

Penn State Dickinson Law

From the Selected Works of Laurel S. Terry

1993

An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct

Laurel S. Terry



PennState
Dickinson Law

Available at: https://works.bepress.com/laurel_terry/44/

THE GEORGETOWN JOURNAL OF LEGAL ETHICS

VOL. VII, NO. 1
SUMMER 1993

AN INTRODUCTION TO THE EUROPEAN COMMUNITY'S
LEGAL ETHICS CODE PART I: AN ANALYSIS OF THE
CCBE CODE OF CONDUCT
Laurel S. Terry

ARTICLES

An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the *CCBE Code of Conduct*

LAUREL S. TERRY*

I. WHO PROMULGATED THE <i>CCBE CODE OF CONDUCT</i> AND WHY?	5
II. TO WHOM DOES THE <i>CCBE CODE OF CONDUCT</i> APPLY?	10
III. WHAT IS THE BINDING FORCE OF THE <i>CCBE CODE OF CONDUCT</i>	11
IV. WHAT TYPE OF CODE IS THE <i>CCBE CODE OF CONDUCT</i> ? ...	15
V. AN ANALYSIS OF THE SUBSTANTIVE PROVISIONS OF THE <i>CCBE CODE OF CONDUCT</i>	17
A. A Description of the Contents of the <i>CCBE Code of Conduct</i>	18
B. A Discussion of the Substance of the <i>CCBE Code</i>	18
1. The "Preamble" of the <i>CCBE Code</i>	19
2. The "General Principles" in the <i>CCBE Code</i>	23

* Professor of Law, The Dickinson School of Law. B.A. 1973, University of California, San Diego; J.D. 1980, University of California, Los Angeles.

I would like to thank the Fulbright Commission for a research grant to work on this article and the innumerable individuals who provided assistance or information, including Dorothy Margaret Donald-Little, Drs. Nicholas and Julie Simon, Dr. Peter Fischer, and the officials of the CCBE, especially including John Toulmin, Q.C., Msr. Denis de Ricci, Dr. Karl Hempel, Dr. Georg Frieders, and Mmse. Janice Webster. In addition, I would like to thank Professor Roger Goebel, Dr. Ena Marlin Bajons, Dr. Patrick Del Duca, Professor Harvey Felman, and Dr. Howard Warshaw for their comments on this article. I would also like to acknowledge the invaluable assistance of my research assistant Elizabeth Dalberth.

3. The "Relations With Clients" Provisions in the <i>CCBE Code</i>	29
4. The "Relations With the Courts" Provisions in the <i>CCBE Code</i>	35
5. The "Relations Between Lawyers" Provisions in the <i>CCBE Code</i>	39
6. Conclusion	43
 VI. ANALYZING THE SUBSTANCE OF THE <i>CCBE CODE</i> PROVISIONS: DO THE <i>MODEL RULES</i> AND THE <i>CCBE CODE</i> CONCEPTUALIZE THE ROLE OF THE ATTORNEY DIFFERENTLY?	45
A. The Thesis: Using <i>CCBE Rule 2.1</i> to Articulate the Differing Conceptions of the Role of the Lawyer	46
B. Specific Provisions from the <i>CCBE Code</i> Which May Illustrate the Thesis that the <i>CCBE Code</i> and <i>Model Rules</i> Are Based On Differing Views of the Role of the Lawyer.	51
 VII. CONCLUSION.	59
 APPENDIX A: A COMPARISON OF THE <i>CCBE CODE OF CONDUCT</i> WITH THE <i>ABA MODEL RULES OF PROFESSIONAL CONDUCT</i>	60
 APPENDIX B: <i>CCBE CODE OF CONDUCT</i>	63
 APPENDIX C: <i>EXPLANATORY MEMORANDUM AND COMMENTARY ON THE CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY</i>	76

I have taught legal ethics for seven years and still do not fully understand the American Bar Association's (ABA) *Model Rules of Professional Conduct* (*Model Rules*) Rule 8.5.¹ You remember . . . that's the rule that states that a lawyer admitted to practice in one jurisdiction is subject to the disciplinary authority of that jurisdiction even when the lawyer is engaged in practice in a different jurisdiction. As the Comment to Rule 8.5 points out, lawyers frequently practice now in more than one jurisdiction. And the rules of professional conduct in the two jurisdictions may impose conflicting obliga-

1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1983) [hereinafter MODEL RULES]. A proposal to amend Rule 8.5 will be considered at the August, 1993 ABA Annual Meeting. [9 Current Reports], *Laws. Man. on Prof. Conduct* (ABA/BNA) 11:173-174 (June 30, 1993).

tions on the lawyer. Imagine, for example, a lawyer licensed in both New Jersey and the District of Columbia who learns of a current client's intent to commit financial fraud. Must the lawyer reveal the client's fraud or must the lawyer remain silent? In fact, both silence and revelation are required.² A solution to the dilemma of how to simultaneously talk and keep silent is offered in the Comment to Rule 8.5. This Comment, which states that "applicable rules of choice of law may govern the situation,"³ requires mastery of yet another subject (perhaps under time pressure) and seems less than ideal.

Ironically, the ethical dilemmas posed by a multi-state practice may eventually be easier to resolve when the multi-state practice arises between France and Germany than when the multi-state practice is between New Jersey and the District of Columbia. The reason why there might be fewer dilemmas in Europe is because there is now a legal ethics code for lawyers in the European Community that attempts to mitigate the difficulties which could result if a lawyer is subject to conflicting ethics rules. This legal ethics code is called the *CCBE Code of Conduct* (*CCBE Code*).⁴

2. Compare D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1991) (Confidentiality of Information) with N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1984) (Confidentiality of Information).

3. MODEL RULES Rule 8.5 cmt.

4. See CCBE CODE OF CONDUCT (1988) [hereinafter CCBE CODE]. This CCBE ethics code has been reprinted in several sources. See STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 526 (1993); John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673, 686 (1991-92) (reviewing the history and provisions of the *CCBE Code*); CROSS BORDER PRACTICE COMPENDIUM ch. 4 at 15 (Dorothy Margaret Donald-Little ed., 1991) [hereinafter CCBE COMPENDIUM]. The *CCBE Code* is reproduced in its entirety, *infra* Appendix B; see also *infra* Appendix A (comparing the *CCBE Code* and the *Model Rules*). The code is also available directly from the CCBE, Rue Washington 40, B-1050 Brussels, Belgium. In Europe, this code is typically referred to as either the "CCBE Code" or the "Common Code."

The *CCBE Code of Conduct* has been discussed in several books and articles, although few have focused exclusively on it. The resources discussing the *CCBE Code* include: HAMISH ADAMSON, FREE MOVEMENT OF LAWYERS (Butterworths ed. 1992) [hereinafter ADAMSON] (describing forms of practice of the legal profession in the EC); Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556 (1991-92) [hereinafter Goebel, *Lawyers in the European Community*] (written by one of the leading U.S. experts, this article focuses primarily on the substantive EC law governing lawyers, but includes a discussion of the *CCBE Code*, including jurisdictional issues); Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443 (1989) [hereinafter Goebel, *Professional Qualification*] (discussing transnational legal practice); Geoffrey Hazard, *Ethics*, NAT'L L.J., March 30, 1992, at 13 (noting the similarities between the *CCBE Code* and *Model Code*); Nicholas J. Skarlatos, *European Lawyer's Right to Transnational Legal Practice in the European Community*, 1 LEGAL ISSUES EUR. INTEGRATION 49 (1991) (commenting on the difficulties of transnational legal practice and reviewing measures taken to improve the system); Toulmin, *supra*. In addition to these articles, numerous articles on specific *CCBE Code* provisions and the substantive EC law regulating lawyers are found in the journals *Lawyers in Europe* and the *International Financial Law Review*.

In addition to the above resources, which discuss the *CCBE Code* in at least some depth, there are

This is the first article of a two-part series which introduces and analyzes the legal ethics provisions of the European Community (EC). The first four sections of this first article offer information about the background, author-

a number of resources that have focused on the substantive European Community law governing lawyers, and in doing so, have mentioned the *CCBE Code* in passing. These resources include the following: H. Brankhorst, *Freedom of Establishment and Freedom to Provide Services under the EEC-Treaty*, 12 COMMON MKT. L. REV. 245 (1975) (commenting on the impact of several judgments handed down by the International Court of Justice and several articles of the EEC Treaty); H. Brankhorst, *Lawyers' Freedom Under the New Directive*, 2 EUR. L. REV. 224 (1977) (discussing the legal problems & the individual provisions of Directive 77/249/EEC); D.A.O. Edward, *European Community Directive — The Provision of Services by Lawyers*, 22 J. L. SOC'Y SCOT. 188 (1977) (reviewing and evaluating the history and provisions of the Lawyers' Services Directive); Horst Eidenmüller, *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 (1990); Elizabeth Freeman, *A Common Market for Professionals?*, 33 CURRENT LEGAL PROBS. 57 (1980) (discussing issues related to the right of establishment and the free movement of services, particularly with regard to decisions of the European Court); Jacqueline Friedlander, Note, *Securing a Lawyer's Freedom of Establishment within the European Economic Community*, 10 FORDHAM INT'L L.J. 733 (1987) (discussing freedom of establishment problems); Rainier Hofmann, *1992 and the Freedom of Establishment for Lawyers*, INT'L LEGAL PROC., Mar. 1990, at 7 (defining and discussing lawyers' freedom of establishment); Julian Lonbay, *Cross-Frontier Provision of Services by Lawyers*, 13 EUR. L. REV. 347 (1989) (examining European Court Case 427/85 (1988), *Commission v. Germany*, and discussing its impact on the cross-border practice of law); Valerie Pease, *Commission v. Germany*, 22 INT'L LAW. 543 (1988); Rebecca M.M. Wallace, *Lawyers' Services with the Common Market*, 121 SOLIC. J. 843 (23/30 Dec. 1977) (discussing the *Lawyer's Services Directive*); Todd Michael Saunders, *The EEC and the USA: Will the Gates be Opened for American Law Firms in 1992*, 3 TEMP. INT'L & COMP. L.J. 1919 (1989) (considering the impact of EC restrictions on the operation of a U.S. firm within the community); Bernhard Schloh, *Freedom of Movement of Lawyers Within the European Economic Community*, 9 ST. LOUIS U. PUB. L. REV. 83 (1990) (discussing efforts of the EC to achieve free movement of lawyers within the EC); Gregory Siskind, *Freedom of Movement for Lawyers in the New Europe*, 26 INT'L L. 899 (1992) (examining the ability of the EC to integrate the legal professions of the Member States); D. B. Walters, *Uncertain Steps Towards a European Legal Profession*, 3 EUR. L. REV. 265 (1978) (discussing the shortcomings of the *Lawyer's Services Directive*); Daphne W. Gardiner, Note, *The European Community Directive Mandating Recognition of Post-Graduate Training: Are Borders Opening for European Professionals?*, 5 AM. U. J. INT'L L. & POL'Y 1109 (1990) (examining the implementation of the freedom of movement for professionals within the EC).

In addition to the above resources, there are several resources that were written before the *CCBE Code* was adopted, but still are of interest. These materials discuss the substantive law of the European Community regarding lawyers. As discussed in Part II of this article, which is forthcoming, this substantive EC law is particularly relevant when trying to determine in which situations the *CCBE Code* should be applied. This EC substantive law establishes the background against which the *CCBE Code* jurisdictional provisions must be read. These resources discussing the EC substantive law include, in addition to those already listed, the following: J.P. DE CRAYENCOUR, *THE PROFESSIONS IN THE EUROPEAN COMMUNITY: TOWARDS FREEDOM OF MOVEMENT AND MUTUAL RECOGNITION OF QUALIFICATIONS* (1982); SERGE-PIERRE LAGUETTE, *LAWYERS IN THE EUROPEAN COMMUNITY* (1987); *LEGAL TRADITIONS AND SYSTEMS: AN INTERNATIONAL HANDBOOK* (Alan N. Katz ed., 1986); LINDA S. SPEDDING, *TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES* (1987); *TRANSNATIONAL LEGAL PRACTICE: A SURVEY OF SELECTED COUNTRIES* (D. Campbell ed., 1982) [hereinafter *TRANSNATIONAL LEGAL PRACTICE I*]; John Boyd, *Mutual Recognition of Lawyers' Qualifications*, 7 BUS. L. REV. 163 (1986); Julian Lonbay, *Picking Over the Bones: Rights of Establishment Reviewed*, 16 EUR. L. REV. 507 (1991); Jeffrey Mendelsohn, *Recent Development, European Court of Justice: Paris Bar Rule Violates Right of Establishment*, 26 HARV. INT'L L.J. 562

ity, and structure of the *CCBE Code*. The fifth section of this article analyzes the substantive provisions of the *CCBE Code*. After first listing the provisions in the *CCBE Code*, the article discusses these provisions section-by-section.

The first five sections of this article are thus static and historic in nature; collectively, they afford a snapshot of the current state of the EC's ethics regulations. In contrast to the first five sections, the final section of this article offers a thesis as to why the EC's ethics code evolved as it did and why it differs from the ABA's *Model Rules* in some instances, but not all. The article then suggests that the substantive differences between the *CCBE Code* and the *Model Rules* may be a function of different ways of looking at the role of the lawyer.

Part II, which will appear in the next issue of this journal, reviews the jurisdictional provisions of the *CCBE Code* and sets forth the situations in which the *CCBE Code* might apply. (It also discusses the interplay between the jurisdictional scope of the *CCBE Code* and the substantive law of the European Community regulating lawyers.) Part II also gives a preview of a possible future direction of the *CCBE Code* by discussing the methods for enforcing the provisions of the *CCBE Code*, by looking at how the *CCBE Code* has fared in the courts, and by highlighting efforts being taken by one country — Austria — to respond to and implement the *CCBE Code*.

I. WHO PROMULGATED THE *CCBE CODE OF CONDUCT* AND WHY?

The *CCBE Code* is a product of the Council of the Bars and Law Societies of the European Community, commonly known as the CCBE.⁵ The CCBE was established in 1960 in order to study, consult, and provide representation with respect to the problems and opportunities for the legal profession arising from the 1957 Treaty of Rome which created the European Economic Community (EEC or EC)⁶. The CCBE is officially recognized by the

(1985); Rolf Waegenbaur, *Free Movement in the Professions: The New EEC Proposal on Professional Qualifications*, 23 COMMON MKT. L. REV. 91 (1986); 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 (1991-92); Peter S. Wilson, Recent Development, *EEC: Freedom to Provide Services for EEC Lawyers*, 19 HARV. INT'L L.J. 379 (1978).

5. The CCBE was formed in 1960 and is commonly known by this acronym. Although the original name of this organization [Conseil des Barreaux de la Communauté Europé] was changed in 1987 to its current name [Commission Consultative des Barreaux de la Communauté Europé], the acronym "CCBE" was officially retained and is used extensively. See CCBE COMPENDIUM, *supra* note 4, ch. 3 at 2-6; Toulmin, *supra* note 4, at 673.

6. The preamble of the Nov. 2, 1990 revised constitution sets forth its purpose as follows:

WHEREAS the Treaty establishing the European Community confers upon members of the legal profession in the member States certain rights and duties in the practice of their profession which extend throughout the territory of the European Community;

WHEREAS it is in the interest of the public, of the administration of justice and of the

European Community Commission as the representative and liaison body in the European Community for the Bars and Law Societies of the Member States.⁷ The CCBE thus represents some 300,000 lawyers in the Member States, although individual lawyers, as yet, may not join the CCBE.⁸

Bars and Law Societies that the representative bodies of the profession through the European Community should consult and act together in all matters concerning the exercise of those rights and the performance of those duties;

WHEREAS in furtherance of those purposes representatives of the legal profession met together in Brussels on 3 December 1960 to create and establish the Commission Consultative des Barreaux de la Communaute Europeene (CCBE) to constitute and be the body through which such consultation and co-operation should take place.

CCBE Const. pmbl.

The Constitution further elaborates on the objectives of the CCBE as follows:

The objects for which the CCBE is established are:

- a) To act as a joint body on behalf of the Bars and Law Societies of the European Community in all matters involving the application of Community Treaties and Community Law to the legal profession.
- b) To coordinate the views, policies and activities of the Bars and Law Societies of the European Community in their common dealings with the European institutions.
- c) To constitute the forum within which the representatives of the Bars and Law Societies may consult and work together.
- d) To further the achievement of the objectives of the Treaty of Rome in its application to the legal profession.
- e) To act as the joint body of the Bars and Law Societies of the European Community in supervising the inter-state practice of the legal profession throughout the Community.
- f) To represent the Bars and Law Societies of the European Community in their dealings with other organisations [sic] in the legal profession and with other authorities and third parties.
- g) To study and promote the study of all questions affecting the profession of lawyer and to develop solutions designed to co-ordinate and harmonise the practice of that profession.

Id. art. 1.03.

7. *Id.* art. 1.02; CCBE COMPENDIUM, *supra* note 4, ch. 3 at 4-6; Goebel, *Lawyers in the European Community*, *supra* note 4, at 601 (describing the CCBE as "an umbrella organization that groups [together] all of the [European] Community national bar associations that represent lawyers engaged in courtroom practice, as well as the law societies representing U.K. and Irish solicitors"). See also Stanley A. Crossick, *The CCBE: An EEC Bar Association*, 67 A.B.A. J. 170, 171 (1981) (explaining the role of the CCBE); DE CRAYENCOUR, *supra* note 4, at 59 (stating that several of the liaison committees of the CCBE had been so involved in the work of the EC Commission that they had almost become an extension of the Commission departments); Paula Donagby, *European Bars in Brussels*, LAWS. EUR., September/October 1991, at 18-20 (focusing in particular on coordination between national bars and the CCBE); Skarlatos, *supra* note 4, at 61 n.46; Piet Wackie-Eysten, *CCBE*, LAWS. EUR., March/April 1991, at 20, 21 (explaining the history); John Toulmin, *On the CCBE After Lisbon*, LAWS. EUR., Nov./Dec. 1992, at 8 (commenting on the special needs of the National Bars and Law Societies of the EC and the CCBE's capacity to satisfy those needs).

