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PUBLICITY RULES OF THE LEGAL PROFESSIONS WITHIN THE UNITED KINGDOM

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I. INTRODUCTION

Historically, the legal professions in European countries frowned upon or prohibited advertising by lawyers. However, the adoption of the Code of Conduct for Lawyers in the European Union (CCBE Code), which permits lawyer advertising,[1] along with the Lawyers' Services Directive,[2] the Diploma Directive,[3] and decisions of the European Court of Justice,[4] led many Member States of the European Union (EU) to review the rules of practice and the codes of conduct for their legal professions.[5] As a result, many EU Member States abandoned their traditional rules prohibiting lawyer advertising in favor of permitting some form of advertising by lawyers.[6] The jurisdictions of the United Kingdom (UK) were no exception.

Not surprisingly, publicity rules promulgated by the individual bars and Law Societies of the EU Member States vary considerably both in breadth and

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1. CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY R. 2.6 (2002), http://www.ccbe.org/en/publications_en.htm (last visited April 19, 2003) [hereinafter CCBE CODE]. The Code of Conduct for Lawyers in the European Union was originally adopted at the CCBE Plenary Session held on October 28, 1988 and subsequently amended during the CCBE Plenary Sessions on November 28, 1998 and December 6, 2002.

2. Council Directive 77/249 of 22 March 1977 to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services, 1977 O.J. (L 78) 17 [hereinafter Lawyers' Services Directive].

3. Council Directive 89/48 of 21 December 1988 on a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years' Duration, 1989 O.J. (L 19) 16 [hereinafter Diploma Directive].

4. *See, e.g.*, Case C-340/89, Vlassopoulou v. Ministerium fur Justiz, 1991 E.C.R. I-2357, [1993] 2 C.M.L.R. 221 (1993) (holding that when determining whether to admit a national of another state to its legal profession, the Member State must consider the evidence of legal qualification obtained in another member State); Case 292/86, Claude Gullung v. Conceils de l'Ordre des Avocats vu Barreau de Colmar et de Saverne, 1988 E.C.R. 111, [1988] 2 C.M.L.R. 57 (1988) (holding that unless barred from the profession for reasons relating to dignity, good repute, or integrity, a national of two Member States admitted to the legal profession as an *advocat* in one state must be recognized in the other).

5. *See* Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556, 561-60 (1992).

6. *Id.* at 630-31 n.182.

scope.[7] These differences are exacerbated by the fact that most countries have different categories of legal professionals, each separately governed by its own rules.[8] In countries with civil law based legal systems, "codes of conduct" governing the practice of law are generally "applicable only to a lawyer with the right of audience," meaning a lawyer "who may represent clients in court."[9] As a general premise, common law based Member States, such as the UK, espouse more liberal publicity rules than the civil law Member States.[10] While most of the legal professions recognize advertising as an appropriate means of providing the public with useful or necessary information about the availability of legal services, most face-to-face solicitation continues to be prohibited.[11]

Over the past two decades, the jurisdictions of the UK have examined their legal professions and initiated significant change. Most recently, rules relating to lawyer publicity have been a focus of scrutiny among the UK legal professions. The advent of the Directive on Electronic Commerce,[12] the Lawyers' Home Title Directive,[13] and proposed revisions to the personal publicity portion of the CCBE Code have served as a motivation for change in the publicity rules for lawyers. The trend in the UK has been to make publicity rules for lawyers more liberal and more compatible with emerging forms of electronic communication; however, the rules of the various legal professions continue to have significant differences.

The first part of this article addresses the relevant EU Directives and recent changes to the CCBE Code that relate to lawyers and publicity within the EU Member States. The second part of this article examines the publicity rules for lawyers in the UK, highlighting recent amendments to the codes of the respective UK legal professions. The article then addresses publicity rules in France and analyzes and compares the current UK lawyer publicity rules, noting their similarities and differences, and concluding with an argument in favor of uniformity with straightforward regulatory standards.

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7. *See* Louise L. Hill, *Lawyer Publicity in the European Union: Bans Are Removed but Barriers Remain*, 29 GEO. WASH. J. INT'L L. & ECON. 381, 383 (1995).

8. *See* Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1148 (1999).

9. *Id.* at 1148-49.

10. *See* Hill, *supra* note 7, at 443; *see also infra* notes 106-45 and accompanying text.

11. Hill, *supra* note 7, at 443.

12. Council Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 [hereinafter E-commerce Directive].

13. Council Directive 98/5 of the European Parliament and of the Council of 16 February 1998 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other Than That in Which the Qualification was Obtained, 1998 O.J. (L 77) 36 [hereinafter Lawyers' Home Title Directive].

II. EUROPEAN UNION LEGISLATION

A. Lawyers' Services Directive and Diploma Directive

The Lawyers' Services Directive was passed in 1977 to help lawyers exercise their freedom to provide services throughout the EU Member States.[14] Because the freedom to provide professional services exists by power of the 1957 Treaty of Rome,[15] the Directive requires Member States to acknowledge and to recognize certain professions as lawyers[16] but allows Member States to reserve designated activities to domestic practitioners.[17] Legal professionals that are classified as lawyers may perform any legal service for which they are hired,[18] provided their qualifications, including professional title and professional affiliation, are made available to the public.[19] Lawyers exercising this freedom to practice must use their home title in the language of their home state.[20] A host

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14. *See* Lawyers' Services Directive, *supra* note 2.

15. *See* Edwin Godfrey, *The European Union*, *in* LAW WITHOUT FRONTIERS 12, 14 (Edwin Godfrey ed., 1995). The 1957 Treaty of Rome created the European Economic Treaty. This treaty calls for the free movement of workers and grants professionals the right to perform services freely and to settle and establish themselves throughout the Member States. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, arts. 48, 52, 59, 60, 298 U.N.T.S. 11 [hereinafter EEC TREATY]. The EEC Treaty calls for the abolition of restrictions based on nationality and for the issuance of directives for "mutual recognition of diplomas, certificates and other evidence of formal qualifications." EEC TREATY art. 57(1). In furtherance of this mandate, Council Regulation 1612/68 on the freedom of movement of workers was adopted by the Council of Ministers on October 15, 1968. This regulation delineated a worker's right to move to any Member State to take up employment, to receive the same social benefits as the nationals of that Member State, to change employment, and to remain in the host Member State after the end of the employment. *See* Council Regulation 1612/68 of 15 October 1968 on Freedom of Movement for Workers Within the Community, 1968 O.J. (L 257) 2; BASIC COMMUNITY LAWS 290 (Bernard Rudden & Derrick Wyatt eds., 1996).

16. Several Member States have legal systems with multiple classifications for providing legal services. Not all of these legal services providers come within the purview of the Lawyers' Services Directive. The Lawyers' Services Directive defines a "lawyer" to be an individual entitled to practice under the following home titles: Belgium–Avocat, Advocaat; Denmark–Advokat; Germany–Rechtsanwalt; France–Avocat; Ireland–Barrister, Solicitor; Italy–Avvocato; Luxembourg–Avocat-avoue; the Netherlands–Advocaat; United Kingdom–Advocat, Barrister, Solicitor. Lawyers' Services Directive, *supra* note 2, art. 1(2).

17. Member states may restrict "the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land." *Id.* art. 1(1).

18. *See* Jonathan Barsdale, *The Effect of EC Regulations upon the Ability of U.S. Lawyers to Establish a Pan-European Practice*, 28 INT'L LAW. 313, 319 (1994).

19. *See* Lawyers' Services Directive, *supra* note 2, art. 3.

20. *Id.*

Member State may require foreign lawyers providing services within its jurisdiction to work in conjunction with local counsel and submit documentation to establish their own qualifications to practice law.[21] Of particular significance to lawyers who choose to publicize the availability of their services is the fact that they are subject to the rules of professional conduct of both the host Member State and their home Member State.[22]

In order to facilitate the provision of services as set forth in the Lawyers' Services Directive, the CCBE Consultative Committee adopted the Declaration of Perugia in 1977.[23] Specifically addressing the matter of professional publicity, the Declaration of Perugia states "lawyers [in all Member States] are forbidden to seek personal publicity for themselves or to tout for business."[24] Recognizing that the extent of this prohibition varies among Member States, the Declaration of Perugia provides that when personal publicity rules conflict, the rules of the host Member State should apply.[25] The Declaration, however, failed to harmonize the significantly differing rules of professional conduct of the Member States and provide a common code of professional ethics for lawyers; unlike the Lawyers' Services Directive, the bar of each Member State had to adopt the Declaration for it to be effective.[26]

To further the internal market goal, the Commission proposed a general approach whereby each Member State would recognize other Member States' diplomas as effectively equal to its own.[27] The Diploma Directive, which applies

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21. *Id.* arts. 5, 7.

22. *Id.* art. 4.

23. *See* SERGE-PIERRE LAGUETTE, LAWYERS IN THE EUROPEAN COMMUNITY 248, 255 (1987).

24. Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community, pt. VII (1977), *reprinted in* LAGUETTE, *supra* note 23, Annex 4, at 281.

25. *See* Goebel, *supra* note 5, at 580.

26. *See* Gregory Siskind, *Freedom of Movement for Lawyers in the New Europe,* 26 INT'L. LAW. 899, 918 (1992); Hill, *supra* note 7, at 390-91. Interestingly, the first five of the General Principles of the CCBE Code reassert principles originally set forth in the Declaration of Perugia. *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, 23 (1993).

27. In June 1985, a White Paper was released suggesting the adoption of delineated measures including the mutual recognition of diplomas to remove legal and economic barriers to aid in the development of a single integrated market. COMPLETING THE INTERNAL MARKET: WHITE PAPER FROM THE COMMISSION TO THE EUROPEAN COUNCIL, COM (85)310, final at 4, 25-26. The establishment of the internal market was also an objective of the Single European Act of 1987 (SEA). SINGLE EUROPEAN ACT OF 1987, 1987 O.J. (L 169) 1, [1987] 2 C.M.L.R. 741 (1987). The SEA, a significant series of amendments to the EEC Treaty that was signed in February 1986, provided for the establishment of an internal market by December 31, 1992. *See generally* Goebel, *supra* note 5, at 559-60.

to all professions without existing directives for mutual recognition of diplomas by Member States, was passed in 1988 in an attempt to establish a system for the recognition of higher education diplomas within the EU.[28] Applying exclusively to EU nationals, the purpose of the Diploma Directive is to promote freedom of movement for persons and services by providing that holders of formal qualifications issued in one Member State, through mutual recognition, have the right to practice their profession in other Member States.[29] However, because proficiency in the law in one state does not ensure proficiency in the law in another state, Member States could require individuals either to complete an adaptation period or take an aptitude test.[30] In implementing the Diploma Directive, many Member States required a foreign lawyer to take an aptitude test before recognizing his/her ability to practice law in their respective jurisdictions; these tests differed significantly in complexity and length from country to country.[31]

B. Lawyers' Home Title Directive

Because the Diploma Directive only facilitates host Member State bar admission for individual lawyers, the CCBE felt that broader establishment rights were needed to further free movement of lawyers.[32] After almost two decades of failed proposals,[33] the Lawyers' Home Title Directive was passed in February

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28. *See* Godfrey, *supra* note 15, at 15; Siskind, *supra* note 26, at 922.

29. *See* Diploma Directive, *supra* note 3, art. 3.

30. *Id.* art. 4(1)(b). Addressing the requirement of an adaptation period, which is not to exceed three years, or an aptitude test, the Diploma Directive provides, in part, the following:

> Should the host Member State make use of this possibility, it must give the applicant the right to choose between an adaptation period and an aptitude test. By way of derogation from this principle, for professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity, the host Member State may stipulate either an adaptation period or an aptitude test.

Id.

31. *See* Goebel, *supra* note 5, at 598-99. Germany implemented one of the most stringent tests for the legal profession by requiring two written examinations of five hours each, as well as a one-hour oral examination. *Id.* at 599 n.106.

32. *Id.* at 604.

33. A Consultative Committee of the CCBE originally proposed a draft establishment directive in December 1980, subsequently amending it in May 1982. *See* Nicholas J. Skarlatos, *European Lawyer's Right to Transnational Legal Practice in the European Community*, 1 LEGAL ISSUES EUR. INTEGRATION 49, 61 n.46 (1991). The final version of this draft directive was proffered in April 1990 but did not receive the support necessary from 10 of the 12 delegations for adoption of the proposal. *See* Goebel, *supra* note 5, at

1998, providing that lawyers in EU Member States may pursue the practice of law in any other Member State under the professional title of their home country.[34] Upon registration with the designated competent authority in a Member State,[35]

603; Heinz Weil, *The Proposal for a Directive on the Right of Establishment for Lawyers in the European Community*, 15 FORDHAM INT'L L.J. 699, 709 (1992). The primary controversy concerned a proposal that there be two classifications of lawyers in the draft directive: integrated lawyers, who could become members of the bar in a host state and registered lawyers, who would be foreign lawyers registered in the host state under home title. CCBE Draft Directive on the Right of Establishment for Lawyers, art. 1(2)(e)-(f) (1990), *reprinted in* Weil, *supra* app., at 711-12; Goebel, *supra* note 5, at 603. In December 1994, reacting to the draft directive and concerns focused on the proposed dual classification for lawyers, the Commission produced a proposed directive to facilitate the practice of law on a permanent basis among the Member States with one category of lawyers and recognition of more than one way for migrant lawyers to become integrated into the legal profession of a host Member State. *See* Commission Proposal for a European Parliament and Council Directive to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other Than That in Which the Qualification Was Obtained, arts. 1, 10, 1995 O.J. (C 128) 6; Weil, *supra*, at 709.

34. *See* Lawyers' Home Title Directive, *supra* note 13, art. 2. The major bodies of the EU government are the Council of Ministers, the Commission, the European Parliament, the European Court of Justice, and the Court of Auditors. *See* T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 11 (3d ed. 1994). The Council of Ministers is made up of delegates from each Member State. It coordinates the Member State policies and approves legislation, budgets, and international treaties. *See id.* at 17. The Commission consists of commissioners that are nominated by the governments of the Member States and approved by the European Parliament. *See id.* at 11-12. The Commission has some power to enact legislation, and it proposes regulations and directives to the Council, which the Council may amend prior to their submission to the European Parliament. *See id.* at 14-17. Upon receipt of a proposal from Council, the Parliament gives its opinion and may suggest amendments to the proposal. *See id.* at 33. The European Court of Justice interprets international and customary law and ensures its observance. *See id.* at 66-67, 85. The Court of Auditors examines the receipt of revenue and expenditures. *See id.* at 11 n.2, 90-91.

35. Regarding registration in the UK and Ireland, the Lawyers' Home Title Directive provides as follows:

> In the United Kingdom and Ireland, lawyers practicing under a professional title other than those used in the United Kingdom or Ireland shall register either with the authority responsible for the profession of barrister or advocate or with the authority responsible for the profession of solicitor.
>
> In the United Kingdom, the authority responsible for a barrister from Ireland shall be that responsible for the profession of barrister or advocate, and the authority responsible for a solicitor from Ireland shall be that responsible for the profession of solicitor.
>
> In Ireland, the authority responsible for a barrister or an advocate from the United Kingdom shall be that responsible for the profession of barrister, and the authority responsible for a solicitor from the United Kingdom shall be that responsible for the profession of solicitor.

lawyers practicing under their home-country professional titles may give advice on the law of their home Member State, Community law, international law, and the law of the host Member State.[36] Member States, however, may reserve work relating to the administration of estates and the transfer of land to a prescribed category of lawyers existing within the Member State, to the exclusion of lawyers practicing under a home-country professional title.[37] Furthermore, lawyers practicing under the professional titles of their respective home country who represent clients in legal proceedings may be required to work in conjunction with a lawyer admitted to practice before the appropriate host-state judicial authority.[38]

After practicing the law of the host Member State or Community law for an uninterrupted period of at least three years, with the purpose of obtaining admission to the legal profession in the host Member State, a lawyer may be integrated into the legal profession of the host Member State without the need for aptitude tests as required under the auspices of the Diploma Directive.[39] For activities pursued in the host state, a lawyer practicing under a home-country professional title is subject to the same rules of professional conduct as the lawyers of the host state,[40] irrespective of the home Member State rules of professional conduct.[41]

While the Lawyers' Home Title Directive provides an easier way for a lawyer to acquire the professional title of a host Member State, a lawyer practicing under a home-country professional title is still subject to the professional rules of both the lawyer's home and host Member States.[42] This can have significant impact on the lawyers advertising their legal services, given the disparate state of lawyer advertising rules among both the UK legal professions and those of the EU Member States.[43]

C. CCBE Code and E-Commerce Directive

The CCBE Code, adopted by eighteen national delegations representing the Bars and Law Societies of the EU, recognizes lawyer advertising as a permissible practice.[44] Described as "both a 'legal ethics' code and a 'conflict of

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Lawyers' Home Title Directive, *supra* note 13, art. 3(3).

