Morgan, *Suing a Current Client*, 1 J. INST. FOR STUDY LEG. ETHICS 87 (1996).

165. See *Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F. Supp. 188 (D. N.J. 1989). See also *Baker v. LeBoeuf, Lamb, Leiby & McRae*, 1993 WL 662352 (S.D. Ohio 1993).

166. See *Two Major US Law Firms with 700 Lawyers Form a Unique Joint Venture for International Expansion*, BUS. WIRE, July 16, 1990, Victoria Slind-Flor, *Client Conflicts Causes a European Exit*, NAT'L L.J., July 30, 1990 at 2; Gail Appleson, *European Law Firms Expanding in the US*, CHI. TRIB., May 12, 1991, at B9; Larry Smith, *Regionalism Meet Internationalism: Midsized Firms Find Global Niche*, 11 OF COUNSEL, June 1, 1992, at 1; Adam Wright, *Firm Associations Provide Network of Counsel Around the World: Need Local Counsel in Atlanta, Austria or Algeria?*, CORP. LEGAL TIMES, Mar. 1993, at 36. For a more extended analysis, see Mary C. Daly, *Ethical and Liability Issues in International Law Practice*, in COMPARATIVE YEARBOOK OF INTERNATIONAL BUSINESS 223 (1995). EU law encourages the formation of joint ventures through European Economic Interest Grouping ("EEIG"). Council Regulation No. 2137/85 of July 25, 1985 on the European Economic-Interest Grouping (EEIG), O.J. L 199/1 (1985). At least one EEIG exists among Belgian, Dutch, and German law firms. See *Putting All Your EEIGs in One Basket*, INT'L FIN. L. REV., June 1989, at 20.

167. The rivalry between U.S. and U.K. firms is a matter of some notoriety. See Stephanie B. Goldberg, *The British Go Global: And Sometimes Head-to-Head With Americans*, A.B.A. J., Apr. 1993, at 50. See also Flood, *supra* note 2.



that the anticipated fee charged by a foreign lawyer who is a member of a network is noticeably lower than the global firm's. If networked firms are collectively considered one firm for conflicts purposes, their existence will be short lived. Constructing and monitoring a comprehensive conflicts-checking system is an operational nightmare, even for a single firm. Imagine the process for networked law firms! Furthermore, there is no economic incentive for foreign law firms to agree to observe U.S. conflicts of interest norms. Almost without exception, a foreign law firm respecting U.S. conflict of interest rules would be forced to decline employment more frequently than if it conformed its conduct only to its own jurisdiction's rules.

### 9. Fees

Fees is a highly accessible topic relating to cross-border practice and is easily integrated into the traditional professional responsibility curriculum. A teacher can approach the prohibition against contingent fee arrangements in most foreign legal systems in a variety of ways.<sup>168</sup> Cultural understandings of the concept of "independent professional judgment" is the obvious way. Another is to discuss it in the context of entrepreneurial lawyering in mass tort class actions.<sup>169</sup> I personally prefer to analyze the prohibition from an economic and historical perspective at a pronounced macro-level. Many civil law countries and the U.K. have mandatory health insurance and labor legislation that provides a safety-net for injured workers, accident victims, and the disabled. Similarly comprehensive programs do not exist in the United States. Workers compensation laws and federal social security insurance programs are relatively new and their pay-

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168. See LAW WITHOUT FRONTIERS, *supra* note 54, at 59 (England and Wales); *id.* at 86 (Germany). The United Kingdom is considering abandoning the prohibition. Fiona Brown, *Contingent Fees to Spread in the U.K.*, NAT'L L.J., Dec. 8, 1997, at A12.

169. See *In re Agent Orange Product Liability Litigation*, 818 F.2d 216 (2d Cir. 1987), *cert. denied*, 484 U.S. (1986). See generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986); Vincent Robert Johnson, *Ethical Limitations on Creative Financing of Mass Tort Class Actions*, 54 BROOK. L. REV. 539 (1989); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 51 U. CHI. L. REV. 1 (1991); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigations*, 88 NW. U. L. REV. 469 (1994). See also Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 7 TEMP. INT'L & COMP. L.J. 217 (1992); Allison F. Aranson, *The United States Percentage Contingent Fee System: Ridicule and Reform From an International Perspective*, 27 TEX. INT'L L.J. 765 (1992).

ments are usually inadequate. Furthermore, "equal justice under law" is inscribed in the American psyche, not just over the portal of the Supreme Court. The lawful existence of contingent fee arrangements in the United States may have more to say about the country's obsession with rugged individualism than its conception of lawyers' ethics.