The CCBE has consultative status with the European Commission. See Christina Morton, *Update: Establishment Directive*, LAWS. EUR., September/October 1990, at 19; Crossick, *supra*, at 171.

8. Piet Wackie-Eysten, *CEEB*, LAWS. EUR., March/April 1991, at 20. For purposes of comparison, it may be interesting to note that in 1992, the ABA, a voluntary organization, had approximately 382,000 lawyers. ABA MEMBER'S GUIDE v (1992-93). In 1990, there were 750,000 licensed lawyers in

One of the CCBE's primary projects has been to draft a legal ethics code which could be used when lawyers, like goods, begin to cross borders freely within Europe.⁹ Although the substantive law of the European Community has in fact addressed the issue of cross-border practice, this substantive law has not addressed in detail the issue of which legal ethics provisions apply in such a situation.¹⁰ Recognizing the need for specific guidance, the CCBE decided to draft an ethics code in order to minimize the problems that could occur when lawyers are subject to two different legal ethics codes — the ethics code of the lawyer's own country and the ethics code of the country where a lawyer is working.¹¹

The work on the *CCBE Code* began in May 1982, after the CCBE resolved at its meeting in Athens to "consider the feasibility of the establishment of a code of conduct that would act as a set of principles to be translated into a disciplinary code in each Member State."¹² The first draft was prepared by Lake Falconer, a Scottish solicitor, in March 1983.¹³ At the CCBE's Plenary Session in Dublin, in April, 1983, a working group was created to study the proposed draft.¹⁴ After meeting together, this Working Group prepared a report which was considered at the November 1983 CCBE Plenary Session in Lisbon.¹⁵ As a result of the presentation made by

the US. THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 2 (5th ed. 1991).

In 1988, the per capita rate of lawyers in the Member States of Britain, Germany, Italy, and Spain was approximately 1/1000. At the same time, the per capita rate of lawyers in Austria and France was much lower, namely 1/3,500. See Karl Hempel, *Die Niederlassungsfreiheit in den Europäischen Gemeinschaften und die österreichische Anwaltschaft*, 9 ANWALTSBLATT 487, 487 (1988) [hereinafter ANW.BL.].

9. CCBE COMPENDIUM, *supra* note 4, ch. 4, at 13; Goebel, *Lawyers in the European Community*, *supra* note 4, at 601 ("The CCBE has produced one major achievement, the Code of Conduct, and is actively working on another, the draft directive on establishment . . ."); John Toulmin, *1992 Has Arrived*, LAWS. EUR., January/February 1992, at 3 (providing background on the CCBE and its projects).

10. See *supra* note 4 and articles cited therein, and Part II of this article, forthcoming (discussing the substantive law of the European Community with respect to lawyers crossing borders).

11. CCBE COMPENDIUM, *supra* note 4, ch. 4, at 13. See also Goebel, *Lawyers in the European Community*, *supra* note 4, at 580 (noting that "[t]he CCBE Code should reduce appreciably the risk of serious conflict between host and home state rules as applied to a lawyer providing cross-border services").

12. See Toulmin, *supra* note 4, at 674.

13. *Id.*

14. See letter from Marcel Veroone, former President of the Working Group that drafted the *CCBE Code of Conduct*, to Denis De Ricci, former President of the CCBE (July 21, 1992) [hereinafter Veroone Letter]. The letter was sent as an enclosure to a letter from Denis De Ricci, former President of the CCBE, to Laurel S. Terry, author (August 31, 1992) (Stephanie T. Farrior trans.) (on file with the author) [hereinafter De Ricci Letter].

The author would like to express her deep appreciation to President De Ricci for his kindness in gathering so much background information about the adoption of the *CCBE Code of Conduct* and to Mr. Veroone for his detailed answers to her questions.

15. Veroone Letter, *supra* note 14. This working group consisted of Lake Falconer, President;

the Working Group at this session, each country was asked to make their reflections available in writing. Thus, for example, the French delegation prepared a seven page document (plus appendices) in January 1984.¹⁶ Following submission of these comments, a third report concerning the new code was presented by the Working Group President, Lake Falconer, at the May 1984 Amsterdam Plenary Session of the CCBE.¹⁷ Shortly thereafter, Lake Falconer resigned as President of the Working Group and Marcel Veroone took over this position.¹⁸ Under the guidance of Marcel Veroone, the Working Group began meeting approximately every two months. Mr. Veroone asked each member of the group to choose a specific issue to study and to gather information in consultation with other colleagues regarding the existing law on that issue in all member states. After the information was assembled, that member was responsible for formulating a proposal for a rule for the new code.¹⁹ Among other resources, the Working Group members consulted the codes that had been prepared by the International Bar Association, the Union International des Avocats, and the American Bar Association.²⁰ Mr. Veroone prepared a report on the progress of the work on January 9, 1985.

Thereafter, the Working Group put together proposals for the *CCBE Code* over time, with the various sections and approaches being approved in principle by the CCBE Plenary Body. Where the Working Group's research revealed potentially divisive issues without a clear resolution, the issues were brought before the CCBE as a whole.²¹ On several issues, the comments at the CCBE Plenary Sessions led to changes by the Working Group.²² During this period, there were some additions and changes to the Working Group, but the membership remained relatively stable.²³ During

Hamish Adamson, Secretary, from Great Britain; Paul Van Mallegheem from Belgium; Rudiger Zuck from Germany; Gianni Manca from Italy; José Coelho Ribeiro from Portugal; Marti Mingarro from Spain; Joorgen Groonborg from Denmark; and Mr. Maheras from Greece. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* At this point, Herbert Verhheem from the Netherlands and Walter Semple from the United Kingdom joined the group. *Id.*

19. *Id.*

20. *Id.*; accord Toulmin, *supra* note 4, at 674.

21. See De Ricci Letter, *supra* note 14; Veroone Letter, *supra* note 14.

22. See De Ricci Letter, *supra* note 14; Veroone Letter, *supra* note 14.

23. Veroone Letter, *supra* note 14. In the Spring of 1985, Louis Schiltz from Luxembourg and Stelios Nestor and Nicholas Koutroubis from Greece joined the Working Group, and Heinz Weil from Germany replaced Rudiger Zuck. In addition, John Cooke from Ireland joined the Working Group upon completing his term as President of the CCBE itself. He was later replaced by Raymond Monahan and then John Fish. *Id.*

In 1987, also added to the Working Group were Professor Panayotis Ladas from Greece, David Anderson from the United Kingdom, Karl Hempel from Austria, Niels Fisch-Thomsen from Denmark, and Arnaldo Bolla from Switzerland. *Id.*

Further, in 1987, Denis de Ricci was elected Vice President of the CCBE. Thereafter Marcel

the final stage of the preparation, Gianni Manca of Italy took over the leadership of the Working Group.²⁴

The completed *CCBE Code* was presented to the CCBE Plenary Session in October 1988 in Strasbourg.²⁵ CCBE President Denis De Ricci had allotted four hours of discussion for consideration of the new code. However, the CCBE adopted the code in less than thirty minutes on a unanimous vote by the national delegates to the CCBE from the twelve EC Member States.²⁶ The *CCBE Code* thus represents the culmination of more than eight years of work by the Working Group and CCBE itself.

The *CCBE Code*, however, was not the first effort the CCBE had made at addressing the topic of legal ethics. In 1977, the CCBE had issued a short statement of ethics, which was entitled "The Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community."²⁷ It contained eight "Principles," most of which were later incorporated into the *CCBE Code*.²⁸ The *Declaration of Perugia* can well be compared to the ABA's *Canons of Legal Ethics*. This Declaration was

neither a full Code of Conduct, nor a binding set of rules, but a short discourse on the function of a lawyer in society, on the nature of the rules of professional conduct, and on some of the more important relevant principles of ethics such as integrity, confidentiality, independence, the corporate spirit of the profession and respect for the rules of other Bars and Law Societies.²⁹

The CCBE concluded, however, that the general statements contained in the *Declaration of Perugia* were insufficient to guide European lawyers tackling the challenges of cross-border practice. This desire for more detailed rules ultimately led to the formation of the Working Group

Veroone became head of the French Delegation and Gianni Manca from Italy took over as head of the Working Group. De Ricci Letter, *supra* note 14.

24. De Ricci Letter, *supra* note 14; Veroone Letter, *supra* note 14.

25. CCBE COMPENDIUM, *supra* note 4, ch. 3, at 13; Toulmin, *supra* 4, at 673; De Ricci Letter, *supra* note 14; Veroone Letter, *supra* note 14.

26. De Ricci Letter, *supra* note 14. Although each Member State has one delegation in the CCBE and thus one vote, the delegation consists of three to six individuals appointed by the various Bars and Law Societies within the Member States. CCBE COMPENDIUM, *supra* note 4, ch. 3, at 9.

27. CCBE COMPENDIUM, *supra* note 4, ch. 4, at 10-12.

28. Compare THE DECLARATION OF PERUGIA ON THE PRINCIPLES OF PROFESSIONAL CONDUCT OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN COMMUNITY (1977) [hereinafter DECLARATION OF PERUGIA] with CCBE CODE. See also *supra* note 6 and accompanying text.

29. CCBE COMPENDIUM, *supra* note 4, ch. 4, at 10-12.

described above.³⁰ The recently-issued *Crōss Border Practice Compendium* (*CCBE Compendium*) justified the need for a more detailed code as follows:

Work towards an agreed Code was undertaken [by the CCBE] not as a pious exercise but as a useful convenience. Agreement on a single Code was seen as a practical damage limitation exercise. The alternative to adopting one Code was the possibility of having to recognise up to fourteen slightly or distinctly different Codes — written or unwritten — the details of which might be only partially known to or understood by each lawyer. The necessity for compliance with two, or more, Codes — the exposure to the requirements of double or multiple deontology — could be largely removed by the adoption of a common Code. In such circumstances the usefulness of a single agreed Code must be similar to that of a common set of weights and measures.³¹

In short, lawyers, selected by the bar associations in their respective countries, promulgated the *CCBE Code* to address some of the issues likely to occur in the EC when lawyers in one Member State begin practicing law in another Member State.

II. TO WHOM DOES THE *CCBE CODE* APPLY?

Because the United States has only one category of legal professional — the lawyer — the *Model Rules* are able to use the term “lawyer” and by that term include such diverse professionals as prosecutors, criminal defense attorneys, tax advisors, public interest lawyers, and house counsel. In European countries, however, one cannot simply use the term “lawyer” and by this term refer to the diverse professionals listed above. European countries do not have a single unified legal profession as does the United States.³² In Austria, for example, there are six distinct careers which require legal education as a prerequisite and six different German words which are used to refer to these different professional careers.³³ These careers include

30. See De Ricci Letter, *supra* note 14; accord CCBE COMPENDIUM, *supra* note 4, ch. 4, at 13 (referring to inadequacies of the *Declaration of Perugia*); Karl Hempel, *Der CCBE-Standesrechtskodex und das österreichische anwaltliche Standesrecht*, ANW.BL., 1991/4, at 209; cf. Xavier Normand-Bodard, *EC Integration — Size is Not Important*, LAWS. EUR., September/October 1990, at 5 (referring to the *CCBE Code* and stating “[w]ith the continuous growth of industrial, commercial and personal contacts throughout the EC, all lawyers (from sole practitioners to large firms) have a clear interest in drawing up common codes of conduct and practice rules”).

31. CCBE COMPENDIUM, *supra* note 4, ch. 4, at 13.

32. See generally HANDBOOKS, reprinted in CCBE COMPENDIUM, *supra* note 4 (listing of ethics codes from individual EC Member and Observer States) [hereinafter HANDBOOKS — EC MEMBER STATES or HANDBOOKS — EC OBSERVER STATES]; SPEDDING, *supra* note 4, at 87.

33. The six professions in Austria for which legal education is required are:

- Rechtsanwalt (attorney)
- Notar (notary public)

the positions of prosecutor, judge, private practitioner, a government employee qualified to do legal work, and a tax lawyer. And, as is true in several European countries, under the current law, a person serving as a "corporate" or "house" counsel may not be regulated as a legal professional.³⁴ Moreover, the "members of the various professions consider themselves and are, in fact and by law, different from the others."³⁵ As one American author recently commented, the incomplete institutionalization of law as a profession in European nations comes as a shock to many Americans.³⁶ Therefore, one cannot answer the question "to whom does the *CCBE Code* apply?" by merely stating that it applies to "lawyers." Rather, one must specify exactly the legal professionals in each country to whom the *CCBE Code* applies. The *CCBE Code* does this in Rule 1.4 by defining the type of "lawyer" in each country to whom it applies.

III. WHAT IS THE BINDING FORCE OF THE *CCBE Code*?

The adoption of the *CCBE Code* by the CCBE could not, by itself, make the *CCBE Code* binding in each of the EC Member States. The CCBE is not an institution of the European Community, nor does it have decision-making power for the EC.³⁷ Rather, the CCBE is the official liaison to the

-
- Steuerberater-Wirtschaftstreuhänder (tax consultant, tax attorney)
 - Staatsanwalt (public prosecutor)
 - Richter (judge); and
 - Rechtskundige Beamte (public employees qualified for legal work).

Eugen Salpius, *Austria*, in *TRANSNATIONAL LEGAL PRACTICE I*, *supra* note 4, at 45.

34. The nature of the legal professions in Austria is beyond the scope of this article. In brief, however, the Austrian *Rechtsanwalt* is most equivalent to the United States privately-retained lawyer. (The term "*Rechtsanwalt*" would not include house counsel or lawyers employed by a single client.) The *Rechtsanwalt* performs both advisory and advocacy functions and can appear in both civil and criminal trials. The *Notar* in Austria plays a very different role than the notary republic in the United States. To become a *Notar* in Austria, one must be nominated by the Minister of Justice. Positions are limited, prestige and fees are high, and competition is keen. *Id.* at 45-47.

Among other legal work, some legal operations in Austria, such as forming certain corporations, may not be done without a *Notar's* assistance. *Id.* at 46. Judges (or *Richter*) in Austria, as in much of Europe, select a "Judge's track" after law school and are trained, examined, and apprenticed for this position. A law student typically selects one of these tracks after completing his law training. In contrast to the United States, it is extremely unlikely that after having selected one of these particular professions, a person will later switch tracks. *Id.* at 45.

35. *Id.* at 45.

36. See Martin Shapiro, *Lawyers, Corporations and Knowledge*, 38 AM. J. COMP. L. 683, 696 (1990) (reviewing RICHARD L. ABEL AND PHILIP S. C. LEWIS, *LAWYERS IN SOCIETY* (1988) and RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* (1988)).

37. For background on the EC institutions and decisionmaking power, see generally G. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* (1973) (providing basic information about the EC, "its structure, goals, fields of action, achievements and aspirations"); P. J. G. KAPTEYN & PIETER VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES AFTER THE COMING INTO FORCE OF THE SINGLE EUROPEAN ACT* (Lawrence W. Gormley ed., 1989) (explaining the impact of the Single European Act and its relationship with the

European Community institutions, representing the interests of the lawyers in the EC Member States.³⁸ Thus, just as the ABA had no formal power to compel the adoption of the *Model Rules*, the CCBE has no official power to create binding requirements.³⁹

As a practical matter, however, the *CCBE Code* is now binding. Section 1.3.2 of the *CCBE Code* proposed that the "rules codified in the following articles . . . be adopted as enforceable rules as soon as possible in accordance with national or Community procedures in relation to the cross-border activities of the lawyer in the European Community"⁴⁰ And, indeed, the CCBE has been more successful with respect to acceptance of

original treaties); DERRICK WYATT & ALAN DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* (3d ed. 1992) (explaining and examining the substantive law of the European Communities). For a non-academic but excellent introduction to the European Community in general and the issues raised by the Maastricht Treaty in particular, see RICHARD OWENS & MICHAEL DYNES, *THE TIMES GUIDE TO THE SINGLE EUROPEAN MARKET* (1992).

As these resources explain, there are in fact three "European Communities," not one. Three separate initiating treaties established the European Coal and Steel Community (ECSC); the European Atomic Energy Community (Euratom); and the European Economic Community (EEC). The 1957 Treaty of Rome, which created the EEC, together with the subsequent law relating to the EEC is typically what is being referred to when the shorthand term "European Community" or "EC" is used.

The four institutions of the EC are the Council of Ministers, the Parliament, the European Commission, and the European Court of Justice. A detailed description of the responsibilities of these four institutions is not possible here. Other than the European Court of Justice, which functions similarly to what an American might expect, these other institutions are organized and function in ways very different than what their names or these shorthand reference might suggest. Indeed, the Council of Ministers, the Commission, and the European Parliament share the political tasks of legislating and administering Community law. BERMAN, *supra*, at 50.

38. See Crossick, *supra* note 7, at 170-71.

The CCBE may have competition, however, in its efforts to be the representative institution of European lawyers. On May 23, 1992, the Federation of European Bars (Federation des Barreaux d'Europe) was formed. The Federation is open to all the Bars in Europe, including local as well as national Bars. There were approximately 50 members of the Federation in the beginning of 1992. See Eugenio Gay Montalvo & Mauro Rubino-Sammartano, *On the Newly Established Federation of European Bars*, *LAWS. EUR.*, July/August 1992, at 3. Some of the aims of the Federation are "to promote the harmonisation of codes of conduct" and "to contribute to improvements in professional rules." *Id.* In addition to the new Federation, the International Bar Association (IBA) also has a code of ethics and is interested in participating in the regulation of foreign (cross-border) practice. See generally Sir Thomas Lund, *Foreign Practice*, *A.B.A. J.*, October 1973, at 1154 (reviewing the IBA conference and its proceedings).