36. *Id.* art. 5(1).
37. *Id.* art. 5(2).
38. *Id.* art. 5(3).
39. *Id.* art. 10(1); *see supra* notes 29-31 and accompanying text.
40. Lawyers' Home Title Directive, *supra* note 13, art. 6(1).
41. *Id.*
42. *Id.*
43. *See, e.g., infra* notes 67, 106-45 and accompanying text.
44. *See* CCBE CODE, *supra* note 1, R. 2.6. In 1960, the *Commission Consultative des Barreaux de la Communaute Europenne* came into being, later changing its name to *Counseil des Barreaux de la Communaute Europeenne* (CCBE) in 1987. The CCBE is a

law' code,"[45] one of the General Principles of the initial 1988 CCBE Code is devoted to the personal publicity of a lawyer.[46] Although amended in 1998, the provisions on personal publicity in the CCBE Code remained unchanged.[47] Not asserting a general standard on publicity, this section of the Code operated as a conflict-of-laws provision rather than as a rule of substantive law.[48] The 1998 version specifically addressed personal publicity as follows:

> 2.6.1 A lawyer should not advertise or seek personal publicity where this is not permitted. In other cases a lawyer should only advertise or seek personal publicity to the extent and in the manner permitted by the rules to which he is subject.
>
> 2.6.2 Advertising and personal publicity shall be regarded as taking place where it is permitted, if the lawyer concerned shows that it was placed for the purpose of reaching clients or potential clients located where such advertising or personal publicity is permitted and its communication elsewhere is incidental.[49]

An explanatory memorandum to help clarify the provision, prepared by the CCBE's Deontology Working Party that drafted the 1988 CCBE Code, comments on "personal publicity" in the following manner:

> The term "personal publicity" covers publicity by firms of lawyers, as well as individual lawyers, as opposed to corporate publicity organized by bars and law societies for their members as a whole. The rules governing personal publicity by lawyers vary considerably in the Member States. In some there is a

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representative body for the bar associations of the EU Member States, formed to "study, consult, and make representation upon the problems and opportunities for the legal profession arising from the Treaty of Rome." CROSS BORDER PRACTICE COMPENDIUM 3 (Dorothy M. Donald-Little ed., 1991 & Supp. 1993) [hereinafter CCBE COMPENDIUM].

45. *See* Terry, *supra* note 26, at 18.

46. The eight General Principles of the CCBE Code are as follows: (1) Independence; (2) Trust and Personal Integrity; (3) Confidentiality; (4) Respect for the Rules of Other Bars and Law Societies; (5) Incompatible Occupations; (6) Personal Publicity; (7) the Client's Interest; and (8) Limitation of Lawyer's Liability Towards His Client. *See* CCBE CODE, *supra* note 1, Rs. 2.1-2.8.

47. Changes to the CCBE Code publicity provisions were considered in 1998, but ultimately rejected. *See* Report to the Presidency of CCBE Concerning Revision of Certain Articles in CCBE's Code of Conduct § 2.1 (Sept. 6, 2002), http://www.hadjimichalis.gr/keimena/deontologiaccbe/15_4_01.doc (last visited April 19, 2003) [hereinafter Report to Presidency].

48. *See* Terry, *supra* note 26, at 23.

49. CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY R. 2.6 (1998), http://www.ccbe.org/doc/En/code_en.pdf (last visited April 19, 2003).

> complete prohibition of personal publicity by lawyers; in others this prohibition has been (or is in the process of being) relaxed substantially. Article 2.6 does not therefore attempt to lay down a general standard on personal publicity.
>
> Article 2.6.1 requires a lawyer not to advertise or seek personal publicity in a territory where this is not permitted to local lawyers. Otherwise he is required to observe the rules on publicity laid down by his own bar or law society.
>
> Article 2.6.2 contains provisions clarifying the question of the place in which advertising and personal publicity is deemed to take place. For example, a lawyer who is permitted to advertise in his Home Member State may place an advertisement in a newspaper published there which circulates primarily in that Member State, even though some issues may circulate in other Member States where lawyers are not permitted to advertise. He may not, however, place an advertisement in a newspaper whose circulation is directed wholly or mainly at a territory where lawyers are not permitted to advertise in that way.[50]

Of all the conflict-of-laws provisions incorporated in the CCBE Code, the general principle on personal publicity is the only one that does not specify which jurisdictional rule should apply when inconsistent rules permitting publicity are at issue.[51]

After having been intact for more than a decade, the personal publicity rules in the CCBE Code were recently revised. Responding to the Directive on Electronic Commerce (E-commerce Directive) that was approved by the European Parliament on June 8, 2000,[52] the revisions to the CCBE Code personal publicity provisions specifically targeted electronic communications and Article 8 of the E-commerce Directive addressing regulated professions.[53] The E-commerce Directive applies only to service providers established within the EU, attempting to avoid obstacles to global electronic commerce.[54] It makes commercial communications subject to certain supervisory and transparency requirements to ensure consumer confidence and fair trading.[55] For instance, Article 7 of the E-commerce Directive requires that unsolicited commercial communications by e-

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50. Explanatory Memorandum and Commentary on the CCBE Code of Conduct for Lawyers in the European Community, *reprinted in* Terry, *supra* note 26, app. C, at 80.

51. *See* Terry, *supra* note 26, at 26.

52. *See* E-commerce Directive, *supra* note 12.

53. *See* E-mail from Sieglinde Gamsjaeger, Legal assistant/*Conseiller juridique*, CCBE, to Louise Hill, Professor of Law, Widener University School of Law (Jan. 25, 2002) (on file with author).

54. *See* E-commerce Directive Adopted, (2000) EU L. Rep. (CCH) § 1087; *see also infra* note 56.

55. *See* E-commerce Directive, *supra* note 12.

mail be clearly identifiable as such as soon as the recipient receives it.[56] Additionally, service providers must regularly consult and respect "opt-out registers," where people wishing not to receive such commercial communications can register.[57]

Article 8.1 of the E-commerce Directive sets out certain obligations to be met by the regulated professions. Specifically, the use of commercial communications "which are part of, or constitute, an information society service" is permitted provided there is "compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession."[58] In Article 8.2, Member States and the Commission are directed to encourage professional associations "to establish codes of conduct at Community level in order to determine the types of information that can be given for the purposes of commercial communication in conformity with the rules referred to" in Article 8.1.[59] To this end, the CCBE Deontology Committee established a Working Group to review the personal publicity provisions of the CCBE Code.[60]

Upon review of the personal publicity provisions within the CCBE Code, the Working Group determined that, in order to "reflect reality" with limitations, "provisions on publicity should be worded so that the lawyer is *entitled* to inform the public about his services."[61] However, with respect to the E-commerce Directive, the Working Group concluded that "[n]o particular changes in the Code seem necessary," except to make "clear that personal publicity or marketing may

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56. *See id.* art. 7. Other key provisions of the E-commerce Directive include the following:

> The place of establishment is where an operator actually pursues an economic activity through a fixed establishment, no matter where web-sites, servers or mail boxes are situated.
>
> - Operators are subject to supervision in the Member State where they are established.
> - Member States must remove restrictions on electronic contract use.
> - Intermediaries playing a passive role (*i.e.*, mere conduit) are exempt from liability.
> - Service providers are not liable for activities of intermediaries, such as storage of information.
> - Member States must provide for legal redress and appropriate sanctions.
> - The principle of mutual recognition of national laws and the principle of the country of origin must be applied.

See E-commerce Directive Adopted, *supra* note 54, at 1088.

57. *See* E-commerce Directive, *supra* note 12, art. 7(2). This is similar to the "do not call" lists that are increasing in popularity in the United States.

58. *Id.* art. 8(1).

59. *Id.* art. 8(2).

60. *See* Report to Presidency, *supra* note 47, § 1.

61. *Id.* § 2(1)–(3) (emphasis in original).

be made also through electronic commercial communications . . . ."[62] The Working Group subsequently circulated a draft report that proposed the following revisions to CCBE Code of Conduct Rule 2.6, with alternative provisions for Rule 2.6.1:

> 2.6.1. ALTERNATIVE ONE
>
> A lawyer is entitled to inform the public about his services provided the information is accurate and not misleading.
>
> OR AS
> ALTERNATIVE TWO
> A lawyer is entitled to inform the public about his services provided the information is accurate and not misleading and to the extent that the information serves a public need for information.
>
> 2.6.2. Personal publicity or marketing by a lawyer in any form of media such as by press, radio, television, by electronic commercial communication or otherwise is permitted to the extent it complies with the requirements of 2.6.1.[63]

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62. *Id.* § 4(2). The EEC Treaty provides for the issuance of directives that "shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means." EEC TREATY art. 189. The countries of the EU signed the TREATY ON EUROPEAN UNION AND FINAL ACT, Feb. 7, 1992, O.J. (C 224) 2 (1992), 31 I.L.M. 247 (1992) (entered into force Nov. 1, 1993). *See* Hartley, *supra* note 34, at 7. The Treaty creates a new entity, the EU, and changes the name of the European Economic Community (EEC), to the European Community (EC). *Id.* at 8. The EU is made up of the EC, the European Coal and Steel Community (ECSC), and the European Atomic Energy Community (Euratom). *Id.* While there are three Communities in the EU, only one set of institutions exists. *Id.* at 9. EU law "comprises the texts of the treaties which make up the [EU];" "all of the secondary legislation which has been adopted within the treaty framework;" "the set of international treaties in which the EU participates;" and "an invention of the European Court of Justice called 'general principles.' " Stuart E. Eizenstar, *U.S. Relations with the European Union and the Changing Europe*, 9 EMORY INT'L. L. REV. 1, 4-5 (1995). For a discussion on the procedures for decision-making under the Treaty on European Union, see Hans-Joachim Glaesner, *Formulation of Objectives and Decision-Making Procedure in the European Union,* 18 FORDHAM INT'L. L.J. 765 (1995).