Advocates of tort reform in the United States have sporadically pressed for the adoption of a fee-shifting mechanism, sometimes called "the English Rule," whereby the losing party in a litigation would pay the winner's court costs and attorneys' fees.<sup>170</sup> The merits of this proposal often provoke lively classroom debate. Moreover, it is important for the students to understand that the English Rule is not as draconian as its definition suggests. The attorneys' fees are almost never equal to the actual amount the winning party has paid the successful lawyer.<sup>171</sup>

Finally, mandatory fee schedules are still common in many civil law countries<sup>172</sup> and, combined with restrictions on advertising, they hold the promise of a decent standard of living for those law students who successfully complete their undergraduate education, are willing to persevere through a lengthy apprenticeship, and pass a difficult bar examination. Even the staunchest student supporters of the free enterprise system have been known to weaken when polled on their endorsement or rejection of mandatory fee schedules. Their weakening is generally in proportion to the size of their loan indebtedness!

## 10. Advertising

It is hard to imagine a professional responsibility classroom in the United States in which the teacher and students do not explore the effect of the Supreme Court's advertising decisions on the legal profession.<sup>173</sup> Whether for good or for bad, they

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170. See Lisa Stansky, *British Legal Reform Changing the Guard: For a Tradition-Bound British Legal System, the Challenge is to Become More Modern Without Becoming Too American*, A.B.A. J., Jun. 1996, at 72; Herbert M. Kritzer, *Legal Fees: The English Rule*, A.B.A. J., Nov. 1992, at 54. See also Werner Pfennigstorf, *The European Experience with Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37 (1984).

171. See Pfennigstorf, *supra* note 170, at 37.

172. See LAW WITHOUT FRONTIERS, *supra* note 54, at 85 (Germany).

173. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. Arizona*, 433 U.S. 350 (1977).

have profoundly changed the way lawyers practice, the way clients choose lawyers, and how the public perceives the profession. Because most foreign legal systems ban lawyer advertising, there is a certain starkness to any comparative discussion.<sup>174</sup> It somberly triggers the "law as profession versus law as a business" debate.

### CONCLUSION

Law schools have recently graduated the first generation of global lawyers. In many courses, their professors earnestly endeavored to introduce them to the structure of foreign legal systems and to impart some understanding of the different systems' substantive law. There was no international dimension to the graduates instruction in professional responsibility, however. Almost without exception, their courses focused exclusively on the ethical dilemmas commonly encountered in U.S. domestic practice. The second and third generation of global lawyers deserve better. The ethical implications of the globalization of the legal profession can no longer be ignored. Incorporating cross-border materials into the traditional curriculum is a challenge. But it is one that the teaching and scholarly community can master.

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174. See Lauren Dobrowalski, *Maintaining the Dignity of the Profession: An International Perspective on Lawyer Advertising and Solicitation*, 12 DICK. J. INT'L L. 367 (1994); see also Law Without Frontiers, *supra* note 50, at 55-58 (England and Wales); *id.* at 85 (Germany); Stefano Agostini, *Advertising and Solicitation: A Comparative Analysis of Why Italian and American Lawyers Approach Their Profession Differently*, 10 TEMP. INT'L & COMP. L.J. 329 (1996). Louise L. Hill, *Lawyer Publicity in the European Union: Bans Are Removed but Barriers Remain*, 9 GEO. WASH. J. INT'L L. & ECON. 381 (1995); Albert Tanghe, *Publish and Be Damned - Local Bar Publicity Restrictions*, 1 LAW IN EUROPE 3 (1990); see also Robert Lever, *American Attorneys in Paris*, NAT'L L.J., June 22, 1987, at 1.