39. Accord Goebel, *Lawyers in the European Community*, *supra* note 4, at 601. The binding requirements in the EC consist of: the initial Treaty provisions; subsequent agreements signed by the 12 Member States, such as the single European Act which created what we now refer to as "1992"; regulations, which are general rules binding in all Member States without further formality; directives, which are binding upon each Member State to which it is addressed as to the result to be achieved, but which leaves to the national authorities the choice of form and methods; and decisions, which are addressed to either Member States or individual citizens and are binding upon those to whom they are addressed. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [hereinafter EEC TREATY] art. 189; see CCBE COMPENDIUM, *supra* note 4, ch. 2, at 3, 15.

40. CCBE CODE Rule 1.3.2.

its Code of Conduct than has the ABA with its *Model Rules*. In most, if not all, of the Member States, the professional body responsible for establishing lawyer ethics codes and regulations has adopted the *CCBE Code* and specified that it will govern the cross-border practice of the designated legal professionals.⁴¹

Moreover, the *CCBE Code* now governs cross-border practice in certain European countries which are not currently members of the EC. The CCBE has given the title "Observer Status" to seven European countries, most of which have petitioned to join the EC.⁴² These Observer States also have representatives in the CCBE. The Observer State Delegations are permitted to participate fully in discussions and debate but are non-voting

41. The issue of exactly which Member States have adopted the *CCBE Code* has been difficult to resolve. Several sources indicate that all Member States have adopted the *CCBE Code*. See CCBE COMPENDIUM, *supra* note 4, ch. 4, at 13-14; accord letter from Treaty Webster, CCBE Director General, to Laurel Terry, author (June 18, 1992) ("You can safely say that all of the countries have accepted the Code, . . . as it has in fact been adopted in all of the Observer countries as well as the Twelve [Member States].") See also Toulmin, *supra* note 4, at 673 n.2 (commenting that "the Code has been adopted in different ways in the Member States," and citing the method of adoption in England and Wales).

On the other hand, other sources have indicated that not all Member States have adopted the CCBE Code. See ADAMSON, *supra* note 4, at 67, 69 (explaining why Germany had not yet adopted the *CCBE Code* as a binding document). Representatives from certain Member States have advised the author of their country's adoption of the *CCBE Code*. Letter from Hamish Adamson, U.K. Delegation to the CCBE, to Laurel S. Terry, author (July 13, 1992); letter from Werner Daem, Director General, Belgium National Bar, to Laurel S. Terry, author, (July 23, 1992); letter from Lambert H. Dupong, Dupong and Associates, to Laurel S. Terry, author (Sept. 22, 1992); letter from Dr. Michael Gout, French Delegation to the CCBE, to Laurel S. Terry, author (July 10, 1992); letter from Mogens Holm, Danish Bar and Law Society, to Laurel S. Terry, author (Aug. 19, 1992); letter from Luis Marti Mingarro, Secretary General, Spanish Bar Association, to Laurel S. Terry, author (July 14, 1992) (all letters on file with the author).

The Director of the CCBE, as well as the individuals listed above, has indicated that the *CCBE Code* has been adopted in the Member State(s) by an organization that has the power to regulate the designated legal professionals. The next question obviously is *why* these organizations have the power and authority to regulate these lawyers. It is beyond the scope of this article to investigate each of the CCBE Member and Observer States for the source of law that gives to the adopting organization the power to regulate their lawyers. It is therefore assumed that these organizations indeed do have the power to adopt the *CCBE Code* and thereby make it enforceable within that country.

See *infra* note 70 (listing the specific legal professionals within each Member State to which the *CCBE Code* applies).

42. By 1992, there were seven Observer States: Austria, Czechoslovakia, Cyprus, Finland, Norway, Sweden, and Switzerland. See CCBE, INFORMATION BROCHURE (1992); Toulmin, *supra* note 4, at 674 n.5 (noting that Czechoslovakia was given Observer Status in the CCBE at the Plenary Session of the CCBE held in Hague on October 25, 1991). In 1993, the CCBE voted to give Iceland and Hungary observer status. *Update*, LAWS. EUR., May 1993, at 10. The CCBE also determined that once the European Economic Area comes into force, Iceland, Norway, Sweden, Finland, and Austria will become Member States, rather than Observer States. *Id.* Those states that have petitioned to join the EC include Austria, Cyprus, Finland, Malta, Norway, Sweden, Switzerland, and Turkey. Telephone Interview with Jonathan Davidson, European Community Academic Affairs (Dec. 18, 1992).

members.⁴³ By 1992, the *CCBE Code* had been adopted in six of the then seven officially recognized Observer States, and adoption was pending in the seventh Observer State, Czechoslovakia, at the time it split into the Czech and Slovak Republics.⁴⁴

In addition to the *CCBE Code*, the CCBE has issued an *Explanatory Memorandum and Commentary on the CCBE Code of Conduct for Lawyers in the European Community (CCBE Explanatory Memorandum)*.⁴⁵ The first paragraph of the *CCBE Explanatory Memorandum* explains that it has not been officially adopted and that it was prepared by the CCBE Deontology Working Party which was responsible for the drafting of the *CCBE Code*.⁴⁶ The memorandum seeks to "explain the origin of the provisions of the Code, to illustrate the problems which they are designed to resolve, particularly in relation to cross-border activities, and to provide assistance to the competent authorities in the Member States in the application of the

43. CCBE COMPENDIUM, *supra* note 4, ch. 3, at 10-12.

44. CCBE COMPENDIUM, *supra* note 4, ch. 4, at 14; *see also* letter from Dr. Karel Cermak, President, Czech Bar Association, to Laurel S. Terry, author (July 14, 1992); letter from Lars Bentelius, Swedish Bar Association, to Laurel S. Terry, author (Sept. 11, 1992); letter from Max P. Oesch, Secretary General, Swiss Bar Association, to Laurel S. Terry, author (July 8, 1992); letter from Wenche Siewers, Juridisk Sekretær, Norwegian Bar Association, to Laurel S. Terry, author (July 10, 1992); letter from Marjukka Silolahti, Deputy Secretary General, Finnish Bar Association, to Laurel S. Terry, author (July 28, 1992) (all letters on file with the author).

At the celebration of the 30th year of the founding of the CCBE, held in Basel on November 1, 1990, representatives of the six Observer States signed agreements that permit the use of the *CCBE Code* and the international proof of lawyer identity. *See Hempel, supra* note 30, at 210.

On October 25, 1991, at an annual meeting of the Plenary Session of the CCBE, five of the then six Observer States, namely Sweden, Switzerland, Finland, Norway, and Austria, signed an agreement that the *CCBE Code* would apply to cross-border practice among the Observer States. *See* Dr. Georg Frieders, *Erweiterung des Geltungsbereiches des CCBE-Standesrechtskodex bei entsprechender Unterwerfungserklärung*, 1 ANW.BL. 24 (1992). This Agreement supplements the November 1, 1990 Agreement in which all six of these Observer States agreed that the *CCBE Code* would apply to cross border practice involving lawyers from that Observer State and lawyers from an EC Member State. *Id.* Cyprus is expected to sign the October 25, 1991 agreement at a later date. It is not clear what will happen to the seventh Observer State, Czechoslovakia, now that it has split into the separate countries of the Czech and Slovak Republics.

45. EXPLANATORY MEMORANDUM AND COMMENTARY ON THE CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY [hereinafter CCBE EXPLANATORY MEMORANDUM], *reprinted in* CCBE COMPENDIUM, *supra* note 4, ch. 4, at 33; *see infra* Appendix C, where the *CCBE Explanatory Memorandum* has been reproduced in its entirety.

46. *Id.* The CCBE Deontology Working Group is a subsidiary committee of the CCBE. The official delegations to the CCBE from the twelve EC Member States meet in plenary session twice a year. According to the *CCBE Compendium*, however, the work of the CCBE is accomplished not only by means of the bi-annual Plenary Sessions, but through the standing committees, working groups, and specialist committees, among others. As of October 1992, the CCBE had five working groups, as follows: Deontology, Future of the Profession, Future Role and Work of the CCBE, Relations with the Bars of East Europe, and Social Security Provisions. In addition, many of these working groups have subsidiary committees, addressing topics such as advertising, legal fees, legal audits, and multinational partnerships. For an excellent overview of the bureaucracy of the CCBE, *see generally* CCBE COMPENDIUM, *supra* note 4, ch. 3, at 9-32.

code.”⁴⁷ The memorandum continues, however, by stating that it is not intended to have any binding force in the interpretation of the code. Thus, the *CCBE Explanatory Memorandum* could be analogized to the comments which accompany the *Model Rules*.

The *CCBE Code* was originally prepared in English and French. Translations into other Community languages are being or have been prepared under the authority of the National Delegations concerned. Thus, the German version was recently published after having been agreed to by the representatives from Germany, Austria, and Switzerland.⁴⁸ The *CCBE Code* also has been formally deposited with the European Commission.⁴⁹

IV. WHAT TYPE OF CODE IS THE *CCBE CODE*?

The *CCBE Code* uses a structure not unlike that of the *Model Rules*. The *CCBE Code* consists of black letter rules which set forth the expected conduct for lawyers. These rules are mandatory requirements, similar to the *Model Rules*, as opposed to the aspirational requirements exemplified by the Ethical Considerations or “EC’s” of the *Model Code of Professional Responsibility (Model Code)*.⁵⁰ As stated in Rule 1.2.1 of the *CCBE Code*, which explains the nature of its Rules of Professional Conduct, “[t]he failure of the lawyer to observe these rules must in the last resort result in a disciplinary sanction.”⁵¹

Although the *CCBE Code* might be described as similar to the *Model Rules* in that it contains black letter rules, it is fair to say that an American reader would find the *CCBE Code* “leaner” than the *Model Rules*. This leanness is understandable. It is a truism that American lawyers have a different style of lawyering than European lawyers; Americans are accus-

47. CCBE EXPLANATORY MEMORANDUM, *supra* note 45.

48. The German version of the *CCBE Code* was prepared by Heinz Weil, a German Rechtsanwalt with offices in Paris and Duesseldorf. This version was agreed to by representatives of the German-speaking section of Belgium and the Observer States Austria and Switzerland. This German version was officially published in Austria. STANDESREGELN DER RECHTSANWÄLTE DER EUROPÄISCHEN GEMEINSCHAFT, *reprinted in* ANW.BL., 1991/4, at 210, 213-218.

49. CCBE COMPENDIUM, *supra* note 4, ch 3, at 16-18. As a result of this “formal deposit,” one can conclude that the European Commission has official knowledge of the existence of the *CCBE Code*. The presentation ceremony, however, did not confer a legally binding status on the *CCBE Code* or indeed have any binding legal effect. See Piet Wackie-Eysten, *Establishment Directive, Where to Now?*, LAWS. EUR., May/June 1991, at 6 (“In January 1989 [the *CCBE Code*] was presented to the European Commission at a short ceremony in Brussels . . .”).

50. The Ethical Considerations provide lawyers with interpretive guidance. The *Model Code* provides, “The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY preliminary statement (1981) [hereinafter MODEL CODE].

51. CCBE CODE Rule 1.2.1. (The method of enforcing the *CCBE Code* through disciplinary proceedings is discussed in Part II of this article, forthcoming.) In short, the *CCBE* has not as yet established a separate procedure for disciplining lawyers who violate the *CCBE Code*.

tomed to more detail and specification than often is used in Europe.⁵² Europeans have revealed a concern to avoid overly-detailed provisions. Thus, for example, in explaining the need for a code of conduct, the *CCBE Compendium* began by recognizing the existence of those who believe that a sufficient code is one that states: "Thou shalt at all times act in the client's best interest."⁵³ The *CCBE Compendium* justified the more detailed approach on the basis of the more complex circumstances of contemporary practice; very simple codes were no longer adequate.⁵⁴ However, although the *CCBE Compendium* acknowledged the need for detailed provisions, it cautioned that "[w]e have to be sure that in the end we are sustained by principle and not shackled by precedent" — nor by endless regulations."⁵⁵

While the CCBE opted for a relatively detailed black-letter code, the *CCBE Compendium* also perceived weaknesses in such an approach:

Codes can create an environment in which certain standards are encouraged. Codes themselves, however, have limitations. They have more often a dissuasive effect than a positive impetus. They help us to avoid rather than to fulfill. They are attempts to capture on paper an approved pattern of behavior, a desired moral climate, an answer to all questions of conduct — which cannot be adequately captured on paper. Codes are helpful only if the value judgements on which they rest are sound, the distinctions which they make are clear and the means by which they are applied are effective.⁵⁶

The concerns expressed in the *CCBE Compendium* about the nature and shape of the *CCBE Code* mirror many of the same concerns that appeared in the United States revolving around whether the approach of the *Model Rules* should be used in place of the established *Model Code* approach—concerns about the appropriate degree of specificity and whether the bar would be better guided by enforceable rules, necessarily reflecting the lowest common denominator, or by aspirational, yet largely unenforceable, rules.⁵⁷

52. Goebel, *Professional Qualification*, *supra* note 4, at 445-446; Louis-Henri Verbeke, *Brussels: What's the Crack*, Jacques, *LAWS. EUR.*, January/February 1992, at 13, 17 (noting the issue European firms are facing of whether to practice "à la New Yorkaise").

53. *CCBE COMPENDIUM*, *supra* note 4, ch. 4, at 10-12.

54. "The legal profession has from earliest times recognised the need to apply ethical principles to professional practice and has made efforts to do so over many centuries. Thus rudimentary rules met simpler circumstances, more refined and detailed rules now meet more complex circumstances." *CCBE COMPENDIUM*, *supra* note 4, ch. 4, at 9.

55. *CCBE COMPENDIUM*, *supra* note 4, ch. 4, at 14 (citation omitted).

56. *CCBE COMPENDIUM*, *supra* note 4, ch. 4, at 14.

57. For an overview of the debate regarding the best format, see AM. BAR ASS'N, *THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 3-4* (1987). See also MORGAN & ROTUNDA, *supra* note 8, at 16-18 (noting

V. AN ANALYSIS OF THE SUBSTANTIVE PROVISIONS OF THE *CCBE CODE OF CONDUCT*

Creating a common code of legal ethics for all the diverse countries in the European community is no small undertaking. Certainly, there are many similarities among the lawyers and legal ethics rules in Europe.⁵⁸ However, even without including the United Kingdom and the Republic of Ireland in the calculus (and the divergent outlooks of the civil law and common law systems), significant differences persist among the legal professions and legal ethics rules of Continental Europe.⁵⁹ Indeed, one of the difficulties is in recognizing the situations in which such rules variations might exist!⁶⁰

Given the varied languages, histories, and cultures of the EC Member States, whose differences are much greater than the differences among the American States, these differences in legal ethics rules are not surprising. Indeed, one might reach the opposite conclusion — despite the common Roman roots of many of the EC Member States, it is nevertheless amazing

Professor Lon Fuller's comparison between an approach involving the "morality of duty" (minimum standards) and the "morality of aspiration").

58. See generally HANDBOOKS — EC MEMBER STATES, *supra* note 32. For example, a similarity exists between the conflict of interest rules of the European countries. The conflict rule in Belgium states:

The lawyer is not permitted to act for two or more clients whose interests conflict, or in circumstances in which the interests of two or more clients are perceived as developing towards the probability of conflicts.

....

This rule also applies where . . . the lawyer already has 'inside knowledge,' the use of which might entail breach of confidentiality.

CODE OF CONDUCT — BELGIUM Rule 8.6, *reprinted in* HANDBOOKS — EC MEMBER STATES, *supra* note 32. This language is also used in the conflict rules of Denmark, Greece, the Netherlands, and Spain. CODE OF CONDUCT — DENMARK Rule 8.6, *reprinted in* HANDBOOKS — EC MEMBER STATES, *supra* note 32; CODE OF CONDUCT — GREECE Rule 8.6, *reprinted in* HANDBOOKS — EC MEMBER STATES, *supra* note 32; CODE OF CONDUCT — THE NETHERLANDS Rule 8.6, *reprinted in* HANDBOOKS — EC MEMBER STATES, *supra* note 32; CODE OF CONDUCT — SPAIN Rule 8.6, *reprinted in* HANDBOOKS — EC MEMBER STATES, *supra* note 32. See *infra* notes 117-123 and accompanying text for a discussion of the CCBE Code Rule 3.2 (discussing the Code's conflict rule).

59. CCBE COMPENDIUM, *supra* note 4, ch. 4, at 9. The compendium explains that when differences occur, they may give rise to complex difficulties and misunderstandings among colleagues. In the past, when practice within the EC was conducted mostly within territorial borders, this divergence was seldom of practical importance. But as cross-border practice develops and will develop both in Europe and on an international scale, it is becoming more essential to work towards a wider consensus. The hope is that there will be a growth of increased trust, closer alignment of standards, and closer co-operation. *Id.*, ch. 4, at 10-12. For a comparison between the *CCBE Code* and the *Model Rules*, see *infra* Part VI.