63. Revision of the Provisions on Publicity, Including the Question of the Consequences on the Code of Conduct of the EU Directive on Electronic Commerce, Extract of the Report on the Revision on the CCBE Code of Conduct, § 2.11 [hereinafter Revision of the Provisions on Publicity].

Upon circulation of the Draft Report, the initial reaction within the CCBE was to favor Alternative One over Alternative Two,[64] which would eliminate "public need" as a limitation on the dissemination of information. This distinction is significant because several countries allow lawyers to advertise only if the general public is provided with "necessary" information.[65] Finding Alternative Two to Rule 2.6.1 too restrictive and considering the reactions of the EU Commission, the Working Group decided that a revised version of the rule with only one alternative should be put forward.[66] As a result, following debate at Standing Committee meetings and Members State comments on the proposed revisions, the personal publicity provisions of the CCBE were amended on December 6, 2002 to provide:

> 2.6 *Personal Publicity*:
>
> 2.6.1 A lawyer is entitled to inform the public about his services provided that the information is accurate and not misleading, and respectful of the obligation of confidentiality and other core values of the profession.
>
> 2.6.2 Personal publicity by a lawyer in any form of media such as by press, radio, television, by electronic commercial communication or otherwise is permitted to the extent it complies with the requirements of 2.6.1.[67]

The new code provisions present the public with information on legal services as an entitlement. This entitlement, however, is not without limitation. Information must be accurate and not misleading. Information must also be presented within the confines of the fundamental values of the profession.[68]

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64. *See* E-mail from Sieglinde Gamsjaeger, Legal Assistant/*Conseiller juridique*, CCBE, to Louise Hill, Professor of Law, Widener University School of Law (Jan. 30, 2002) (on file with author).

65. In France, lawyers are allowed to advertise necessary information to the public. Decret no. 91-1197 du 27 novembre 1991, Organisant la profession d'avocat, art. 161, J.O., 28 novembre 1991, p. 15502; 1991 D.S.L. 490, 502. "But such advertising activities should be undertaken with dignity, scrupulousness, integrity and discretion, and a copy of each advertisement must be forwarded to the Bar association." Facsimile from Marie Ravanel & Etienne Pax, Gide Loyrette Nouel, to Louise L. Hill, Professor of Law, Widener University School of Law (Jan. 25, 2002) (on file with author) (discussing Decret no. 91-1197 du 27 novembre 1991, *supra*). Lawyers in Belgium may advertise if the general public is provided with necessary information. Rule of June 25, 1990 from the General Council of the National Agency for Advertisement (as modified by decision of April 25, 1991); *see* Hill, *supra* note 7, at 406, 425.

66. *See* Revision of the Provisions on Publicity, *supra* note 63, § 2(4).

67. CCBE Code, *supra* note 1, R. 2.6

68. *See id.*

Publicity is aimed at informing the public of the services the lawyer can offer rather than the marketing of legal services.

III. THE UNITED KINGDOM

The United Kingdom is divided into the three separate jurisdictions of England and Wales, Scotland, and Northern Ireland.[69] Each jurisdiction has its own legal system and legal profession, with England and Wales and Northern Ireland recognizing the two separate categories, or branches, of barrister[70] and solicitor,[71] and Scotland recognizing the branches of advocate[72] and solicitor. Each category of the legal professions within these jurisdictions has its own code of conduct, which addresses how its members may publicize the availability of their professional services.[73]

The individual codes that govern the conduct of barristers, solicitors and advocates within the UK legal professions are quite disparate. This should be a matter of concern for UK lawyers who choose to practice outside their respective jurisdiction, since they may be subject to conflicting rules. With the EU Member States calling for facilitation of cross-border practice, it seems the legal professions within the UK should strive for uniformity among their regulatory codes.

A. England and Wales

The 1980s represented a period of review and reform of the branches of the legal profession in England and Wales. A direct result of this process was the Courts and Legal Services Act of 1990.[74] The movement toward reform began with a report issued by the Royal Commission on Legal Services for England and Wales in 1979. Three primary issues were addressed: (1) retaining the

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69. *See* HAMISH ADAMSON, FREE MOVEMENT OF LAWYERS 23 (1992).

70. Barristers are primarily advocates. Before the Court and Legal Services Act of 1990 in England and Wales, barristers had the sole right to practice before the trial courts of general jurisdiction and the appellate courts. *See* Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 CONN. J. INT'L L. 185, 186, 223-24 (1994).

71. The primary role of solicitors is that of "office lawyer" who drafts documents, advises clients and negotiates. However, solicitors are entitled to litigate cases in lower courts. *Id.* at 186.

72. The role of the advocate in Scotland is similar to that of the barrister in England and Wales and Northern Ireland. *See* ADAMSON, *supra* note 69, at 24.

73. *See infra* notes 102-34 and accompanying text.

74. *See* Hamish Adamson, *The English System*, *in* RIGHTS, LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE 45 (Mary C. Daly & Roger J. Goebels eds., 1995).

professional division between barristers and solicitors; (2) retaining the barristers' monopoly of right of audience before the high courts; and (3) retaining the solicitors' monopoly over conveyancing work.[75] The conclusion of the Royal Commission was that the status quo should be maintained. This recommendation was accepted in 1983 by Prime Minister Thatcher's government through the Benson Report.[76] However, the following year a bill was advanced which took the form of the Administration of Justice Act of 1985. This Act removed the conveyancing monopoly enjoyed by solicitors and permitted competition between solicitors and licensed conveyancers.[77]

When the Law Society in England and Wales[78] became aware of the government's intent to break up the solicitors' conveyancing monopoly, it announced that the traditional restrictions on solicitor advertising would be lifted.[79] With the exception of television, a restriction that was eliminated in 1987, solicitors would be permitted to advertise in almost all media.[80] The Law

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75. *See* Michael Zander, *The Thatcher Government's Onslaught on the Lawyers: Who Won?*, 24 INT'L LAW. 753, 753 (1990). The tasks of the Royal Commission were as follows:

> To inquire into the law and practice relating to the provision of legal services in England, Wales and Northern Ireland and to consider whether any, and if so what, changes are desirable in the public interest in the structure, organisation, training, regulation of and entry to the legal profession, including the arrangements for determining its remuneration . . . and in the rules which prevent persons who are neither barristers nor solicitors from undertaking conveyancing . . . .

C.D. Wickenden, *Royal Commission on Legal Services: Pause for Reflection-II*, 123 SOLIC. J. 260 (1979). Conveyancing deals with the examination of property titles and the drawing of documents for the conveyance of property.

76. *See* Zander, *supra* note 75, at 754.

77. *Id.* at 754-55.

78. The Law Society of England and Wales is the official representative body for solicitors, having authority over education admission procedures and disciplinary procedures for solicitors. *See* CCBE COMPENDIUM, *supra* note 44, at England and Wales (Solicitors) 25 (Supp. Apr. 1993); M.J. Quinn, Note, *Reform of the Legal Profession in England and Wales*, 12 N.Y.L. SCH. J. INT'L & COMP. L. 237, 248-49 (1991).

79. *See* S.H. BAILEY & M.J. GUNN, SMITH & BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM, 137-38 (2d ed. 1991); Zander, *supra* note 75, at 755. *But see* Lauren Dobrowalski, Note, *Maintaining the Dignity of the Profession: An International Perspective on Legal Advertising and Solicitation*, 12 DICK. J. INT'L L. 367, 375-77 (1994) (discussing how the British legal profession was forced to market itself in response to the downturn in the real-estate market). Prior to the Law Society's decision to allow individual advertising by solicitors, the profession could make use of referral lists and collective advertising, but "touting" or soliciting business was considered to be unprofessional. *See* BAILY & GUNN, *supra*, at 137.

80. *See* Zander, *supra* note 75, at 755. The restriction on television advertising was relaxed in the 1987 Publicity Code, with direct mailing, references to the quality of a solicitor's services, and advertising by a third party also being permitted. *See* BAILEY & GUNN, *supra* note 77, at 139.

Society also announced that it "decided to press for the removal of the barristers' monopoly of rights of advocacy in the higher courts."[81] A joint committee of barristers, solicitors, and lay people was established to review this matter; however, no agreement on the issue was reached because the branches of the profession were in "irreconcilable conflict."[82]

Partially in response to this situation, the government decided to review "the fundamental issues of what activities require the services of lawyers and on what basis such services ought ideally to be provided."[83] The result of this inquiry was the publication of three Green Papers in 1989 that addressed many aspects of the legal profession and made proposals, including advertising by barristers.[84] In addition to suggesting an expansion of the right to provide conveyancing services, along with an abolition of the monopolies on the rights of audience in the courts and for judicial appointments, the Green Papers proposed relaxing the rules on advertising for barristers, making them similar to that provided for solicitors.[85] The Green Papers suggested that advertising by barristers be limited to "legal, decent, honest, and truthful" information.[86] The government thus followed the language of the British Code of Advertising Practice of the Advertising Standards Authority, implying that its principles were sufficient to govern advertising by the legal profession.[87]

The reaction in England and Wales to the Green Papers was negative. Barristers, solicitors, judges, politicians, the press, and legal institutional experts contributed to the debate.[88] With the exception of the lay press and the consumers' lobby, almost all were hostile to all or part of the Green Paper proposals.[89] Less than six months later, the government issued a report in the form of a White Paper in response to the views expressed.[90] The White Paper put forth positions that softened the Green Paper proposals and foreshadowed the

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81. *Solicitors Seek Equal Court Rights with Barristers*, L. SOC'Y GAZETTE, Mar. 28, 1984, at 858; Zander, *supra* note 75, at 756.

82. Zander, *supra* note 75, at 757.

83. *Id.*

84. *Id.* at 758, 761.

85. *See* Quinn, *supra* note 78, at 261, 265; Zander, *supra* note 75, at 758-61. The Green Papers contained four primary proposals: (1) to have rights of audience in the courts dependant on earning "advocacy certificates," which would be available to both barristers and solicitors; (2) to allow barristers to enter into partnerships or to incorporate; (3) to allow barristers to be contacted directly by the public; and (4) to consider allowing contingency fees. *See* Schwarzschild, *supra* note 70, at 220-21.

86. Zander, *supra* note 75, at 761.

87. *See* Quinn, *supra* note 78, at 265. The British Code of Advertising Practice of the Advertising Standards Authority provided that "advertising should be legal, decent, honest and truthful." *Id.*

88. *See* Zander, *supra* note 75, at 763.

89. *Id.*; *see also* Schwarzschild, *supra* note 70, at 221-22.

90. *See* Zander, *supra* note 75, at 776.

shape of the subsequent Courts and Legal Services Act of 1990.[91] Although the White Paper did not specifically mention advertising, a separate White Paper was released in July 1989, which referred to bans on advertising as anticompetitive.[92] The Bar of England and Wales, prior to the enactment of the Court and Legal Services Act of 1990, removed the absolute ban against advertising by barristers in its March 31, 1990 Code.[93]

One of the major goals of the Court and Legal Services Act of 1990 was "the opening up of the provision of legal services to increased competition by increasing the pool from which advocates could be drawn in the future."[94] Under the Act, while barristers' rights of audience remained untouched, solicitors in England and Wales satisfying special education and training requirements could obtain advocacy rights in the higher courts.[95] The Court and Legal Services Act allowed barristers to contract directly with clients, but not to "hinder the General Council of the Bar from making rules to prohibit such conduct."[96] Moreover, the Act addressed matters relating to legal education and conduct, the judiciary, multidisciplinary and multinational practice, probate contingency fees, and conveynancing.[97]

At the time of the promulgation of the Court and Legal Services Act of 1990, the Solicitors' Publicity Code was enacted.[98] The Solicitors' Publicity Code of 1990 precluded any publicity that "may reasonably be regarded as being in bad taste,"[99] or that was "inaccurate or misleading in any way."[100] It also contained

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91. *See* Courts and Legal Services Act, 1990, ch. 41 (Eng.); Schwarzschild, *supra* note 70, at 223.

92. *See* Quinn, *supra* note 78, at 277.

93. *Id.* at 277 n.305.

94. Lord Mackay of Clashfern, *Shaping the Legal Profession–Leadership and the Reform of the English Legal System*, 39 ST. LOUIS U. L.J. 437, 443 (1995).

95. *See* Schwartzschild, *supra* note 70, at 223-24. The 1990 Act provides that certain high-ranking judges in England have a veto right over the qualification standards set for the extension of advocacy rights. *Id.*

96. Quinn, *supra* note 78, at 290.

97. *Id.* at 280-90.

98. SOLICITORS' PUBLICITY CODE 1990 (with Consolidated Amendments to 1 January 1992) § 1(b), *reprinted in* THE GUIDE TO PROFESSIONAL CONDUCT OF SOLICITORS 223 (Stephen Hammett et al. eds., 6th ed. 1993). The principles contained in the Publicity Code supplement the Solicitors' Practice Rules and:

> [M]ust not be construed so as to be in breach of those rules or indeed any other professional obligation or requirement. As a matter of professional conduct the publicity of a solicitor must comply with the general law and in particular the Consumer Credit Act 1974, the Business Names Act 1985, the Companies Act 1985, the British Code of Advertising Practice and the Independent Broadcasting Authority Code of Advertising Standards and Practice for the time being in force.

Edwin Godfrey & Anne Damerell, *England and Wales*, *in* LAW WITHOUT FRONTIERS 51, 55 (Edwin Godfrey ed., 1995).

99. SOLICITORS' PUBLICITY CODE 1990 § 1(b), *supra* note 98, at 223.

detailed rules concerning the manner in which solicitors could advertise their services, such as prohibiting references to a solicitor's success rate and direct comparisons or criticisms of the charges or quality of services of another solicitor.[101]

In November 2001, the Solicitors' Publicity Code of 2001 replaced the Solicitors' Publicity Code of 1990. Deleting "bad taste" as a prohibition of publicity along with detailed rules about the manner of advertising, the Solicitors' Publicity Code 2001 simply states that "[p]ublicity must not be misleading or inaccurate."[102] The new Code prohibits unsolicited visits or telephone calls to members of the public, however, "member of the public" is narrowly construed, targeting lay individuals in its prohibition, rather than professional or business entities.[103] Publicity relating to charges must be clearly stated and publicity in electronic form is specifically recognized as falling within the Code.[104] Focusing on the international aspects of publicity, the Solicitors' Publicity Code 2001 is applicable to "solicitors, registered European lawyers and recognized bodies practicing in England and Wales; and registered foreign lawyers practicing in England and Wales in partnership with solicitors or registered European lawyers."[105] The Solicitors' Publicity Code 2001, which entered into force on November 16, 2001, provides as follows:

> *(a) Misleading or inaccurate publicity*
> Publicity must not be misleading or inaccurate.
> *(b) Clarity as to charges*
> Any publicity as to charges or a basis of charging must be clearly expressed. It must be clear whether disbursements and VAT are included.
> *(c) Name of Firm*
> A private practice must not use a name or description which is misleading. It would be misleading for a name or description to include the word "solicitor(s)," if none of the

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100. *Id.* § 1(c), at 223.

101. *See id.* § 2(c)-(d), at 224. The 1990 version of the Publicity Code permitted solicitors to identify themselves as specialists or experts and eased restrictions on attorneys' naming of clients, conducting unsolicited visits, and telephone calls with clients. *Id.* § 2(b), 3-4, at 224-25.

102. SOLICITORS' PUBLICITY CODE 2001 § 1(a) (2001), *available at* http://www.manupatra.com/downloads/code%20of%20professional%20conduct/solicitors%20publicity%20code%202001/toc.htm (last visited April 19, 2003).

103. *Id.* § 1(d)(i). Specifically excluded from "member of the public" are current clients, former clients, lawyers, existing or potential professional or business connections, commercial organizations, and public bodies. *Id.* § 1(d)(ii)(a)-(d).

104. *Id* § 1(b)-(h).

105. *Id.* pmbl.

principals or directors (or members in the case of a limited liability partnership) is a solicitor.

(d) Unsolicited visits or telephone calls

(i) Practitioners must not publicise their practices by making unsolicited visits or telephone calls to a member of the public.

(ii) "Member of the public" does not include:

(A) a current or former client;

(B) another lawyer;

(C) an existing or potential professional or business connection; or

(D) a commercial organization or public body.

(e) Addresses to the court

It is not proper for practitioners to distribute to the press, radio or television copies of a speech or address to any court, tribunal or inquiry, except at the time and place of the hearing to persons attending the hearing to report the proceedings.

(f) International aspects of publicity

Publicity intended for a jurisdiction outside England and Wales must comply with:

(i) the provisions of this code; and

(ii) the rules in force in that jurisdiction concerning lawyers' publicity.

(g) Practitioners' responsibility for publicity

A practitioner must not authorize any other person to conduct publicity for the practitioner's practice in a way which would be contrary to this code.