60. I was quite surprised, for example, to learn that in France and six other countries in the EC, pursuant to the relevant legal privilege principles, if a lawyer indicates that the lawyer's correspondence with another lawyer is to be treated as confidential, the recipient lawyer may not show the letter to the recipient lawyer's own client! See CCBE CODE Rule 5.3; CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 5.3 cmt. See discussion *infra* notes 162-166 and accompanying text.

the legal ethics codes of these European countries have developed so similarly. As a result, it is hardly surprising that the *CCBE Code* contains many areas where agreement and consensus were noted and other areas where the drafters could only note disagreement without resolving that disagreement. As a result, in some areas, the *CCBE Code* has attempted to eliminate what it refers to as "double deontology" (*i.e.*, conflicting provisions) without providing a "single deontology" (*i.e.*, without adopting a particular substantive position). In other words, in certain places, the *CCBE Code* might be more accurately described as a "conflicts of law" code, stating which state's ethics rules to use, rather than a universally acceptable "legal ethics" code.

This section of the article, which discusses the substantive content of the *CCBE Code*, is divided into three subsections. The first subsection offers a brief overview of the topics contained within the *CCBE Code*. The second subsection discusses the content of the substantive provisions in the *CCBE Code*. The third subsection compares certain *Model Rules* and *CCBE Code* provisions and suggests that their differences may reflect a different way of conceptualizing the role of the lawyer.

A. A DESCRIPTION OF THE CONTENTS OF THE *CCBE CODE*

The provisions in the *CCBE Code* are separated into five major sections: (1) Preamble, (2) General Principles, (3) Relations with Clients, (4) Relations with the Courts, and (5) Relations between Lawyers. Under these five general headings are thirty-five rules, many of which have subsections.⁶¹

B. A DISCUSSION OF THE SUBSTANCE OF THE *CCBE CODE*

One of the first things an American reader must understand about the *CCBE Code* is that it is not a pure substantive legal ethics code in the same tradition as the *Model Rules*. The *Model Rules* provides substantive provisions defining what a lawyer can and cannot do for almost all of its covered topics.⁶² In contrast, as noted earlier, the *CCBE Code* might be described as both a "legal ethics" code and a "conflicts of law" code. The *CCBE Code* is

61. See *infra* Appendix B, where the code has been reproduced in its entirety.

62. Some of the *Model Rules*, however, do not set forth their own substantive standards, but instead require the lawyer to comply with the existing substantive law. For instance, Rule 3.5, regulating "Impartiality and Decorum of the Tribunal," provides that "[a] lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; [or] (b) communicate *ex parte* with such a person except as permitted by law." MODEL RULES Rule 3.5(a)-(b).

Despite this occasional absence of independent substantive standards, I believe it is fair to say that the ABA *Model Rules* almost uniformly provide substantive standards for the legal ethics issues and thus can be properly described as a "legal ethics" code.

a "legal ethics" code because for some topics the *CCBE Code* provides substantive legal ethics provisions. For other topics, however, the *CCBE Code* does not provide a substantive provision but instead merely tells a lawyer which state's legal ethics rules the lawyers should use. Such provisions function as "conflicts of law" provisions.

This discussion of the provisions of the *CCBE Code* uses an organization which follows the headings used in the *CCBE Code* since these topics are thematically related. It does not use an organization based on the nature of the provision (which would group together all the "conflicts of law"-type provisions). The discussion of each rule, however, does note whether a rule has substantive content and the nature of that content or whether a rule is a "conflicts of law"-type provision which merely states whose substantive rule the lawyer should use.

1. The "Preamble" of the *CCBE Code of Conduct*

The *CCBE Code* begins with a "Preamble," which consists of six rules, several of which have subsections. Starting in reverse order, Rule 1.6 is the "definitions" section of the *CCBE Code* and is noticeably shorter than the definitions section in the *Model Rules*.⁶³ Indeed, the *CCBE Code* defines only three terms: "Home Member State," "Host Member State," and "Competent Authority."⁶⁴ In contrast to the *Model Rules*, which offer a definition of words whose meanings have been the topic of considerable debate (e.g., "knowingly," "reasonable belief," "consultation"),⁶⁵ none of the three definitions in the *CCBE Code* purports to resolve a particularly thorny philosophical debate.

Rules 1.5 and 1.4, which delineate the professionals to whom the *CCBE Code* is applicable and the situations to which it applies, have no direct counterpart in the *Model Rules*. As explained below, the need for these *CCBE Code* provisions stems from the different context in which the *CCBE Code* must operate. Rule 1.5 states the situations to which the *CCBE Code* was intended to apply. Because the *CCBE Code* was not designed to regulate all the activities of the "lawyers" in the states adopting it, Rule 1.5 was necessary. This rule specifies that the *CCBE Code* was intended to apply to only the "cross-border activities of lawyers."⁶⁶

Rule 1.4 of the *CCBE Code* does not define the *situations* to which the *CCBE Code* applies, but rather the *individuals* to whom it applies.⁶⁷ As

63. Compare CCBE CODE Rule 1.6 with MODEL RULES terminology.

64. CCBE CODE Rule 1.6.

65. MODEL RULES terminology.

66. CCBE CODE Rule 1.5. The difficult jurisdictional issues of when the *CCBE Code* applies are discussed at length in Part II of this article, forthcoming.

67. CCBE CODE Rule 1.4.

explained earlier, because European countries do not have a unified legal profession as does the United States, Rule 1.4 serves a necessary role by defining the type of "lawyer" in each country to which it applies.

Most surprising to an American, house counsel in many instances are not covered by the listing of professionals in *CCBE Rule 1.4*. Many European countries take the position that an *employed* lawyer, who by definition has only one client, cannot maintain the required independent professional judgment and is, in essence, in a permanent conflict of interest situation.⁶⁸ These countries therefore specifically exclude employed lawyers or house counsel from their definition of lawyer.⁶⁹ The *CCBE Code* has not overridden this judgment by the Member States as to who constitutes a lawyer. Instead, the category of lawyer authorized in the Member States was merely incorporated by reference.⁷⁰

Rule 1.3 is used to establish "The Purpose of the Code." The first subsection of Rule 1.3 explains the background of the *CCBE Code*.⁷¹ In the second subsection, the CCBE identified its intentions for the *CCBE Code*, which were that the rules therein:

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

68. Crossick, *supra* note 7, at 171. "The practicing legal profession does not include the house attorney in Belgium, France, Italy, and Luxembourg, where they cannot be members of the bar. Indeed, these countries do not permit lawyers to be employed, even by other lawyers. Employment is regarded as incompatible with the independence of the lawyer." *Id.* Cf. DE CRAYENCOUR, *supra* note 4, at 20-21 (discussing "independence [as] one of the characteristic features of the professions . . .").

69. Countries that specifically exclude employed lawyers or house counsel from their definition of lawyer include Belgium, France, Greece, Spain, Austria, Cyprus, and Sweden. See HANDBOOKS, *supra* note 32 (discussing Rule 2.2 on incompatible occupations).

70. CCBE CODE Rule 1.4. "The following rules shall apply to lawyers of the European Community as they are defined by the Directive 77/249 of 22nd March 1977." *Id.* Article 1, Section 2 of this Directive states:

'Lawyer' means any person entitled to pursue his professional activities under one of the following designations:

Belgium: Avocat-Advocaat

Denmark: Advokat

Germany: Rechtsanwalt

France: Avocat

Ireland: Barrister

Solicitor

Italy: Avvocato

Luxembourg: Avocat-avoué

Netherlands: Advocaat

United Kingdom: Advocate

Barrister

Solicitor

Council Directive 77/249, art. 1, § 2, 1977 O.J. (L 78) 17, reprinted in CCBE COMPENDIUM, *supra* note 4, ch. 5, at 38-39.

71. CCBE CODE Rule 1.3.1.

- be adopted as enforceable rules as soon as possible in accordance with the national or Community procedures in relation to the cross-border activities of the lawyer in the European Community;
- be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation.⁷²

The *Model Rules* do not have a direct counterpart to Rule 1.3. Instead, the ABA has addressed the purpose of the *Model Rules* in the its "Scope" section.⁷³

An additional rule of the "Preamble" section of the *CCBE Code* is Rule 1.2, which sets forth "The Nature of Rules of Professional Conduct."⁷⁴ As explained in the *CCBE Explanatory Memorandum*, this rule consists of a restatement of principles contained in the *Declaration of Perugia*, which was the CCBE's first effort at a code of ethics.⁷⁵ The first subsection corresponds in large part to material contained in the "Scope" section of the *Model Rules*: it explains the role of the *CCBE Code* as a basis for discipline while recognizing that enforcement must rely on a lawyer's willing acceptance of the rules.⁷⁶ The second subsection acknowledges that while "particular rules of each Bar or Law Society arise from its own traditions. . . , [they] nevertheless are based on the same values."⁷⁷

72. CCBE CODE Rule 1.3.2. See *supra* note 41 and accompanying text for a discussion of the extent to which the *CCBE Code* has been adopted within the Member States as an enforceable rule. For a discussion of the extent to which at least one CCBE country has taken the *CCBE Code* into account in its revisions of its national rules of deontology or professional practice, see Part II of this article, forthcoming.

73. MODEL RULES scope.

74. CCBE CODE Rule 1.2. See also Lund, *supra* note 38 (recounting the Int'l Bar Ass'n's recommendations regarding foreign (cross-border) practice).

75. CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 1.2 cmt.

76. CCBE CODE Rule 1.2.1 provides as follows:

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

CCBE CODE Rule 1.2.1.

The "Scope" section of the *Model Rules* includes the following language:

Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

....

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.

MODEL RULES scope.

77. CCBE CODE Rule 1.2.2.

Rule 1.1, like Rule 1.2, is a reaffirmation of principles originally hammered out in the context of the *Declaration of Perugia*.⁷⁸ This rule, which explains "The Function of the Lawyer in Society," reflects many of the principles contained in the "Preamble" to the *Model Rules*. *CCBE Rule 1.1* states:

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

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

- the client;
- the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf;
- the legal profession in general and each fellow member of it in particular; and
- the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.⁷⁹

Rule 1.1 thus acknowledges the same conflicting obligations identified in the *Model Rules*.⁸⁰

In sum, the rules contained in the "Preamble" section of the *CCBE Code* could properly be described as true "legal ethics code" provisions rather

78. CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 1.1 cmt.

79. CCBE CODE Rule 1.1.

80. The "Preamble" section of the *Model Rules* similarly recognizes the multiple roles of the lawyer as both a representative of, and adviser to, the client. It provides that "[a]s a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES pmb1. The section also recognizes that a lawyer owes obligations to a variety of individuals and that these obligations can sometimes appear to be in conflict with one another. It states, "[i]n the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living." *Id.* Accord MORGAN & ROTUNDA, *supra* note 8, at 22 ("Another useful way to approach these problems is to recognize that in an important sense, any Code of Professional Responsibility or set of Model Rules is an attempt to accommodate at least five interests. The interests are those of (1) lawyers as individuals, (2) lawyers in their relationships with each other, (3) clients, (4) the public, and (5) the legal system.").

than "conflicts of law" provisions. Rules 1.1 and 1.2 state general principles, capable of application in all circumstances. Rules 1.3, 1.4 and 1.5 have been developed specifically for the cross-border practice situations, but nevertheless have substantive content. With the exception of Rule 1.4, which permits the continued exclusion of "house counsel" from the lawyers to whom the *CCBE Code* applies, none of these rules should appear particularly surprising to an American lawyer.

2. The "General Principles" in the *CCBE Code*

The "General Principles" section of the *CCBE Code* contains seven rules, many of which have subsections. These seven "General Principles" address a lawyer's obligations with respect to: 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 [advertising], and 7) the predominance of the client's interests.

The first five of the seven principles listed above appear to be codifications of principles that were originally set forth in the 1977 *Declaration of Perugia*.⁸¹ These first five "General Principles" are not verbatim adoptions but nevertheless demonstrate that the two documents are closely related. Much of the language in the "General Principles" section of the *CCBE Code* is lifted from the *Declaration of Perugia* with only small modifications.⁸² The last two of these "General Principles," however, have no counterparts in the *Declaration of Perugia*.

81. The *Declaration of Perugia* was the CCBE's predecessor document to the *CCBE Code* and contained eight principles of "professional conduct of the bars and law societies of the European Community." DECLARATION OF PERUGIA, *supra* note 28, pmbi. See also *supra* notes 27-30 and accompanying text for a discussion of the *Declaration of Perugia*. The Declaration is available directly from the CCBE. See *supra* note 4 for correspondence information.

82. I have listed the *Declaration of Perugia* antecedents of these provisions because I consider this information to be in the nature of legislative history which might be important if a court or other body ever had to interpret such a provision or, more importantly, decide between seemingly competing provisions. On the one hand, the fact that a rule had its antecedents in the earlier, and much shorter *Declaration of Perugia* might suggest the priority or fundamental importance of such a rule. On the other hand, because the *CCBE Code* rules were subject to a much lengthier and more rigorous drafting procedure, one might expect a rule taken directly from the *Declaration of Perugia* to be more cursory and perhaps ambiguous. I have made such an argument with respect to Rule 2.4 in Part II of this article, forthcoming.

As set forth below, many of the "General Principles" in the *CCBE Code* have antecedents in the *Declaration of Perugia*. The CCBE Rule regarding "Independence," for example, has used almost all of the language in § V(1-2) from the *Declaration of Perugia*. Compare CCBE CODE Rule 2.1 with DECLARATION OF PERUGIA, *supra* note 28, at § VII(2). The *CCBE Code* did not carry forward the language from Declaration section V(3).

The CCBE rule regarding "Trust and Personal Integrity" changed the language of Declaration section III so that the obligation is now framed in positive, rather than negative terms. CCBE CODE Rule 2.2. Instead of talking about when a trust relationship cannot exist, the *CCBE Code* now talks about what is required in order for a relationship of trust to exist. *Id.*

The CCBE rule regarding "Confidentiality" is taken almost verbatim from Declaration section

Several of these seven "General Principles" are, not surprisingly, rather general. And because they are so general and basic, American lawyers may have difficulty discovering how the nuances in application of these rules will be different from the application of the *Model Rules*. For example, Rule 2.7, which sets forth the duty of loyalty which requires a lawyer to put the client's interests first, should appear noncontroversial to an American lawyer.⁸³ Rule 2.2, regarding "Trust and Personal Integrity," similarly appears completely straightforward and noncontroversial.⁸⁴ Rule 2.4, regarding "Respect for the Rules of Other Bars and Law Societies," will be discussed at length in the forthcoming Part II of this article. In a nutshell, however, this provision asserts the noncontroversial proposition that lawyers have a duty

IV(1). CCBE CODE Rule 2.3.1. However, the remaining sections of this provision have no counterpart in the Declaration. *Id.* at Rules 2.3.2-2.3.4. Similarly, some of the subsections of the Declaration did not make it into the *CCBE Code*. See DECLARATION OF PERUGIA, *supra* note 28, at § IV(2-4).

The CCBE rule regarding "Respect for the Rules of other Bars and Law Societies" uses the first two sentences of Declaration section VIII, with only minor language changes. Compare CCBE CODE Rule 2.4 ("Under community law (in particular under the Directive 77/249 of 22nd March 1977) a lawyer from another Member State may be bound to comply with the rules of the Bar or Law Society of the host Member State.") with DECLARATION OF PERUGIA, *supra* note 28, at § VIII ("The Directive of 22 March 1977 specifies the circumstances in which a lawyer from another community country is bound to comply with the rules of the Bar or Law Society of the host country.") The third and fourth sentences of the Declaration were not carried forward into the "General Principles" section of the *CCBE Code*.

The CCBE rule regarding "Personal Publicity," however, is completely different from the statements contained in the Declaration. Whereas the *Declaration of Perugia* contained an absolute ban on advertising, the *CCBE Code* recognizes that advertising may be permissible in certain circumstances and in certain Member States. Compare CCBE CODE Rule 2.6 with DECLARATION OF PERUGIA, *supra* note 28, at § VII.

The remaining two provisions in the "General Principles" section of the *CCBE Code* had no counterpart in the *Declaration of Perugia*. CCBE CODE Rules 2.5, 2.7.

83. This rule states:

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

CCBE CODE Rule 2.7.

In the U.S., there are still vigorous debates about how to balance a lawyer's duty of zealous representation with a lawyer's obligations to the courts and the public, especially in the context of a lawyer's revealing client confidences. I suspect, however, that participants in the debate could agree with the principle expressed in *CCBE Rule 2.7*. No one denies the lawyer's duty of loyalty to the client. The issue in the U.S. would be "what does *CCBE Rule 2.7* mean when it says 'subject to due observance of all rules of law and professional conduct'?" Can those other rules override the lawyer's duty of loyalty and duty of confidentiality?"

84. This Rule provides:

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

CCBE CODE Rule 2.2.

to inform themselves about the law which will affect them in the performance of their duties.⁸⁵

For two of the remaining provisions, however, the title "General Principles" is a misnomer, since these rules function more as "conflicts of laws" provisions as opposed to establishing substantive obligations. Rule 2.5, dealing with "Incompatible Occupations," is the first of these "conflicts of law" provisions. As the *CCBE Explanatory Memorandum* pointed out about Rule 2.5:

There are differences both between and within Member States on the extent to which lawyers are permitted to engage in other occupations, for example in commercial activities. The general purpose of rules excluding a lawyer from other occupations is to protect him from influences which might impair his independence or his role in the administration of justice. The variations in these rules reflect different local conditions, different perceptions of the proper function of lawyers and different techniques of rule-making. For instance in some cases there is a complete prohibition of engagement in certain named occupations, whereas in other cases engagement in other occupations is generally permitted, subject to observance of specific safeguards for the lawyer's independence.⁸⁶

The *CCBE Code* did not resolve these conflicts regarding what, if anything, constitutes an incompatible occupation for a lawyer. Instead, Rule 2.5 essentially provides a "conflicts of law" rule by clarifying when the lawyer's "Host State" rules apply and when the lawyer's "Home State" rules apply. This rule identifies two situations in which a lawyer who is engaged in cross-border activities should use the ethics rules of his "Host State," as opposed to the ethics rules of his "Home State."⁸⁷

The second "General Principle" which operates as a "conflicts of laws" provision, rather than as substantive provision, is Rule 2.6 dealing with advertising.⁸⁸ Like Rule 2.5, which deals with "Incompatible Occupations," Rule 2.6 operates as a "conflicts of laws" provision by telling a lawyer which

85. CCBE CODE Rule 2.4.

86. CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 2.5 cmt. See also DE CRAYENCOUR, *supra* note 4, at 20-21 (articulating the principle of "independence" as one of the three most important for the professions and explaining the basis for those who believe a professional should not practice as an employee of another); Toulmin, *supra* note 4, at 678 (stating that the conflicting rules with respect to incompatible occupations include differing views on the ability to take on directorships in companies).

87. CCBE CODE Rule 2.5. The two situations in which a lawyer should use "Host State" rules are: 1) where a lawyer is representing or defending a client in legal proceedings or before a public authority in the "Host State" and 2) where the lawyer has permanently set up shop in the "Host State," i.e. where the lawyer has become "established" there. For a detailed discussion of the jurisdictional issues of when the *CCBE Code* applies and the issues of when to use "Host State" rules and "Home State" rules, see Part II, forthcoming.

88. See *infra* Appendix B & Appendix C.

of several competing advertising provisions to use. As the *CCBE Explanatory Memorandum* points out:

The rules governing personal publicity by lawyers vary considerably in the Member States. In some there is a 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.⁸⁹

Rule 2.6 thus deals with the conflict in advertising rules of the Member States simply by forbidding a lawyer from advertising or seeking personal publicity where it is not permitted.

Because this rule essentially imposes a geographic limitation on advertising, it also explains how the determination will be made as to location of the advertisement:

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.⁹⁰

While this advertising rule operates as a "conflicts of laws" rule, it is the only "conflicts of law" rule in which the governing jurisdiction is *not* spelled out. In situations where there is not a complete ban on advertising, Rule 2.6.1 states that "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."⁹¹ While one could say that in this situation a lawyer is subject to the "Host State" rules, this language may reflect a failure to resolve the potentially contentious issue of whose advertising rules should bind a lawyer in the situation where the "Host State" has more restrictive advertising rules and in the situation where the "Home State" has more restrictive advertising rules.⁹²

89. CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 2.6 cmt. Compare Toulmin, *supra* note 4, at 681 (noting that in many jurisdictions, the rules on lawyer advertising have been transformed within the last ten years) with *Update: The Latest From the German Bar Association*, LAWS. EUR., March/April 1992, at 4 (noting that the German Constitutional Court recently held that the restrictive advertising rules were consistent with basic human and professional rights) and *Update: Spanish Bar Association Opposes Government Changes*, LAWS. EUR., September/October 1992, at 4 (noting that the Spanish Competition Authority has concluded that the lawyer advertising rules are anti-competitive).

90. CCBE CODE Rule 2.6.2.

91. CCBE CODE Rule 2.6.1.

92. There is an alternative explanation for Rule 2.6.1's failure to specify whether the lawyer should use "Host State" or "Home State" rules. The drafters of the *CCBE Code* may have thought that the issue of which advertising rules to use was already covered by the 1977 Lawyer's Services Directive. *To Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services*, COUNCIL

A third "General Principle" in the *CCBE Code*, Rule 2.3, deals with the topic of confidentiality.⁹³ While this rule purports to be a general principle, it may in fact hide an unresolved disagreement. Thus, although this rule has substantive content, this rule perhaps should have been drafted instead as a "conflicts of law" provision instead.

Rule 2.3 establishes an absolute rule of confidentiality without any exceptions. It defines the information protected, indicates that a lawyer is bound to respect this confidentiality even after representation ceases, and imposes upon a lawyer a duty to ensure that the lawyer's support staff protect this confidentiality.⁹⁴ Furthermore, the *CCBE Explanatory Memorandum's* comment on Rule 2.3 contains nothing which would undercut the conclusion that this confidentiality rule is absolute.⁹⁵

Although Rule 2.3 appears to be absolute, there may be more disagreement lurking behind this rule than the rule suggests. The *Declaration of Perugia*, for example, states:

2. While there can be no doubt as to the essential principle of the duty of confidentiality, the Consultative Committee [CCBE] has found that there are significant differences between the member countries as to the precise extent of the lawyer's rights and duties. These differences which are sometimes very subtle in character especially concern the rights and duties of a lawyer vis-a-vis his client, the courts in criminal cases and administrative authorities in fiscal cases.

3. Where there is any doubt the Consultative Committee is of the opinion that the strictest rule should be observed — that is, the rule which offers the best protection against breach of confidence.

4. The Consultative Committee most strongly urges the Bars and Law Societies of the Community to give their help and assistance to members of the profession from other countries in guaranteeing protection of professional confidentiality.⁹⁶

While it is certainly possible that the "significant differences" referred to in the *Declaration of Perugia* have been resolved, this author is inclined to be skeptical, especially in view of the silence of the *Explanatory Memorandum* on this issue.⁹⁷ Moreover, the absolute nature of *CCBE Rule 2.3* regarding

DIRECTIVE, March 22, 1977 (77/249/EEC) [hereinafter *Lawyer Services Directive*]. This jurisdictional issue of which Member State's advertising rules are proper is discussed in detail in Part II, forthcoming. See *infra* note 117 for discussion of this Directive and the substantive EC law.

93. CCBE CODE Rule 2.3.

94. *Id.*

95. CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 2.3 cmt.

96. DECLARATION OF PERUGIA, *supra* note 28, § IV (2-4).

97. CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 2.3 cmt. (containing no mention of how the issue of conflicts among Member States regarding confidentiality was resolved). Despite this silence, John Toulmin, one of the drafters of the *CCBE Code*, has explained that the committee

confidentiality may in fact be undercut by Rule 4.4, regarding "False or Misleading Information," which states that "a lawyer shall never knowingly give false or misleading information to the court."⁹⁸ Rule 4.4 may operate as an exception to the confidentiality provision of the *CCBE Code*.⁹⁹ The

had the task of reconciling the differing rules regarding confidential correspondence. Toulmin, *supra* note 4, at 679.

Some of these differences which exist among the EC Member States' approach to the topic of "confidentiality" were set forth in a report authored by D.A.O. Edward of the Scotland Bar on behalf of the CCBE. See generally D.A.O. EDWARD, CCBE, THE PROFESSIONAL SECRET, CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE IN THE NINE MEMBER STATES OF THE EUROPEAN COMMUNITY (1976). (This report is available directly from the CCBE. See *supra* note 4 for correspondence information.) This report highlighted the fact that one cannot even use a single term, such as confidentiality, from country-to-country. *Id.* at 9. The primary source of law in this area derives from "an Article of the Penal Code, which provides that it is an offence . . . to reveal another person's 'secret'." *Id.* at 10. However, there are differences between the member states as to who is bound to preserve the "professional secret." For instance, the terms of the Code are general and broad in France, Belgium, Italy, and Luxembourg. *Id.* at 15. The report explains:

In these four states the words of the Code are wide enough to include lawyers from any state, their 'stagiaires' and other employees. The words are also wide enough to impose the duty of secrecy even if the secret has been communicated before the professional relationship of lawyer and client has been formally created, and to preserve the duty after that relationship has ended.

Id.

In contrast, the terms of the Code in Germany apply to specific persons, including the Rechtsanwalt, Patentanwalt, Notary, and defense advocate. *Id.* at 16. There is also no express reference to lawyers from other states. *Id.* at 17. Differences in the approach to correspondence among lawyers was also noted. *Id.* at 29. Thus, while the underlying principles are substantially similar, there are enough differences in approach that a single term can be misleading because of the implications that accompany it.

This report was referred to in the CCBE's submission to the European Court of Justice in support of the existence of a lawyer's privilege of confidentiality. See CCBE COMPENDIUM, *supra* note 4, ch. 3, at 33. The European Court of Justice supported the CCBE's position. Sandy Ghandhi, *Legal Professional Privilege in European Community Law*, 7 EUR. L. REV. 308, 312-13 (1989). The Court concluded that although there was no attorney-client privilege explicitly set forth in the relevant treaties and laws, the EC Commission had no right to subpoena documents which would violate an attorney client privilege. *Id.* The court based its recognition of the attorney-client privilege on the fact that all Member States recognized such a privilege, even though differences in the nature and scope of the privilege existed. *Id.* See Case 155/79, *AM & S Eur. Ltd. v. Commission*, 1982 E.C.R. 1575, 2 C.M.L.R. 264, 322-25 (1982).

98. CCBE CODE Rule 4.4. The comment to Rule 4.4 in the *CCBE Explanatory Memorandum* states in full that "this provision applies the principle that the lawyer must never knowingly mislead the court. This is necessary if there is to be trust between the courts and the legal profession." CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 4.4 cmt.

99. The possibility of conflict between Rule 4.4 and Rule 2.3 was recently noted by another commentator. See Goebel, *Lawyers in the European Community*, *supra* note 4, at 629. One of the Austrian delegates to the CCBE explained Rule 4.4 by stating that in the Anglo-American trial tradition, the lawyer's duty to find the truth is at least as important as, if not more important than, the lawyer's duty of loyalty to the client and therefore the lawyer may not knowingly introduce false testimony. Thus, a lawyer who is subject to Rule 4.4. of the *CCBE Code* may, in certain cases, be required to breach the duty of confidentiality and repress the duty of loyalty to the client. The Committee did not comment further on whether this "Anglo-American" approach was inconsistent

European Community is quite possibly confronting the same debate which has occurred and is still occurring in the U.S. about how to balance the lawyer's duty of confidentiality on the one hand and the duty to uphold the law and serve justice on the other hand.¹⁰⁰ Unlike the situation in the U.S., however, this debate currently appears to be an underground debate in the EC. Instead of acknowledging any disagreement and adopting a "conflicts of law"-type provision, the *CCBE Code* presents the absolute right to confidentiality as a "General Principle" concerning which there is no debate. Thus, despite its language, Rule 2.3 may ultimately prove to be less of a "general principle" than it at first purports to be.

The remaining provision of the "General Principles" section is Rule 2.1, addressing the topic of "Independence."¹⁰¹ Emphasizing the importance of independent action of the part of the lawyer in all aspects of representation,¹⁰² this provision imposes substantive obligations, rather than a "conflicts of law" provision.¹⁰³ In sum, the title of the "General Principles" section of the *CCBE Code* is somewhat misleading since not all of the principles contained in this section could be described as "General Principles." Instead, this section of the *CCBE Code* functions not only as a legal ethics code providing substantive standards for regulation but also as a "conflicts of law" code addressing the issue of which country's legal ethics rules to use for particular issues.

3. The "Relations With Clients" Provisions in the *CCBE Code*

The "Relations with Clients" section of the *CCBE Code* contains nine rules. Of these nine rules, the last seven might be said to deal in one way or another with money-related issues.¹⁰⁴ The first rule in this section is not a money-related rule but instead sets forth the conditions for a lawyer's

with the Austrian legal ethics rules, or whether revision would be required in order to make Austrian law consistent with *CCBE Rule* 4.4. Instead, it merely referred the reader to the literature and cases decided pursuant to § 146 of the Criminal Procedure Code (StGB) which establish the definition and limits of false testimony in a case. See Hempel, *supra* note 30, at 209.

100. For an overview of the issues and debates concerning the proper course of action a lawyer should take when faced with either future or past client perjury, see MODEL RULES OF PROFESSIONAL CONDUCT ANNOTATED 339-347 (2d ed. 1992); Laws. Man. on Prof. Conduct (ABA/BNA) 61:401-423 (1993); 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.3 (2d ed. Supp. 1991 & Supp. 1992) (especially note § 3.3:219-220, which gives an overview of the leading articles which set forth this debate).

101. *CCBE Code* Rule 2.1.

102. *Id.*

103. See *infra* notes 186-192 and accompanying text for a further discussion of Rule 2.1.

104. These seven rules cover the topics of contingency fees, regulation of fees, regulating advance deposits for fees, fee-sharing with non-lawyers, safekeeping of client property, a duty to notify a client of legal aid opportunities, and malpractice insurance. *CCBE Code* Rules 3.3-3.9.

acceptance and termination of instructions from a client.¹⁰⁵ The second rule, which also is not a money-related rule, contains the regulations regarding conflicts of interest.¹⁰⁶ While the substance of many of these rules will look familiar to an American lawyer, several of them contain matters that an American might find surprising.

The first surprise an American might encounter lies in *CCBE Rule 3.1*, which deals with a lawyer's acceptance and termination of instructions.¹⁰⁷ This rule includes subsections which are counterparts to many of the requirements found in the ABA's Rules 1.1, 1.3, and 1.4, and thus are not surprising.¹⁰⁸ For example, this ethical standard requires lawyers to represent their clients conscientiously and diligently and to keep their clients informed as to the progress of the matter.¹⁰⁹ It also forbids lawyers from handling matters that they are not competent to handle.¹¹⁰ Finally, the rule addresses the issue of withdrawal, prohibiting withdrawal "in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client."¹¹¹

Upon closer examination, the first surprising aspect of this rule occurs in *CCBE Rule 3.1.1*, which states:

A lawyer shall not handle a case for a party except on his instructions. *He may, however, act in a case in which he has been instructed by another lawyer who himself acts for the party* or where the case has been assigned to him by a competent body.¹¹²

This rule thus seemingly allows the "substitution" of attorneys, a permitted practice in several European countries.¹¹³ Under this practice, a lawyer who is unable to handle part of a case (such as a court appointment) contacts another lawyer and asks that second lawyer to handle the case. Both under this rule and in practice in at least some countries, this substitution of attorneys does not require the consent of the client and can be done without the client ever being aware of such substitution.¹¹⁴

105. CCBE CODE Rule 3.1.

106. CCBE CODE Rule 3.2.

107. CCBE CODE Rule 3.1.

108. These rules speak to competence, diligence, and communication. MODEL RULES Rules 1.1, 1.3, 1.4.

109. CCBE CODE Rule 3.1.2.

110. CCBE CODE Rule 3.1.3.

111. CCBE CODE Rule 3.1.4.

112. CCBE CODE Rule 3.1.1 (emphasis added).

113. See, e.g., the classified advertisements ["Anzeigen"] in the Austrian Bar Association's monthly magazine, in which lawyers seek other lawyers to handle this "substitution" work for them. ÖSTERREICHISCHES ANWALTSBLATT, Jan. 1992, at 84-85.

114. Nothing in the Austrian statutes regulating lawyers nor the administrative regulations which are comparable to an ethics code require client consent before such "substitution" work is permitted. See generally RECHTSANWALTSORDNUNG [hereinafter RAO], 1868 RGBI 96 and RICHTLIN-

Depending on how it is ultimately interpreted, an American might also find Rule 3.1.2 surprising. Part of this rule requires a lawyer to "undertake personal responsibility for the discharge of the instructions given to him."¹¹⁵ The *CCBE Explanatory Memorandum* explains:

The provision that he shall undertake personal responsibility for the discharge of the instructions given to him means that he cannot avoid responsibility by delegation to others. It does not prevent him from seeking to limit his legal liability to the extent that this is permitted by the relevant law or professional rules.¹¹⁶

If Rule 3.1.2 were interpreted to mean that *within* an office a lawyer may not delegate responsibility to another lawyer in the firm, an American might then find this provision surprising.

An American might also be surprised by the strictness of the conflict of interest provisions of Rule 3.2.¹¹⁷ Under Rule 3.2, "a lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients."¹¹⁸ The rule also requires a lawyer to cease acting for both clients, if a conflict arises later, where there is a risk of breach of confidence, or where the lawyer's independence may be impaired.¹¹⁹ This rule also has a "former clients" conflict section, forbidding a lawyer from accepting a new client if there is a risk of breach of the confidences of the former client or if the lawyer's knowledge of the former client would give an unfair advantage to the new client.¹²⁰ This conflicts rule also has an imputed disqualification provision which applies to the other members of the lawyer's firm.¹²¹

However, unlike the rules familiar to American attorneys, this conflict rule does not contain a consent exception. This rule does not provide the

LEN FÜR DIE AUSÜBUNG DES RECHTSANWALTSBERUFES, FÜR DIE ÜBERWACHUNG DER PFLICHTEN DES RECHTSANWALTES UND FÜR DIE AUSBILDUNG DER RECHTSANWALTSANWARTER (RL-BA 1977) [hereinafter *RICHTLINIEN* or the *RL-BA*], both of which are reprinted in DR. WALTER SCHUPPICH & DR. HELMUTH TADES, *RECHTSANWALTSORDNUNG* (4th ed. 1991), at 2-49 and at 171-186, respectively. An Austro-American lawyer, who has practiced in both Boston and Vienna, advised me that this substitution work sometimes occurs without client knowledge or express consent. Interview with Dr. Nicholas A. Simon, in Vienna, Austria (April 29, 1992).

115. CCBE CODE Rule 3.1.2.

116. CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 3.1 cmt.

117. CCBE CODE Rule 3.2. The 1977 *Lawyer's Services Directive* is also relevant to the topic of conflict of interest. This Directive states that the Host State may regulate conflicts of interest and confidentiality without prejudice to "Home State" rules. See *Lawyer's Services Directive*, *supra* note 92.

118. CCBE CODE Rule 3.2.1. This conflicts rule may be stricter than the conflicts rules used in some CCBE Member States. See Toulmin, *supra* note 4, at 682.