(h) Application

This section of the code applies to all forms of publicity including stationary, advertisements, brochures, directory entries, media appearances, press releases promoting a practice, and direct approaches to potential clients and other persons, and whether conducted in person, in writing, or in electronic form.[106]

Solicitors in England and Wales who advertise in jurisdictions outside of England and Wales must comply with the Solicitors' Publicity Code, as well as the rules relating to publicity in the jurisdiction where they advertise. This follows the mandate of the Lawyers' Home Title Directive, which subjects a

106. *Id.* § 1.

lawyer practicing under a home-country professional title to the professional rules of both the home and host Member States.[107]

Advertising by barristers in England and Wales is addressed in the Code of Conduct of the Bar of England and Wales, which contains regulatory provisions relating to the legal profession.[108] Amended on March 23, 2002, Section 710 of the Code on Advertising and Publicity provides as follows:

> 710.1 Subject to Paragraph 710.2 a barrister may engage in any advertising or promotion in connection with his practice which conforms to the British Codes of Advertising and Sales Promotion and such advertising or promotion may include:
>
> (a) photographs or other illustrations of the barrister;
> (b) statements of rates and methods of charging;
> (c) statements about the nature and extent of the barrister's services;
> (d) information about any case in which the barrister has appeared (including the name of any client for whom the barrister acted) where such information has already become publicly available or, where it has not already become publicly available, with the express prior written consent of the lay client.
>
> 710.2 Advertising or promotion must not:
>
> (a) be inaccurate or likely to mislead;
> (b) be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;
> (c) make direct comparisons with or criticisms of other barristers or members of any other profession (whether they be barristers or members of any other profession);
> (d) include statements about the barrister's success rate;
> (e) indicate or imply any willingness to accept instructions or any intention to restrict the persons from whom instructions may be accepted otherwise than in accordance with this Code;
> (f) be so frequent or obtrusive as to cause annoyance to those to whom it is directed.[109]

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107. *See supra* note 40 and accompanying text.

108. *See* CCBE COMPENDIUM, *supra* note 44, at England and Wales (Barristers) 32 (Supp. May 1993).

109. CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES § 710.1-.2 (2002), *available at* http://www.barcouncil.org.uk/document.asp?languageid=1&documentid=47 (last modified Feb. 19, 2003).

As with the 1991 version of the Code, barristers' advertising may include their photograph or illustration, fee structure, reveal the nature and extent of their services, and provide designated information about cases in which they have appeared.[110] Still specifically excluded from allowable promotional material is that which is inaccurate or likely to mislead, that which is likely to reflect negatively on the legal profession, comparisons with or criticism of other barristers, and a barrister's success rate.[111] Additionally, promotion cannot be so frequent or obtrusive as to be annoying and there can be no indication that cases would be taken other than according to the Code.[112] In the 2002 revisions to the Code, the Bar of England and Wales removed "statements about the quality of the barrister's work" and "the size or success of his practice" from the list of condemned practices.[113]

Since barristers are most often retained by the public through solicitors, most advertising by barristers takes the form of "chambers" brochures that are distributed to solicitors.[114] These brochures typically describe the barristers in a specific chamber and name their specialties.[115] Barrister advertising is usually less entrepreneurial than advertising used by solicitors, who tend to publicize the availability of their services through a wider variety of methods.[116]

B. Scotland

The legal system in Scotland is primarily based on Roman law rather than English common law.[117] Scotland's laws, legal profession and courts are separate and independent from England and Wales.[118] The jurisdiction of Scotland currently allows advertising by both solicitors and advocates.

The two branches of the profession in Scotland have their own governing bodies with separate rules regarding publicity.[119] Advertising by solicitors is governed by the Solicitors (Scotland) (Advertising and Promotion) Practice Rules 1995, providing in part as follows:

> 4. Subject to Rules 5 and 8 hereof a solicitor shall be entitled to promote his services in any way he thinks fit.

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110. *Id.* § 710.1(a)-(d).
111. *Id.* § 710.2(a)-(d).
112. *Id.* § 710.2(e)-(f).
113. *See id.* § 710.2.
114. BAILEY & GUNN, *supra* note 77, at 140.
115. Schwarzschild, *supra* note 70, at 227.
116. BAILEY & GUNN, *supra* note 77, at 139; Schwarzschild, *supra* note 70, at 227.
117. *See* Quinn, *supra* note 78, at 237 n.1.
118. *Id.*
119. CCBE COMPENDIUM, *supra* note 44, at Scotland (Solicitors) 9 (Supp. Apr. 1993).

5. A solicitor shall not make a direct or indirect approach whether verbal or written to any person whom he knows or ought reasonably to know to be the client of another solicitor with the intention to solicit business from that person.
6. Rule 5 shall not preclude the general circulation by a solicitor of material promoting that solicitor's services whether or not the persons to whom it is directed are established clients.
7. A solicitor shall not be in breach of these rules by reason only of his claim to be a specialist in any particular field of law or legal practice, provided that:
   (a) the onus of proof that any such claim is justified shall be on the solicitor making it; and
   (b) an advertisement of or by a solicitor or other material issued by or on behalf of a solicitor making any such claim shall conform otherwise to the requirements of rule 8.
8. An advertisement of or by a solicitor or promotional material issued by or on behalf of a solicitor or any promotional activity by or on behalf of a solicitor shall be decent and shall not:
   (1) claim superiority for his services or practice over those of or offered by another solicitor; or
   (2) compare his fees with those of any other solicitor; or
   (3) contain any inaccuracy or misleading statement; or
   (4) be of such nature or character or be issued or done by such means as may reasonably be regarded as bringing the profession of solicitors into disrepute; or
   (5) identify any client or item of his business without the prior written consent of the client; or
   (6) be defamatory or illegal.[120]

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120. SOLICITORS (SCOTLAND) (ADVERTISING AND PROMOTION) PRACTICE RULES 1995 Rs. 4-8 (1995). Rule 9 provides as follows:

> Any advertisement, promotional material or promotional activity of or by a solicitor (whether or not he be named or referred to therein) and any advertisement, promotional material or promotional activity of or by a third party which relates to the services of a solicitor shall be presumed to have been issued or promoted with the authority of the solicitor.

Id.

As was the case with the preceding Practice Rules in 1991, the 1995 rules on advertising and promotion prohibit inaccurate, misleading, defamatory, or illegal statements, and preclude claims of superiority over or comparisons of fees with those of other solicitors.[121] The 1995 Rules also retain condemnation that would bring the profession of solicitors into disrepute, and limit the identification of clients or items of business.[122] Along with the 1995 Practice Rules, the Council of the Law Society of Scotland approved a professional Practice Guideline addressing the advertising of solicitors' fees. The guideline provides that any such advertisement for services "must show the full range of fees chargeable for such work and not simply the cheaper end of the range. The advertisement must also include mention of outlays and VAT with no less prominence than the fees."[123]

Similar to England and Wales, the public in Scotland most often retains advocates through solicitors.[124] Additionally, advocates may accept instructions from members of other approved professional bodies such as accountants and surveyors.[125] While advocates in Scotland are not permitted to "tout for work or do anything to draw attention to him or herself in his or her professional capacity which might impair public trust in him or herself or the profession of advocate,"[126]

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121. *See id.* Rs. 8(1)-(3), (6).

122. *Id.* R. 8(4)-(5).

123. *Id.* at Prof'l Practice Guideline, Guideline on Adver. Fees.

124. *See* CCBE COMPENDIUM, *supra* note 44, at Scotland (Advocates) 8 (Supp. Apr. 1993); *supra* note 114 and accompanying text.

125. *See* CCBE COMPENDIUM, *supra* note 44, at Scotland (Advocates) 8 (Supp. Apr. 1993).

126. Ronald Mackay, *Advocates in Scotland, in* THE LEGAL PROFESSIONS IN THE NEW EUROPE 360, 366 (Alan Tyrrell et al. eds., 1996) [hereinafter LEGAL PROFESSIONS]. The advocates Guide to Professional Conduct provides as follows at Rule 10:

> *10. Advertising, Publicity, Touting and Relations with the Media*
>
> 10.1 The basic rule is that an advocate may not, in any way or any form, tout for professional work or do anything to draw attention to himself in his professional capacity which would be liable to impair public trust in himself or his profession.
>
> 10.2 An advocate must also bear in mind at all times his duty to maintain the trust of the client and to preserve the confidential character of information disclosed to him in confidence . . . .
>
> 10.3 For these reasons, an advocate should not write, broadcast or give interviews to the media about matters in which he is engaged as counsel, or talk about his general practice. He should not make "statements to the press" or give press conferences in relation to such matters. Even when a case is over, or a matter completed, he should confine himself to matters of public record.
>
> 10.4 An advocate may not appear robed on television or act the part of counsel in film, on television or radio.
>
> 10.5 Subject to the foregoing rules, which must be carefully observed in the spirit as well as the letter, there is no rule which prevents an advocate from

advertising, subject to regulation, is permitted. In 1991, the Faculty of Advocates[127] determined that advocates could advertise, but any advertising must "be consistent with professional standards and be of good taste, and it should be approved by the Dean."[128] Presently, the advocate rules relating to advertising and publicity are the subject of revision[129] before the Professional Practices Committee.[130]

C. Northern Ireland

The laws of Northern Ireland, based on English common law and its legal system, are closely aligned with the legal system of England and Wales.[131] However, similar to Scotland, Northern Ireland's laws, legal profession, and courts are separate from those in England and Wales and joined with Britain at the level of the House of Lords.[132] While Solicitors in Northern Ireland are currently

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describing himself, or being described as "Advocate" and/or "Queen's Counsel," or from writing or speaking on a subject connected with the law.

10.6 In practice, it is sometimes difficult to determine the point at which use of the titles "Advocate" or "Queen's Counsel" is, or may be interpreted as being, a form of touting. In deciding where to draw the line (for example, in printing or use of notepaper, personal cards, cheques, etc.), an advocate should ask himself three questions –

(a) is it useful or relevant to the recipient or bearer to know that I am an advocate or Queen's Counsel;

(b) is the use of those titles liable to be interpreted as a form of touting, even if I do not intend it to be so; and

(c) would members of other professions use equivalent titles in similar circumstances?

GUIDE TO PROFESSIONAL CONDUCT R. 10 (1988).

127. The Faculty of Advocates is the governing professional body for advocates in Scotland. The Dean of Faculty serves as its head, and since 1993 he is accompanied by an elected Faculty Council. *See* CCBE COMPENDIUM, *supra* note 44, at Scotland (Advocates) 19 (Supp. Apr. 1993).

128. *See* LEGAL PROFESSIONS, *supra* note 126, at 367. Upon submitting to the Dean, "[i]f a proposed advertisement is distasteful or misleading it would be liable to be vetoed." Hill, *supra* note 7, at 417 (quoting letter from R. Marrin for J. Raymond Doherty, Clerk of Faculty, Faculty of Advocates, to Louise Hill (July 3, 1995)).

129. *See* Facsimile from Scott Breckenridge, Faculty of Advocates, to Louise Hill, Professor of Law, Widener University School of Law (June 2, 2002) (on file with author).

130. The Professional Practices Committee is one of the new committees set up by the Faculty as a result of recent restructuring. *See* E-mail from Veronica Phillips, Faculty of Advocates, to Louise L. Hill, Professor of Law, Widener University School of Law (Feb. 27, 2002) (on file with author).

131. *See* CCBE COMPENDIUM, *supra* note 44, at Northern Ireland (Solicitors) 8 (Supp. Oct. 1993).

132. *See* Quinn, *supra* note 78, at 237 n.1.

permitted to advertise, barristers are not. The Solicitors Practice Regulations of 1997, which are a consolidation and simplification of "early regulations with the principal aim of regulating the message, not the medium,"[133] provide in part as follows:

> 4. A solicitor may employ advertising, public relations and marketing technique to promote his practice by any medium, including the press and electronic media, provided the content of any advertisement or public relations or marketing material or activity:
>
> (a) is not of such a nature as to bring the profession into disrepute;
>
> (b) does not contain any inaccuracy or misleading or unjustifiable statement;
>
> (c) does not advertise fees or compare fees with other solicitors; and
>
> (d) does not amount to applying for or seeking instructions for business in such a manner, or doing or permitting in the carrying on of his practice any such act or thing, as may reasonably be regarded as soliciting business or as attracting business unfairly.
>
> 5. A solicitor may identify a client or items of a client's business in advertising, public relations or marketing material produced to promote his practice provided that:
>
> (i) the client gives written consent; and
>
> (ii) any such identification is not likely to prejudice the client's interests.[134]

The 1997 regulations retain the condemnation of inaccurate and misleading statements found in the 1993 regulations, as well as a prohibition of fee advertising, comparing fees with those of other solicitors, and that which would be harmful to the reputation of the legal profession.[135] Furthermore, the revised regulations retain a prohibition against the unfair solicitation of business,[136] but the circumstances under which a client or client's business may be

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133. Facsimile transmission from Suzanne Bryson, The Law Society of Northern Ireland, to Louise L. Hill, Professor of Law, Widener University School of Law (Jan. 29, 2002) (on file with author).

134. SOLICITORS (ADVERTISING, PUBLIC RELATIONS AND MARKETING) PRACTICE REGULATIONS 1997 Rs. 4-5 (1997).

135. *See* SOLICITORS' (ADVERTISING AND PUBLIC RELATIONS) PRACTICE (AMENDMENT) REGULATIONS, Reg. 7(b)-(e) (1993) (N.Ir.) [hereinafter PRACTICE REGULATIONS OF 1993].

136. *See* SOLICITORS' (ADVERTISING) PRACTICE REGULATIONS, Reg. 4 (1989) (N.Ir.).

revealed have been changed. Included in these changes to the Regulations is a prohibition of statements that are unjustified.[137]

An amendment to the Solicitors Practice Regulations in 1998 provides that "a solicitor shall not, directly or indirectly, make or offer to make any payment to or on behalf of any person for the purpose of obtaining or retaining instructions from that person or for the purpose of securing the transfer of that person's instruction from another solicitor."[138] An amendment in 1994 required that any proposed fees be in writing and "clearly indicate separately the solicitors fees, VAT and outlay."[139]

At the present time, barristers in Northern Ireland are not permitted to tout for business[140] or to advertise.[141] As to what constitutes touting, a "barrister's conscience should be the guide."[142] However, several draft regulations exist

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137. *See* PRACTICE REGULATIONS OF 1993, *supra* note 135, Reg. 7(2)(a).

138. SOLICITORS PRACTICE (AMENDMENT) REGULATION 12A (1998).

139. SOLICITOR'S ADVERTISING (AMENDMENT) REGULATION 5(ii) (1994). Regulation 5 of the Principal Regulations was substituted, in part, with the following:

> 5(i) A solicitor may, if so requested by or on behalf of any person, provide a statement of proposed fees in relation to any services the solicitor is willing to provide, provided always that where the services to be provided by the solicitor involve the sale and/or purchase of domestic property (whether by transfer, conveyance, building agreement, lease or howsoever) then and in such circumstances a solicitor shall, in all cases, immediately following receipt of instructions, and whether requested to do so or not, provide a statement of his proposed fees, or an indication of the manner in which such fees will be calculated, together with VAT and outlay and such statement or indication shall specify at which point in the transaction payment of outlays and fees will from time to time be required.
>
> 5(ii) Any such statement of proposed fees or indications of charges shall be in writing and shall clearly indicate separately the solicitors fees, VAT and outlay.

Id. Reg. 5(i)-(ii).

140. The Regulations of the Inn of Court of Northern Ireland provides as follows at 28.01:

> It constitutes professional misconduct for a barrister to tout for business and a barrister may not do or cause to be done on behalf of a barrister anything for the purpose of touting whether directly or indirectly or which is likely to lead to the reasonable inference that it was done for such purpose.

REGULATIONS OF THE INN OF COURT OF NORTHERN IRELAND Reg. 28.01 (1990) [hereinafter REGULATIONS OF THE INN OF COURT].

141. The Regulations of the Inn of Court of Northern Ireland provides as follows at 29.01: "A barrister may not do or cause to be done on behalf of that barrister anything with the primary motive of personal advertisement or anything likely to lead to the reasonable inference that it was so motivated." *Id.* Reg. 29.01.

142. *Id.* Reg. 28.02. Examples of conduct that can be construed as touting are as follows:

(a) Quoting or accepting fees which are less than the recognized "going rates."

which would remove the advertising ban and permit a barrister to engage in regulated advertising and promotion. The draft regulations further address a barrister's use of the Internet and its impact on solicitation and advertising. With regard to a barristers' Internet presence, the draft regulations would add a section condoning the use of websites, providing as follows:

> 28.03 The establishment and maintenance of a page on the Internet is not deemed to be a breach of this Code with respect to touting or advertising provided that the page is maintained in accordance with existing guidelines issued from time to time by the Bar Council.[143]

The draft regulations also propose that current section 29.01 be deleted,[144] and replaced with the following:

> 29.01 There shall be established an Advertising Standards Committee of the Bar Council nominated for that purpose in order to regulate advertising under this section.
>
> 29.02 Subject to Section 29.03 a barrister in independent practice may engage in any advertising or promotion in connection with that barrister's practice which conforms to the British Code of Advertising Practice (and in the case of Overseas work conforms to any further requirements binding on that barrister under the rules of any national or local bar) and which is approved by the committee referred to in Section 29.01. Such advertising and promotion may include:

(b) Facilitating a professional client in a manner which causes the Barrister to act in an unprofessional manner by, for example:

(1) subject to Section 12.02, acting on instructions which are either not in writing or which are otherwise inadequate; or

(2) calling at the office of a solicitor for reasons other than specified at Sections 11.05 and 11.06 of this Code

(c) Making entries in the attendance book held at the Bar Library Reception to show impending visits to Courts during periods in excess of the following two working days.

(d) Making a habit of telling a solicitor that although unable to accept a brief which is on offer he or she will arrange for a colleague to accept it.

Id.

143. Draft Regulations of the Inn of Court of Northern Ireland Reg. 28.03 (2002) [hereinafter Draft Reg. 2002].

144. *See supra* note 141.

(a) photographs or other illustrations of the barrister;
(b) statements about the nature and extent of the barrister's services;
(c) with that client's express written consent the name of any professional or lay client.