119. CCBE CODE Rule 3.2.2.

120. CCBE CODE Rule 3.2.3.

121. CCBE CODE Rule 3.2.4.

client with the authority to waive the restrictions and assume the risk of representation. Thus, if this omission of a consent exception is interpreted to mean that there in fact is no such exception, then European "lawyers" would be left with a paternalistic approach contrary to the American model which elevates the client's autonomy and thus assures the right to assume certain risks.¹²²

This interpretation of the conflict of interest rule, however, may not be correct. The omission of a consent exception might be interpreted to mean only that the issue has not been discussed or resolved. For example, the editor of the *CCBE Compendium* has indicated her belief that a client may waive certain potential conflicts of interest after proper consultation and therefore that the *CCBE Code* should contain the same principle.¹²³ Consequently, *CCBE Rule 3.2* ultimately might not be found to be so strict as it at first appears.

An American reader might be equally surprised by one of the seven fee provisions in the "Relations with Clients" section of the *CCBE Code*. At first glance, Rule 3.3 of the *CCBE Code* appears to prohibit contingency fees.¹²⁴ The first subsection of this rule simply states that "[a] lawyer shall not be entitled to make a *pactum de quota litis* [contingency fee]."¹²⁵

The *CCBE Explanatory Memorandum* also suggests, at first glance, that there is a common position in the EC Member States against contingency fees.¹²⁶ The *CCBE Explanatory Memorandum* is correct in the sense that pure contingency fees are virtually, if not universally, prohibited in Europe.¹²⁷ Some of the rationales for the prohibition against contingency fees

122. This "no waiver" aspect of the conflicts rule recently was noted by one of the *CCBE Code* drafters. Toulmin, *supra* note 4, at 682. For an overview of some of the issues that can arise with respect to the issue of whether client waiver is appropriate and the competing concerns of client autonomy and paternalism, see *Unified Sewerage Agency, Inc. v. Jelco*, 646 F.2d 1339 (9th Cir. 1981).

123. Interview with Dorothy Margaret Donald-Little, editor of the *CCBE Compendium*, in Friedburg, Germany (June 26, 1992). Indeed, the comments of one of the Code drafters implicitly suggests that perhaps a consent exception is needed. Toulmin, *supra* note 4, at 682 ("It may be that in a code of universal application, this matter can be resolved by adding a clause permitting waiver by the client provided that such waiver is freely given after the issues have been fully explained to the client.")

124. *CCBE CODE Rule 3.3*; see also Toulmin, *supra* note 4, at 678 (indicating that the provisions about contingency fees generated considerable discussion).

125. *CCBE CODE Rule 3.3*.

126. *CCBE EXPLANATORY MEMORANDUM*, *supra* note 45, Rule 3.3 cmt. (providing that "these provisions reflect the common position in all Member States that an unregulated agreement for contingency fees (*Pactum de Quota Litis*) is contrary to the proper administration of justice because it encourages speculative litigation and is liable to be abused"). Toulmin, *supra* note 4, at 682 n.54.

127. See HANDBOOKS — EC MEMBER STATES, *supra* note 32, Rule 7.1; HANDBOOKS — EC OBSERVER STATES, *supra* note 32, Rule 7.1 Contingency fees are expressly prohibited in Austria, Cyprus, Germany, Norway, and Spain; contingency fees are prohibited "except as in accordance with the *CCBE Code of Conduct*" in Belgium, Denmark, France, and the Netherlands. *Id.* See also *CCBE CODE*, Rule 3.3.

are remarkably similar to the critique of contingency fees which one reads in the United States. To the critics, contingency fees encourage speculative litigation. In addition, a lawyer's independence and judgment may be compromised when that same lawyer has a stake in a case financed by contingency fees.¹²⁸

The absolute prohibition on contingency fees contained in Rule 3.3.1, however, is partially relieved by the exception found in Rule 3.3.3. This subsection excludes from the contingency fee ban "an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the competent authority having jurisdiction over the lawyer."¹²⁹ This exception thus permits the use of bar-approved fee schedules which add a premium to the lawyer's fee if successful and which therefore are a form of contingency fee.¹³⁰ (There has been little or no concern on the part of the bar associations with respect to the issue of whether bar-approved fee schedules would violate any antitrust provisions.)¹³¹

Rule 3.4 of the *CCBE Code* confirms that the antitrust issues which proved to be a barrier in the United States to such bar-approved fee schedules are not, at the moment, troubling to the drafters of the *CCBE Code*. Rule 3.4, in fact, expressly permits such fee schedules.¹³² After requiring a fee to be "fair and reasonable," this rule continues by saying that in the absence of a proper fee agreement to the contrary, a lawyer's fees shall be regulated by the bar society to which the lawyer belongs and which has the closest connection to the contract between the lawyer and client.¹³³

The remaining money-related rules in the "Relations with Clients" section of the *CCBE Code* probably would not surprise an American. Rule 3.5, for example, permits a lawyer to require a deposit which is a reasonable

128. See *supra* note 126.

129. CCBE CODE Rule 3.3.3.

130. See *supra* note 126. See also Toulmin, *supra* note 4, at 682-83 (citing the Paris and Portugal bars as examples of bars that permit a lawyer to charge a larger fee when successful, and England and Wales where, since 1990, by written agreement an advocate may receive a higher than normal fee if successful and no fee if unsuccessful).

131. Compare *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (holding that a mandatory minimum fee schedule published by a county bar association and enforced by the state bar violated the Sherman Antitrust Act) with *Update: Spanish Bar Association Opposes Government Changes*, LAWS. EUR., September/October 1992, at 4 (noting the Spanish Bar's objections to a report by the Spanish Competition Authority which proposed eliminating the rules on minimum fees on the grounds that they were anticompetitive). Neither the *CCBE Code* nor the *CCBE Explanatory Memorandum* mention the issue of whether such fees would be improper on antitrust grounds.

132. See CCBE CODE Rule 3.4.

133. CCBE CODE Rule 3.4. See also DE CRAYENCOUR, *supra* note 4, at 23 (noting that "[s]cales of fees can sometimes seem incompatible with the independence and autonomy of self-employed professional people," but then explaining why they are acceptable).

estimate of the fees and permits the lawyer to withdraw for failed payment, subject to the withdrawal limits set forth in Rule 3.1.¹³⁴ Rule 3.6 prohibits a lawyer from sharing fees with a non-lawyer, with the exception of a lawyer's heirs.¹³⁵ Rule 3.7 has no counterpart in the *Model Rules*; the rule contains the not-so-surprising requirement that lawyers must inform their clients of the availability of legal aid, where applicable.¹³⁶

Rule 3.8, which deals with client funds, is strict but probably not too surprising to an American. Nevertheless, this rule establishes stricter standards than some of the client fund rules currently found in CCBE Member and Observer States.¹³⁷ These provisions of this rule have been described by a member of the drafting committee as "significant advances in client protection."¹³⁸ This rule requires a lawyer to segregate client funds from other funds, requires client funds to be held in an identifiable account in a bank or other institution subject to the supervision of a public authority unless agreed otherwise, requires that records be maintained, and requires that the lawyer not use these funds for purposes or clients other than those for which they were intended.¹³⁹ Rule 3.8's only potential surprise lies in its declaration that the "competent authorities in all Member States" should have the power to conduct random audits of these trust accounts.¹⁴⁰ These "client funds" requirements set forth in Rule 3.8 establish a minimum threshold with which a lawyer must comply. The rule indicates that in addition to the above rules, a lawyer must comply with his "Home State" rules when they are stricter.¹⁴¹ The rule, however, does provide certain circumstances under which a lawyer who is practicing in a "Host State" may arrange to comply with the Host State rules, rather than the "Home State" rules.¹⁴²

The final provision of the "Relations with Clients" section of the *CCBE Code* addresses the topic of malpractice or professional indemnity insurance. Rule 3.9 begins with the general principle that "[l]awyers shall be insured at all times against claims based on professional negligence to an extent which is reasonable having regard to the nature and extent of the risks which lawyers incur in practice."¹⁴³ The rule continues by providing

134. CCBE CODE Rule 3.5.

135. CCBE CODE Rule 3.6.

136. CCBE CODE Rule 3.7.

137. Goebel, *Lawyers in the European Community*, *supra* note 4, at 603.

138. Toulmin, *supra* note 4, at 678.

139. CCBE CODE Rule 3.8.

140. *Id.*

141. *Id.*

142. *Id.*

143. CCBE CODE Rule 3.9.

various "conflicts of law" provisions which specify whose malpractice insurance rules a lawyer should use — "Host State" or "Home State."¹⁴⁴ As the *CCBE Explanatory Memorandum* explains, this rule "reflects a Recommendation, also adopted by the CCBE in Brussels in November 1985, on the need for all lawyers in the Community to be insured against the risks arising from professional negligence claims against them. Again in some Member States such an obligation has not yet been introduced for internal purposes."¹⁴⁵ Thus, by agreeing to adopt the CCBE's rule, transforming the CCBE recommendation for malpractice insurance into a mandatory requirement, each member of the CCBE has agreed to adopt for its cross-border practice situations a mandatory malpractice insurance requirement. (Although this kind of requirement is rare in the United States, it is not unknown.¹⁴⁶)

In sum, while many of the provisions in the "Relations with Clients" section of the *CCBE Code* will look familiar to Americans, there are some provisions which may come as a surprise, particularly the provision which deals with the "substitution" of another lawyer and the provisions which show a completely different view of what are considered appropriate and inappropriate methods of setting fees.

4. The "Relations With the Courts" Provisions in the *CCBE Code*

The *CCBE Code* has five rules which set forth a lawyer's relationship with the courts. Four of these rules might be described as substantive "legal ethics" provisions, while the remaining provision might be described as a "conflicts of law" provision. Of the four substantive provisions, three appear to be relatively noncontroversial provisions.

The first of the three noncontroversial provisions is Rule 4.1 concerning the "applicable rules of conduct in court." This rule states that a "lawyer who appears, or takes part in a case, before a court or tribunal in a Member State must comply with the rules of conduct applied before that court or

144. *Id.*

145. CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 3.9. Undoubtedly because this mandatory insurance obligation did not exist in all member states, a drafter of the *CCBE Code* described this rule as a "significant advance." Toulmin, *supra* note 4, at 678. Accord Goebel, *Lawyers in the European Community*, *supra* note 4, at 603. A recent article pointed out, however, that "there is still a long way to go" with respect to consistency in the rules regarding malpractice protection. John Young, *Professional Indemnity Insurance: Compulsory Arrangements in England and Wales*, 15 LAWS IN EUROPE 9, 11 (May-June 1992).

146. See generally K. Hall, *PLF Progress, 1978-92*, OR. ST. B. BULL., Oct. 1992, at 41 (reviewing the history of Oregon's mandatory malpractice requirement and resulting bar-owned captive malpractice insurance carrier).

tribunal.”¹⁴⁷ (This rule is thus comparable to Rule 3.4(c) of the *Model Rules*.¹⁴⁸)

The second noncontroversial rule in the “Relations with the Courts” section is *CCBE Rule 4.3* concerning a lawyer’s “demeanour in court.” This rule states “[a] lawyer shall while maintaining due respect and courtesy towards the court defend the interests of his client honourably and in a way which he considers will be to the client’s best advantage within the limits of the law.”¹⁴⁹ (This rule might be compared to the *Model Rule 3.5(c)* which forbids a lawyer from engaging in conduct intended to disrupt a tribunal.¹⁵⁰ It also touches on the decision-making authority principles reflected in *Model Rule 1.2(a)* which requires a lawyer to “abide by a client’s decisions concerning the objectives of representation . . . [and] consult with the client as to the means by which they are to be pursued.”)¹⁵¹ While lawyers may disagree about how to apply Rule 4.3 of the *CCBE Code* to a particular situation, the underlying principle is not particularly controversial.

The third noncontroversial provision in this section is *CCBE Rule 4.5*, which confirms that “[t]he rules governing a lawyer’s relations with the courts apply also to his relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.”¹⁵²

The potentially “controversial” substantive “legal ethics” provision governing a lawyer’s relationship with the courts in the *CCBE Code* is Rule 4.4 concerning “False or Misleading Information.” This rule states in its entirety: “A lawyer shall never knowingly give false or misleading information to the court.”¹⁵³ As described above in the discussion of the confidentiality requirement of *CCBE Rule 2.3*, the *CCBE Explanatory Memorandum* contains no explanation of the parameters of this rule.¹⁵⁴ Thus, it is not yet clear whether the same debate will emerge in the European Community that has emerged in the United States concerning how this duty of candor to

147. *CCBE CODE Rule 4.1*. It should be noted that neither the *CCBE Code* nor the *CCBE Explanatory Memorandum* define what is meant by the terms “judge”, “court,” or “tribunal” which are used throughout this section of the *CCBE Code*. In other words, there is no counterpart to Rule 1.4, which defined the legal professionals in each CCBE Member and Observer State to whom the *CCBE Code* applied.

148. *Model Rule 3.4 (c)* states:

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no rated obligation exists.

MODEL RULES Rule 3.4(c).

149. *CCBE CODE Rule 4.3*.

150. *MODEL RULES Rule 3.5(c)*.

151. *MODEL RULES Rule 1.2(a)*.

152. *CCBE CODE Rule 4.5*.

153. *CCBE CODE Rule 4.4*.

154. See *supra* notes 93-100 and accompanying text.

the court should be balanced against the lawyer's duty of confidentiality.¹⁵⁵ If such a debate is possible, then *CCBE Rule 4.4* certainly has provided less guidance on this issue than is provided by the Comments to the ABA's *Model Rule 3.3(a)*.¹⁵⁶

The remaining provision dealing with a lawyer's relationship with the courts is as much a "conflicts of law" provision as it is a "legal ethics" provision. This remaining rule — *CCBE Rule 4.2* — is titled "Fair Conduct of Proceedings." It states:

A lawyer must always have due regard for the fair conduct of proceedings. He must not, for example, make contact with the judge without first informing the lawyer acting for the opposing party or submit exhibits, notes or documents to the judge without communicating them in good time to the lawyer of the other side *unless such steps are permitted under the relevant rules of procedure*.¹⁵⁷

Although the *CCBE Explanatory Memorandum* does not emphasize this issue, it does confirm the possibility that in some Member States there will be rules which permit a lawyer to have *ex parte* contacts with a judge.¹⁵⁸ And indeed, this possibility is an actuality; in some member states, *ex parte*

155. See *supra* notes 93-100 and accompanying text. It is also unclear how *CCBE Rule 4.4* compares with *Model Rule 3.3*. Professor Geoffrey Hazard, a leading expert on the *Model Rules*, has noted that *CCBE Rule 4.4* may go further because a lawyer subject to the *CCBE* rule may not "knowingly offer 'false or misleading' information," whereas *Model Rule 3.3* prohibits a lawyer from "knowingly offering false evidence." Geoffrey C. Hazard, *Ethics*, NAT'L L.J., March 30, 1992, at 13.

156. *Model Rule 3.3(a)(4)* prohibits a lawyer from knowingly offering "evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." The rule itself does not explain what constitutes "reasonable remedial measures." The Comment, however, provides guidance by stating:

[T]he advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps doing nothing.

MODEL RULES Rule 3.3 cmt. Although this rule and comment do not provide perfect guidance, see generally authorities cited in the MODEL RULES OF PROFESSIONAL CONDUCT ANNOTATED, at 342-45 (2d ed. 1992) [hereinafter MODEL RULES ANN.]. They provide significantly more guidance than is provided by *CCBE Rule 4.4*.

157. *CCBE CODE Rule 4.2*.

158. The *CCBE Explanatory Memorandum* states with regard to Rule 4.2:

This provision applies the general principle that in adversarial proceedings a lawyer must not attempt to take unfair advantage of his opponent, in particular by unilateral communications with the judge. An exception however is made for any steps permitted under the relevant rules of the court in question (see also on 4.5 below [concerning demeanor in court]).

CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 4.2.

contacts with the court on "non-fundamental" issues is not prohibited.¹⁵⁹ Because Rule 4.2 does not provide a substantive provision outlawing *ex parte* contacts but instead defers to the procedural rule of the particular Member State, it should properly be referred to as a "conflicts of law" rule.¹⁶⁰

In sum, three of the five "Relations With the Courts" rules in the *CCBE Code* are completely straightforward and noncontroversial. A fourth rule, which does not prohibit *ex parte* contacts between a lawyer and a judge, is not so much controversial as it is surprising to an American reader. The fifth rule may ultimately prove quite controversial. This rule, which deals with a lawyer's duty of candor to the court, does not on its face indicate that it is subject of disagreement, much less controversy. The experience in the United States, however, suggests that this rule may ultimately prove to be controversial.

159. See CODE OF CONDUCT — GERMANY, § 8.3 at 31 ("A lawyer may contact or submit documents or exhibits to a judge without the knowledge of the lawyer(s) or the opposing client(s) in the case."); CODE OF CONDUCT — BELGIUM, § 8.3, at 33 ("An advocate may not contact or submit documents or exhibits to a judge without the knowledge of the lawyer(s) or the opposing client(s) in the case unless such steps are permitted under the relevant rules of procedure."), both reprinted in HANDBOOKS — EC MEMBER STATES, *supra* note 32. The German legal ethics regulation that appears most relevant is section 9(2) of the *Grundsätze des anwaltlichen Standesrechts, Richtlinien gemäß §177 Abs. 2 Nr. 2 BRAO [RichtlRA]*. This regulation might be translated into English as follows: "Any attempt to influence the judge's decision with irrelevant means is a violation of the code of ethics, especially to invoke someone who legally cannot influence the decision, or to disparage the judge because of his decision."