29.03 Advertising or promotion must not:
(a) be inaccurate or likely to mislead;
(b) be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;
(c) make comparisons with or criticisms of other barristers or members of any other profession;
(d) include statements about the quality of the barrister's work, the size or success of his practice or his success rate;
(e) indicate or imply any willingness to accept a brief or instructions or any intention to restrict the persons from whom a brief or instructions may be accepted otherwise than in accordance with this Code;
(f) be so frequent or obtrusive as to cause annoyance to those to whom it is directed.[145]

The Draft Regulations are similar but not intended to replicate provisions regulating advertising and promotion for barristers in England and Wales.[146] The proposals for barristers in Northern Ireland would preclude advertising that is inaccurate or likely to mislead, likely to bring the legal profession into disrepute, makes comparisons or criticizes other barristers, or addresses the size or success of the barrister's practice.[147] Advertising cannot be so frequent or obtrusive to be annoying, nor can it indicate that cases would be accepted in a manner not in accordance with the Code.[148] The draft regulations represent a significant departure from current regulations, which prohibit a barrister from advertising and which limit the barrister's ability to publish and broadcast information to the public.[149]

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145. Draft Reg. 2002, *supra* note 143, Reg. 29.01-.03.
146. *See supra* note 109 and accompanying text.
147. *See* Draft Reg. 2002, *supra* note 143, Reg. 29.03(a)-(d).
148. *Id.* Reg. 29.03(e)-(f).
149. While a barrister may publish "any law book or article in any law magazine intended for use of lawyers or students of the law," a barrister may not publish or broadcast "any particulars of any matters on which he has been or is currently or may in the future be engaged as counsel." REGULATIONS OF THE INN OF COURT, *supra* note 140, Regs. 30.01, 30.03. The Regulations further provide that "[a] barrister may lecture on a legal subject to

IV. FRANCE

Just as review and reform of the legal profession occurred in England and Wales, similar reformative steps regarding the legal profession commenced in France. In response to the Lawyers' Services Directive, the Diploma Directive, decisions of the European Court of Justice,[150] as well as the need to prepare France for a single European market, the French National Assembly passed a law reforming the legal profession in France on December 31, 1990.[151] Prior to the 1990 reform, the French legal profession[152] was divided into three groups: (1) *avocat*;[153] (2) *notaire*;[154] and (3) *conseil juridique*.[155] The 1990 law merged the

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persons engaged in serious study or as part of an educational course but not at a function that is primarily social in nature." *Id.* Reg. 30.04. Regarding broadcasting on radio and television, a barrister is limited in that he:

> (a) May broadcast in his own name on a non-legal subject but may not disclose that he is a barrister.
> (b) May not appear in robes or act the part of a barrister.
> (c) May not broadcast on any matters in which he has been or may be engaged as a barrister.
> (d) May not broadcast about his practice at the Bar.

Id. Reg. 30.05.

150. *See supra* notes 2-4; *see also* John M. Grimes, Note, *"Une et Indivisible"–The Reform of the Legal Profession in France: The Effect on U.S. Attorneys*, 24 N.Y.U. J. INT'L L. & POL. 1757, 1765, 1773-74 (1992); Jeffrey Mendelson, *European Court of Justice: Paris Bar Rule Violates Right of Establishment*, 26 HARV. INT'L L.J. 562, 566-68 (1985).

151. Loi No. 90-1259 du 31 decembre 1990, Portant reforme de certaines professions judiciares et juridiques, 219 J.O., 5 janvier 1991 p. 219, 1991 D.S.L. 81.

152. The various types of lawyers in France are referred to as *auxiliaries de justice*. *See* CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 111 (1993). It has been said that "[t]here is no general concept of legal profession in France." RENE DAVID, ENGLISH LAW AND FRENCH LAW 49 (1980). The 1990 reform attempted to "modernize the splintered French legal profession." Grimes, *supra* note 150, at 1765. The law has been described in the following manner:

> The 1990 reform prevents anyone from giving legal advice or drafting legal documents on a regular and remunerative basis unless the person meets certain conditions. Those conditions include having a formal academic education in the law and a diploma. While exceptions to the new rule are numerous, the days when an astrologer could dispense legal advice and draft legal documents seem to have disappeared.

Ronald P. Sokol, *Reforming the French Legal Profession*, 26 INT'L LAW. 1025, 1029-30 (1992).

153. Prior to 1971, the role of the *avocat* was to give advice and assistance. *See* DADOMO & FARRAN, *supra* note 152, at 114. In 1971, the role of the *avocat* was extended to include the function of representation, which was previously reserved for the professions of *avoue pres le tribunal de grande instance* (*avoue*) and *agree pres les tribunaux de commerce* (*agree*). *Id.* The 1971 law essentially merged the profession of avocat with those of avoue and agree, abolishing their professional distinctions. *Id.* at 118-19.

avocat group with the *conseil juridique* group to form a revised category of *avocat*.[156] Because the Lawyers' Directive and Draft Establishment Directive[157] being circulated recognized only the French *avocat* as a lawyer,[158] a reconfigured classification of *avocat* in the 1990 reform helped French lawyers compete in the single European market.[159]

In addition to merging the legal professional classifications of *avocat* and *conseil juridique*, the 1990 reform outlined requirements for admission to the profession and established a French National Bar Council.[160] The 1990 statute aimed "to ensure that legal advice is given, and legal documents drafted, only by properly regulated professionals."[161] By law, the French National Bar Council is authorized to set standards for the profession as a whole and to oversee an examination process implementing both the Diploma Directive and requirements for new *avocats*.[162] The advent of the French National Bar Council–a powerful association of national scope–represented a "departure from past practice."[163]

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154. The *notaire* serves as legal advisor, with the primary function of drafting enforceable and authentic legal documents. *Notaires* have a monopoly of practice in the areas of conveyances, marriage settlements, and successions. *Id.* at 123.

155. Prior to 1972, individuals, other than *avocats* and *notaires*, that gave legal advice for remuneration were not regulated. ANDREW WEST ET AL., THE FRENCH LEGAL SYSTEM: AN INTRODUCTION 114 (1992). Such individuals usually referred to themselves as *conseils juridiques*. *Id.* The 1972 law set down criteria for the profession of *conseil juridique*, requiring a four-year law degree, three years of practice experience, registration with the local *procureur de la republique*, and conduct and morality requirements similar to those for *avocats*. *See* DADOMO & FARRAN, *supra* note 152, at 113.

156. *See* DADOMO & FARRAN, *supra* note 152, at 113, 117. The rights previously enjoyed by *avocats* and *conseils juridiques* as separate entities were given to all members of the merged professions of *avocat*. *See* WEST ET AL., *supra* note 155, at 117. The law of 1990 requires that new advocates be either French, from an [EU] Member State, or from a *unite territoriale* that extends reciprocity to French lawyers. *See* Grimes, *supra* note 150, at 1767.

157. *See supra* note 33.

158. *See supra* note 16.

159. A motivation for the 1990 reform was "a determination that the traditions of the legal profession should not be allowed to shackle [lawyers] in competing for legal work after 1992." WEST ET AL., *supra* note 155, at 116. The 1990 reform allowed more French lawyers to qualify for the advantages of cross-border practice and helped foreign lawyers that were already practicing in France. However, the reform worked to the disadvantage of new lawyers outside the EU who might want to practice in France. *See id.* at 117-18.

160. *Id.* at 121. The French National Bar Council, composed of 60 members who are elected for three-year terms, is intended to be representative of the various bar associations in France. *See id.*; CCBE COMPENDIUM, *supra* note 44, at France 20 (Supp. Oct. 1993).

161. *See* WEST ET AL., *supra* note 155, at 116.

162. *See id.* at 121; *see also* Grimes, *supra* note 150, at 1772.

163. Grimes, *supra* note 150, at 1772.

VI. CONCLUSION

Publicity rules promulgated by the individual bars and Law Societies of the UK vary considerably in both breadth and scope. While there has been significant change to the communication rules of some UK legal professions to date, review and revision of these regulatory measures will likely continue. Although not exclusively the case, the tide of change among the legal professions' publicity rules is one of liberalization and simplicity. Using the revised CCBE Code and the Solicitors' Publicity Code for England and Wales 2001 as an illustration, a workable approach seems to be that if a communication is not false or misleading, it should be allowed.

With increased use of electronic communications, cross-border practice, and changes to the CCBE Code, the legal professions of the UK need to harmonize their standards. A uniform and simplistic approach to lawyer advertising is important to the legal professions in the UK and throughout the EU, since lawyers engaging in international practice currently are bound to both home-state and host-state rules. Ideally, the various legal professions should harmonize their publicity rules applicable to lawyers. If this is not possible, the professions should at least defer one state's publicity rules to that of another. With de-emphasized borders and open communications, both the legal professions and the public at large are best served by parallel standards, which give consumers access to available information that is accurate and not misleading.