Furthermore, even some of the countries that are listed in the *CCBE Compendium* as not permitting *ex parte* contact may in fact in some circumstances permit such contact. For example, the *CCBE Compendium* states, "A lawyer may not contact or submit documents/exhibits to a judge without the knowledge of the opposing lawyer in the case." CODE OF CONDUCT — AUSTRIA § 8.3 at 31, reprinted in HANDBOOKS — EC OBSERVER STATES, *supra* note 32. In fact, however, neither the statute regulating lawyers nor the administrative regulations governing lawyers contains an express ban on a lawyer's *ex parte* contacts with a judge. See generally RAO and RL-BA, *supra* note 114. In a conversation with Dr. Karl Hempel, a former Austrian representative to the CCBE, Dr. Hempel confirmed that there was no explicit prohibition on *ex parte* communications, but he indicated that communication on fundamental issues would be improper. Interview with Dr. Karl Hempel, former Austrian representative to the CCBE, in Vienna, Austria (July 6, 1992). Dr. Nicholas Simon, an Austro-American lawyer who has practiced in both Boston and Vienna, has indicated that he sees more *ex parte* contact in Vienna than in Boston. Interview with Dr. Nicholas Simon, in Vienna, Austria (April 29, 1992).

160. Using this definition, *Model Rule 3.5*, which is the counterpart to *CCBE Rule 4.2*, might similarly be described as more of a "conflict of laws" provision than a substantive legal ethics provision. *Model Rule 3.5* states:

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate *ex parte* with such a person except as permitted by law; or
- (c) engage in conduct intended to disrupt a tribunal.

MODEL RULES Rule 3.5.

5. The "Relations Between Lawyers" Provisions in the *CCBE Code*

The *CCBE Code* also contains a section entitled "Relations Between Lawyers." There are nine provisions in this section, four of which are based at least in part on provisions that were contained in the CCBE's 1977 *Declaration of Perugia*.¹⁶¹ The predominant themes in this section are issues of money on the one hand and issues of collegiality and cooperation on the other hand. Many of these rules are expressly designed to protect the interests of the lawyer. (This section also contains the rule against communicating with an opposing party and a rule requiring training of young lawyers.) Of these nine rules, only one rule — Rule 5.3 which deals with correspondence between lawyers — might be described as a "conflicts of laws" provision. This rule is probably the most important rule in this section of the *CCBE Code* because it addresses an issue about which many European Community lawyers probably know very little.

The *CCBE Explanatory Memorandum* gives the background of Rule 5.3 as follows:

In certain Member States communications between lawyers (written or by word of mouth) are normally regarded as confidential. This means that lawyers accept that those communications may not be disclosed to others and copies may not be sent to the lawyers' own client. This principle is recognised in Belgium, France, Greece, Italy, Luxembourg, Portugal and Spain. Such communications if in writing are often marked as 'confidential' or 'sous la foi du Palais.'¹⁶²

(The *CCBE Explanatory Memorandum* then compared this approach with the approaches taken in Denmark, the Netherlands, and Germany.) The *CCBE Explanatory Memorandum* then continued as follows:

These differences often give rise to misunderstandings between lawyers of different Member States who correspond with each other. For this reason, lawyers should be particularly careful to clarify the basis upon which correspondence with lawyers in other Member States is sent and received. In particular a lawyer who wishes to make a confidential or 'without prejudice' communication to a colleague in a Member State where the

161. The Section of the *Declaration of Perugia* that was used as a model for the *CCBE Code* in this area is Article VI, entitled "The Corporate Spirit of the Profession". Section 1 of Article VI became *CCBE Rule 5.1*, also entitled "Corporate Spirit of the Profession." Section 2 of the Article, dealing with communications between lawyers, is embodied in *CCBE Rule 5.3*, entitled "Correspondence Between Lawyers." Section 3 of Article VI, dealing with competence, became *CCBE Rule 5.2*, entitled "Co-operation among Lawyers of Different Members States." The last section of Article VI, dealing with financial obligations, became *CCBE Rule 5.7*, "Responsibility for Fees." Compare DECLARATION OF PERUGIA, *supra* note 28, at art. VI, §§ 1-4 with CCBE CODE Rules 5.1-5.3, 5.7.

162. CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 5.3.

rules may be different should ask in advance whether it can be accepted as such.¹⁶³

The *CCBE Code* has not attempted to adopt a single substantive legal ethics provision which would eliminate these different approaches. Indeed, the *CCBE Code* has not even provided a "conflicts of law" provision addressing the issue of the confidentiality of lawyer-to-lawyer communications that would establish which of these conflicting rules will set the terms by which the confidentiality of such correspondence can be judged. Instead, the *CCBE Code* has opted for an education approach which requires lawyers to communicate with one another about this topic in an effort to avoid misunderstandings.¹⁶⁴ This rule provides:

5.3 CORRESPONDENCE BETWEEN LAWYERS

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

5.3.2. If the recipient of the communication is unable to ensure its status as confidential or without prejudice he should return it to the sender without revealing the contents to others.¹⁶⁵

This approach, of course, does not address the age-old question of whether "you can put the genie back in the bottle." A recipient lawyer faces a dilemma if practicing in a jurisdiction where a lawyer has no right to keep information confidential from the client. In such circumstances, Rule 5.3.2 requires the lawyer to return the "confidential" correspondence to the originating lawyer. However, if a lawyer must read a letter in order to learn that the sender intended it to be confidential, and thereafter must decline acceptance of the correspondence Without revealing its contents to the client, though, the lawyer is in reality withholding information from the client. Can a lawyer, in essence, act as if the lawyer has not in fact obtained this information? The solution adopted by the CCBE may not be completely

163. *Id.*

164. The "educatory" nature of this rule is no doubt due in part to the fact that this provision proved to be one of the most difficult to draft in view of the differences among the CCBE representatives. See Toulmin, *supra* note 4, at 679-684 nn.63-65. However, education certainly appears to be acutely needed in this area because of the different terminology used in different countries. For instance, the terms used can have different meanings as well as different methods of enforcement. Thus, whereas some countries speak of "legal privilege," others speak of "confidentiality" and still others speak of "le secret professionnel" (the professional secret). Furthermore, while some countries recognize the confidentiality of correspondence, others do not. For an excellent overview of the different terms and their meanings, see generally EDWARD, *supra* note 97.

165. CCBE CODE Rule 5.3.

logical or elegant, but it probably avoids more misunderstandings and disputes than a "conflicts of law" provision would have.¹⁶⁶

Although the concepts underlying Rule 5.3 and lawyers' correspondence might be unfamiliar to an American reader, the concepts underlying the remaining "Relations Between Lawyers" provisions are relatively clear. However, although the tone of some of these provisions may sound familiar, an American reader might not expect the express acknowledgment in some provisions of their intent to protect the interests of the legal profession in general or each member of it in particular. These remaining rules of this section of the *CCBE Code* are summarized below.

Both *CCBE Rules* 5.1 and 5.2 raise the issue of "cooperation." Rule 5.1 addresses the topic of the "corporate spirit of the profession" and requires cooperation among lawyers, but not at the expense of clients.¹⁶⁷ Rule 5.2, titled "Co-operation among Lawyers of Different Member States," requires a lawyer not to undertake from a lawyer in another Member State a matter which the lawyer is not competent to handle.¹⁶⁸ Moreover, if the contacted lawyer is not able to help the lawyer from another Member State, that lawyer must help that person locate the appropriate person who can be of assistance.¹⁶⁹

Rule 5.4 forbids a lawyer from requesting or receiving a referral fee in exchange for referring or recommending a client.¹⁷⁰ Although the language of this rule is absolute and contains no exceptions, a court or disciplinary body interpreting this code might conceivably find that there is an implicit exception to this rule. Such an finding might be based, in part, on the language of the accompanying *CCBE Explanatory Memorandum*. The *CCBE Explanatory Memorandum* asserts that this provision "does not prevent fee sharing arrangements between lawyers on a proper basis" and explains that in some Member States a lawyers can retain a commission.¹⁷¹ Thus, this provision may have less bite than first appears and may be much closer to a "conflicts of law" approach since the *CCBE Explanatory Memorandum* acknowledges that in some Member States a lawyer may receive a state-

166. The editor of the *CCBE Compendium* has suggested that it would not be correct for a lawyer to place another lawyer in the difficult situation of having to read a letter in order to learn that it is confidential and then act as if that lawyer never learned the confidential information. A solution which she has used is to send a cover letter asking if the second lawyer was at liberty to read her correspondence and maintain its confidentiality. If so, the cover letter instructed the second lawyer to open the enclosed sealed envelope. If not, the lawyer was instructed not to open the second envelope. Letter from Dorothy Margaret Donald-Little to Laurel S. Terry, author (July 18, 1992)(on file with author).

167. *CCBE CODE* Rule 5.1.

168. *CCBE CODE* Rule 5.2.

169. *CCBE CODE* Rule 5.2.

170. *CCBE CODE* Rule 5.4.

171. *CCBE EXPLANATORY MEMORANDUM*, *supra* note 45, Rule 5.4.

sanctioned referral fee. An exception consistent with this comment presumably would be necessary before the original lawyer and the substitution lawyer discussed earlier could split a fee.

CCBE Rule 5.5 is entitled "Communication with Opposing Parties" and directs that a "lawyer shall not communicate about a particular case or matter directly with any person whom he knows to be represented or advised in the case or matter by another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications)."¹⁷² This rule is thus analogous to the ABA's *Model Rule 4.2*, although the topical issue in the United States concerning how to apply this rule to an organizational client is not addressed.¹⁷³ Unlike the comment to the *Model Rules*, the commentary concerning *CCBE Rule 5.5* explicitly acknowledges that it is designed not only for the protection of the opposing parties, but also "to promote the smooth conduct of business between lawyers"¹⁷⁴

Both *CCBE Rules 5.6* and *5.7* of the deal with fee-related issues. *CCBE Rule 5.6* indicates that when a lawyer is taking over a case for another lawyer, the new lawyer shall not begin to act before ascertaining that arrangements have been made for the settlement of the first lawyer's fees.¹⁷⁵ According to one of the drafters, this provision required considerable discussion before it was adopted.¹⁷⁶ The issue of primary concern was the extent of responsibility, if any, a succeeding lawyer had to ensure that the prior lawyer was paid.¹⁷⁷ The compromise adopted by the *CCBE Code*

172. *CCBE CODE Rule 5.5*.

173. In the case of an organization, *Model Rule 5.5* prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. *MODEL RULES Rule 4.2 cmt.* At least one court has stated the purpose of the rule is not "to protect a corporate party from the revelation of prejudicial facts . . . [but] to preclude the interviewing of those corporate employees who have the authority to bind the corporation." *Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984). However, it seems the rule is applied differently in different situations. *Compare Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv. Ltd.*, 745 F. Supp. 1037 (D.N.J. 1990) (holding that a lawyer may not interview former employees of opposing company without consent of opposing counsel) and *Niesig v. Team I*, 558 N.E.2d 1030 (N.Y. 1990) (holding that a lawyer may not interview any current employees of defendant corporation without consent of corporation's counsel) with *Triple A Mach. Shop, Inc. v. State*, 261 Cal. Rptr. 493 (Cal. Ct. App. 1989) (holding that a lawyer may speak *ex parte* with employees of opponent other than officers, directors, or managing agents) and *Morrison v. Brandeis Univ.*, 125 F.R.D. 14 (D. Mass. 1989) (holding that a lawyer may interview employees of opponent without opposing counsel's consent in an employment bias case).

174. *CCBE EXPLANATORY MEMORANDUM*, *supra* note 45, *Rule 5.5*.

175. *CCBE CODE Rule 5.6*. This is particularly problematic because in some jurisdictions before a lawyer may take on a case, the lawyer has a duty to ensure that the prior lawyer was paid.

176. Toulmin, *supra* note 4, at 678, 684.

177. *Id.*

permits the new lawyer to take any required urgent steps which are necessary to protect the interests of the client, *provided, however*, that the second lawyer informs the first lawyer of this fact.¹⁷⁸ *CCBE Rule 5.7*, unlike *CCBE Rule 5.6*, does not deal with the successive-lawyer situation. Rather, it deals with the situation in which a lawyer assists a client to retain additional counsel. *CCBE Rule 5.7* adopted the *Declaration of Perugia* rule establishing the circumstances under which a lawyer who brings in another lawyer on a case is responsible for the new lawyer's fees.¹⁷⁹

CCBE Rule 5.8, which is titled "Training Young Lawyers," is essentially a nondiscrimination exhortation. Framed in nonmandatory terms, the rule states that the members of the legal profession in the European Community should take into account the need of the profession to have lawyers trained in different member states when considering training issues.¹⁸⁰

CCBE Rule 5.9, the final rule in this section, indicates that if a lawyer believes that a colleague has breached a rule of professional conduct or if a professional dispute arises, the lawyer should first contact this colleague and attempt to resolve the dispute.¹⁸¹ If the dispute cannot be resolved, this rule then requires the lawyer to notify the bar associations before beginning any proceedings so that the associations may attempt to facilitate a settlement.¹⁸²

In sum, with the exception of *CCBE Rule 5.3*, which deals with conflicting rules about the confidentiality of correspondence between lawyers, the topics addressed in this section are not particularly ground-breaking. Most of these rules concern either issues of money and finances or cooperation and collegiality. What may be most unexpected to an American is the extent to which this code unabashedly acknowledges its intent to protect the lawyer's own interests. And this lack of embarrassment may, in turn, reflect a different way of thinking about the lawyer's role.

6. Conclusion

The introductory paragraph of this article referred to what *ultimately* may be the situation of a German lawyer wishing to practice in France. *Ultimately*, a German lawyer practicing in France may be subject to fewer conflicting ethical rules than a New Jersey lawyer practicing in the District of Columbia. The reason why cross-border practice may eventually be easier in Europe is that the European Community has expressed an interest in

178. *CCBE CODE Rule 5.6*.

179. *CCBE CODE Rule 5.7*; see also *DECLARATION OF PERUGIA*, *supra* note 28, art. VI, § 4.

180. *CCBE CODE Rule 5.8*. This provision also was the topic of some discussion during the drafting stage. See Toulmin, *supra* note 4, at 678.

181. *CCBE CODE Rule 5.9*.

182. *Id.*

developing a standard code of ethics which "harmonizes"¹⁸³ the previous ethics rules of each country. This EC interest in harmonizing the ethics rules that will be used in the Member States contrasts with the approach used in the United States, in which the ethical regulation of lawyers occurs on a state-wide basis rather than a national basis, and in which there seems to be very little discussion of the need to standardize the ethical rules in all States. Indeed, since the promulgation of the *Model Rules* in 1983, there has probably been less standardization than there was previously.¹⁸⁴

Although a lawyer in the European Community may *ultimately* be subject to fewer conflicting ethical rules than a American lawyer, at the moment significant barriers exist for an European Community lawyer who wants to practice in a different Member State. Some of the barriers that face an European Community lawyer wanting to practice in a different Member State are a result of the substantive European Community law.¹⁸⁵ But at least one of the barriers facing an European Community lawyer hoping to engage in a cross-border practice occurs because a lawyer who originally

183. As explained earlier, one of the listed purposes of the *CCBE Code* is that it be taken into account in all revisions of national rules of deontology or professional practice with a view of their progressive "harmonization." See *supra* note 72. "Harmonization" is the process through which the European Community develops a uniform set of standards applicable to all Member States. See generally BERMAN, *supra* note 37, at 428-441.

The CCBE, however, does not appear to be unequivocally in support of "harmonization" of legal ethics rules. There are repeated references that the legal ethics codes are a result of particular legal systems and that one cannot harmonize the legal ethics codes without streamlining all the legal systems, which is not necessarily desirable. Compare Toulmin, *supra* note 4, at 677 (stressing that the rules of a jurisdiction should not be taken out of context, nor should an attempt be made to give general application to rules which inherently are incapable of such application) with Goebel, *Lawyers in the European Community*, *supra* note 4, at 561, 602-03 (noting the changes in national rules regarding lawyers which have occurred in the recent past). Recently, the EC has authorized the use of "mutual recognition" in lieu of "harmonization," in which a Member State may be required to recognize the requirements of another Member State and treat them as equivalent to their own. See BERMAN, *supra* note 37, at 441.

184. The lack of "harmonization" in the U.S. is readily apparent by contrasting the states' adoption of the *Model Rules* with the adoption of the *Model Code*. Compare Laws. Man. on Prof. Conduct 1:11-43 (ABA/BNA) (1992) (summarizing each state's version of the *Model Rules*) with CHARLES WOLFRAM, MODERN LEGAL ETHICS §2.6.3, at 56-57 (Practitioner's ed. 1986) (noting that the initial version of the *Model Code* was adopted almost *in toto* by the vast majority of states).

The author views this lack of "harmonization" in the ethics rules as a positive sign of the increasing sophistication (and resulting debate) about these issues. However, while this lack of harmonization provides for a fuller development of the issues and the debate, it does create problems for practitioners. See generally ABA Committee on Counsel Responsibility, *Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States*, 45 BUS. LAW. 1229 (1990); Stanley Kaplan, *Professional Responsibility: Which State's Rules Apply?*, INSIGHTS, Feb. 1988, at 17 (explaining why there is no "harmony" in the *Model Rules*).

185. For a discussion of the issues raised under substantive European Community law concerning a lawyer's right to engage in cross-border practice, see *supra* note 4, and the discussion in Part II of this article, forthcoming, concerning the relationship of *CCBE Rule 2.4* to substantive European Community law.

was licensed in one state, but is now practicing in another state, may be subject to multiple, and perhaps conflicting, ethical systems.

The *CCBE Code* represents an attempt to deal with this barrier that is created by having a lawyer subject to multiple ethics codes. Despite the fact that the *CCBE Code* has not "harmonized" the legal ethics rules from all Member States so as to provide substantive provisions governing all issues, the *CCBE Code* has, in essence, attempted to harmonize the "conflicts of law" choices facing a lawyer. It has attempted (although not always successfully) to provide clear rules stating in which situations a lawyer's "Home State" ethics rule governs and in which situations a lawyer's "Host State" ethics rule governs. Thus, to use the terminology of the *CCBE Code* itself, it has attempted to avoid the "double deontology" [conflicting codes] problem without providing a single deontology. While not an ideal solution, the combination of substantive "legal ethics" provisions and "conflicts of law" provisions used in the *CCBE Code* certainly appears to be a step in the right direction.

VI. ANALYZING THE SUBSTANCE OF THE *CCBE CODE* PROVISIONS: DO THE *MODEL RULES* AND THE *CCBE CODE* CONCEPTUALIZE THE ROLE OF THE ATTORNEY DIFFERENTLY?

The preceding section of this article contained a section-by-section analysis of the *CCBE Code* provisions and noted those instances where the *CCBE Code* provisions differ from the *Model Rules* provisions. While this information may be interesting to legal ethics scholars (and possibly useful to lawyers involved in European Community matters), the earlier analysis is ultimately not particularly satisfying. One is left with a dry listing of what the state of the law is without any sense about *why* the European Community ethics code evolved as it did and why it differs from *Model Rules* in some instances but not all.

In analyzing the similarities and differences between the *Model Rules* provisions and the *CCBE Code* provisions, the similarities and differences between the two might well be attributable to differing ways of conceptualizing the role of the lawyer.

These broad-brush generalizations are speculative. However, to the extent that substantive differences exist between the content of the *Model Rules* and the *CCBE Code*, this type of broad-based approach, however speculative, may provide a first step toward understanding why in certain situations the two ethical standards adopted different rules. It is in this spirit, then, that the following comments are offered.

This article cites two different kinds of authority in support of the thesis that underlying the *Model Rules* and the *CCBE Code* are different ways of thinking about the role of the lawyer. First, it cites the "General Principle of

Independence" set forth in *CCBE Rule 2.1*, as a vehicle for better introducing the theory about the different ways in which the role of the lawyer is conceptualized.¹⁸⁶

After using *CCBE Rule 2.1*'s "General Principle of Independence" to articulate this thesis, this article reviews a number of specific provisions — some of which might be considered to be "important" and some not — which support this thesis about the different ways in which the *Model Rules* and the *CCBE Code* envision the role of the lawyer.

A. THE THESIS: USING *CCBE Rule 2.1* TO ARTICULATE THE DIFFERING CONCEPTIONS OF THE ROLE OF THE LAWYER

In analyzing whether the *CCBE Code* and the *Model Rules* have different conceptualizations of the role of the lawyer, *CCBE Rule 2.1* regarding "Independence" provides a useful starting point. Rule 2.1 provides as follows:

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

2.1.2 This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to his client has no value if it is given only to ingratiate himself, to serve his personal interests or in response to outside pressure.¹⁸⁷

Most United States lawyers probably would assert that their professional obligation is to please their clients. When most American lawyers describe the limits which exist on their behavior, they might well speak in terms of lawyers not compromising their professional standards by forgetting their duty to the court or to the legal system in general. Most United States lawyers likely would *not* speak in terms of being careful not to compromise their professional standards in order to please their clients. Thus, this slightly different emphasis, which is illustrated by the *CCBE Rule 2.1* principle of "Independence" may reflect a very different way of thinking about the lawyer-client relationship.¹⁸⁸

186. *CCBE CODE Rule 2.1*.

187. *Id.* (emphasis added).

188. Professor Goebel has described this difference in the role of the lawyer and the different emphasis given in the *CCBE Code* and the *Model Rules* as "striking." Goebel, *Lawyers in the European Community*, *supra* note 4, at 644.

An explanation is necessary. It is a truism often repeated in the United States that a lawyer is a "hired gun." In the last ten years, there has been a concerted movement to get away from this language and the "no holds barred" mentality it may encourage.¹⁸⁹ Thus, for example, the *Model Rules* have deleted the language requiring a lawyer to "zealously represent" a client, and there has been a concerted effort in the secondary literature and in the courts to emphasize the requirement that a lawyer's representation must be within the bounds of the law.¹⁹⁰ (For example, there is a growing consensus that a lawyer must report perjury by a client.) Despite this change of emphasis and language, one suspects that even those Americans who are most opposed to the extremes of this "hired gun" mentality nevertheless think of a lawyer essentially as the client's "hired gun". Although many interpret the term "hired gun" in a negative sense, no pejorative meaning is intended here. Rather, this phrase is used in large part because it accurately captures this author's belief that in the United States, we view the lawyer essentially as an agent of the client, who hired the lawyer because of the lawyer's expertise. It is the lawyer's duty to help the client obtain that which the client is not able to obtain on its own.¹⁹¹ Although there are clearly limits on what the lawyer-agent may do on the client's behalf (just as there are limits on every agent), the lawyer is functioning only because of the

189. See *infra* note 190.

190. Compare MODEL CODE DR 7-101 ("Representing a Client Zealously") with MODEL RULES 1.1, 1.2, 1.3 ("Competence," "Scope of Representation," and "Diligence," respectively, omitting any reference to "zealously").

The change in tone regarding the requirement of "zealous" representation is indicated by the following excerpt:

Furthermore, the term "zeal" suggests a frame of mind appropriate in advocacy but not perhaps appropriate in the lawyer's role as advisor. Even when appropriate, the lawyer's zeal must always respect and defer to those decisions properly reserved to the client. . . . However, a lawyer's zeal must always be tempered so as not to subject parties or opposing counsel to certain indignities.

Laws. Man. on Prof. Conduct (ABA/BNA) 31:407 (1984).

191. In a trial setting, this means that a lawyer acts as an integral part of the adversary system. See MURRAY SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION* 1 (1979) (examining ethical issues within the legal profession, particularly with regard to the lawyer as a client representative and the legal services distribution system). The premises and virtues of the adversary system, as summarized by Professor Schwartz, are that by vigorous adversarial representation, we provide an opportunity to discover the truth. In addition, even if the adversarial system is not ideally designed as a vehicle to elicit the truth, it nevertheless serves the function of validating individuals by permitting them to vigorously "speak their piece."

The above comments apply most clearly to a lawyer acting in an adversarial adjudicative setting. However, even when a lawyer is acting as an advisor rather than an advocate, American society continues to think of the lawyer as an agent of the client who has no authority other than to do that which the client desires. The lawyer may suggest to the client that the client's desires are inappropriate, and the lawyer may refuse to do as the client instructs because to do so would be a violation of the *Model Rules* or other law, but a lawyer has no authority to go forward with respect to an objective that has not been approved by the client. See MODEL RULES Rule 1.2.

client and to further the client's interests. Thus, the American legal community's language is always in terms of "consent" — in almost all situations which present ethical issues, a lawyer can proceed, if at all, only by receiving client consent.¹⁹² The client is clearly the master of the relationship. (One might also notice the semantic change that occurred with the adoption of the *Model Rules*: instead of talking about lawyer-client relationships, the *Model Rules* now speak of the client-lawyer relationship.) In essence, then, when an American lawyer acts in a representational capacity, the lawyer loses the lawyer's separate identity and becomes a functionary or representative of the client, subject, however, to special limitations.

The *CCBE Code* may be based on a different way of thinking about the lawyer. According to this perspective, the lawyer, even when acting in a representative capacity, remains an independent being, whose identity is not collapsed into the identity of the client. As a result, a lawyer has certain obligations which stem from the mere fact of being a lawyer, as opposed to obligations that a lawyer assumes because of the lawyer's relationship to a client. In other words, one can speak of a lawyer's duties in the abstract, as opposed to the lawyer's duties in relationship to someone else. Or to state it slightly differently, lawyers owe certain duties to their clients (which are spelled out in Rule 3 of the *CCBE Code*) and lawyers owe certain duties to themselves or their jobs (which are spelled out in Rule 2 of the *CCBE Code*.) This approach, in which a lawyer assumes certain obligations simply by virtue of the lawyer's status, reflects a certain distance between the client and the lawyer. This distancing might seem recognizable to an American if one imagines the relationship between Rumpole and his clients or an English barrister as opposed to a solicitor.¹⁹³

One might argue that the United States uses a similar approach, in which a lawyer assumes certain obligations simply by virtue of the lawyer's status as "an officer of the court." Although there is some truth to this point, this author would suggest that the "officer of the court" principles are usually raised in the context of describing what it is a United States lawyer may do for the lawyer's client. In other words, the dialogue is still framed in terms of what it is the lawyer does or does not owe the client, as opposed to duties which lawyers owe to themselves or to their profession.

192. See Laws. Man. on Prof. Conduct (ABA/BNA) 31:407-408 (1984); MODEL RULES Rules 1.5-1.9. I am indebted to Professor David Luban, who first described the *Model Rules* as using a "language of consent," in contrast to the German ethics code's "language of interests." See David Luban, *The Sources of Legal Ethics*, 48 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 246, 264-267 (1984).

193. The fictional Rumpole defends his clients on the BBC television series, *Rumpole of the Bailey*.

It must be emphasized that even if this distancing exists, it does not follow that a lawyer using this perspective is any less of a vigorous advocate on behalf of the client.¹⁹⁴ One must remember to distinguish between two separate questions — the questions of the process used and the result achieved.

With respect to this first question of “process,” which is the question described in this section, one is essentially talking about a decision-making tree and how lawyers make their decisions (by separating self from client). The second question, which is not addressed in this section of the article, focuses on the results of the decision-making tree.

These two issues are distinguishable. Under this “separate identity” conceptualization of the lawyer, the result may well be (and indeed in many countries is) that a lawyer is the vigorous advocate of the client and the lawyer’s overarching concern is the duty to the client. But even where the result (vigorous adversarial advocacy) is the same, it is possible that lawyers from different countries may have reached the same result using different processes (or decision-making trees). In other words, even if one assumes that the lawyer is engaged in rigorous adversary representation, it is possible for a lawyer to have a different conception of this role and the relationship to the client than is used in the United States. It may be possible for a lawyer to vigorously pursue this adversarial role while still maintaining this sense of separate identity, which offers the lawyer more choices about accepting the adversary role from the outset.

This distinction between “process” and “result” may help explain an apparent inconsistency between the writings of Professors Luban and Ruschemeyer concerning German lawyers. Professor Ruschemeyer had concluded that in Germany lawyers are more independent from the client

194. This paragraph of the article was added following several conversations I had with Austrian lawyers about the nature of their work. As an American who primarily had read about, but had not experienced, the inquisitorial system, I had certain preconceptions about the lawyer’s role in an inquisitorial system. I expected lawyers in an inquisitorial system to think of themselves in less adversarial terms. This, however, was not my experience. The lawyers I encountered in my very small sample appeared to think of themselves as just as vigorous an advocate as would an American adversarial-system lawyer.

My limited experience nonetheless confirms the conclusions of Professor David Luban. In his study of German legal ethics, he posited that ethics are a function of a country’s procedural system. He then concluded that German lawyers were really operating on an adversary system basis, notwithstanding the traditional comments about “inquisitorial systems.” He observed many similarities between the German and United States legal ethics systems with respect to the “nonordinary duties” or loyalty, confidentiality, and the duty of candor to the court.

Neither my observations, nor Professor Luban’s conclusions, however, have undermined my conclusion that the *CCBE Code* may reflect a different way of thinking about the role of the lawyer. This footnote, I believe, addresses the *result* of a particular approach, whereas my thesis addresses the reasoning *process* by which an European Community lawyer may reach the *result* of being a vigorous advocate.

than in the United States.¹⁹⁵ Professor Luban concluded that German lawyers use a legal ethics and advocacy perspective which is similar to that of American lawyers.¹⁹⁶ Both perspectives may in fact be correct because they may be answering slightly different questions. Professor Ruschemeyer could be viewed as describing the decision-making tree and how lawyers make their decisions (by separating themselves from the client). Professor Luban is talking about the results of the decision-making tree — and the fact that a German lawyer pursues the interests of the client no less vigorously than would an American lawyer. The conclusion that Professors Ruschemeyer and Luban were addressing slightly different questions is supported by Professor Luban's comments. He observed that German lawyers consider the same types of issues as American lawyers and generally reach the same conclusion but present their conclusions in a different way using this language of interests, rather than a language of consent. Professor Luban's observation supports the idea that although the result achieved by German lawyers may be the same, the process by which they reach that result is often quite different.

Thus, when considering the "decision-making" process and the lawyer's method of conceptualizing the lawyer-client relationship, it is important to remember that these comments are not intended to suggest that a European lawyer is ultimately a less vigorous advocate on behalf of the client. If, however, the *CCBE Code* reflects a different conceptualization of the lawyer's role, this perspective may explain those instances where differences exist between the legal ethics rules of the EC and those of the ABA.

These conclusions are based heavily on the author's research and experience in Austria. The location of certain provisions within the Austrian legal ethics code suggests even more strongly than the language in the *CCBE Code* a perspective in which a lawyer's separate identity is maintained.¹⁹⁷ At

195. DIETRICH RUESCHEMEYER, *LAWYERS AND THEIR SOCIETY* 124-125, 127-131 (1973) (comparing the bar in Germany to the bar in the United States).

196. Luban, *supra* note 192.

197. In Austria, there are two major sources that regulate lawyers and that might be viewed as equivalent to the *Model Rules*. See generally RAO and RL-BA, *supra* note 114. The first source which regulates the behavior of Austrian lawyers is a federal statute — the *Rechtsanwaltsordnung* (RAO). The *Richtlinien* (RL-BA) are the second major source that one must consult when looking at Austrian legal ethics. They are not federal statutes, but are in the nature of administrative regulations.

The *Richtlinien* contains three sections or "Artikels." The first Artikel is captioned "Der Rechtsanwalt und sein Beruf" (which might be loosely translated to mean a lawyer and his professional activities). The second Artikel is captioned "Der Rechtsanwalt und sein Parteij," (which might be translated to mean the lawyer and his obligations to his client). The third Artikel is captioned "Der Rechtsanwalt und sein Stand," (which might be translated to mean the lawyer's obligation to his profession).

Many of the provisions of the *Richtlinien* are not located where an American would expect them to be because substantive rules that we view as primarily for the benefit of the client are not located in

least in Austria, this way of thinking about a lawyer and his identity probably has its roots in the development of the legal profession as a "free profession."¹⁹⁸ However, the comparative legal ethics writings about Germany,¹⁹⁹ together with the language used in the *CCBE Code*, suggest that these observations about a lawyer's way of conceptualizing may not be limited to Austria but may also explain the way in which the lawyer is viewed in the *CCBE Code*.

B. SPECIFIC PROVISIONS FROM THE *CCBE CODE* WHICH MAY ILLUSTRATE
THE THESIS THAT THE *CCBE CODE* AND *MODEL RULES* ARE BASED ON
DIFFERING VIEWS OF THE ROLE OF THE LAWYER

The language of *CCBE Rule 2.1* regarding "Independence" provides only slim evidence for broad generalizations about the differences between the U.S. and the European way of conceptualizing the lawyer's role. Some of the specific provisions discussed below may provide additional support for these differences.

To restate the thesis: in the United States society thinks about the lawyer primarily as an agent of the client, one who acts because of, and at the direction of, the client. In other words, the lawyer is a derivative person, whose duties flow from the client. In contrast, the *CCBE Code* suggests a perspective in which lawyers sometimes can be viewed as acting for themselves, as opposed to acting as the agents of, and at the direction of, clients.

the *Richtlinien* section dealing with a lawyer and his client. These different locations reflect implicit assumptions and values about the persons to whom a duty is owed. By carefully comparing the organization and location of provisions in the two ethics codes, several differences in the values, approaches, and assumptions of the American and Austrian codes emerge.

For example, the title of Artikel I of the *Richtlinien* might be translated as "The Lawyer and His Job" or "The Lawyer and his Professional Activities." This Artikel contains such requirements as a lawyer's duty of diligence, duty to honor his obligations, and duty not to improperly influence witnesses. It is interesting to note, however, that these duties do not appear in Artikel II, which is captioned "The Lawyer and his Client." In contrast to this organization, the *Model Rules* do not differentiate between duties owed to a client and duties owed to oneself as a lawyer. Thus, the duties of diligence and competence appear in Article 1 of the *Model Rules*, which governs the "Client-Lawyer Relationship." In other words, whereas the *Richtlinien* place these duties in Artikel I, the *Model Rules* place these obligations in what appears to be the counterpart to Artikel II. Compare *MODEL RULES Rule 1 with RICHTLINIEN, supra* note 114, arts. I, II, *reprinted in* RECHTSANWALTSORDNUNG, *supra* note 114, at 172-75.

198. When I first taught for a summer in Austria, one of the concepts that seemed most foreign to me was the emphasis on describing lawyers as a "free profession." Indeed, the Austrian legal ethics rules have several references to the fact that the Austrian lawyers are part a "free profession." Moreover, this concept appears to be a living one, used in the language of lawyers as a way of identifying themselves. (The term "free profession" reflects the change from a system in which lawyers were civil servants who worked for, and were subject to, government control, to a system in which lawyers work independent of the state and are thus a "free profession.") See generally ERNST LOHSING & RUDOLF BRAUN, *ÖSTERREICHISCHES ANWALTSRECHT* (2d ed. 1950).

199. See *supra* notes 195-96 and accompanying text.

According to this perspective, the lawyer is sometimes perceived as an independent being who has rights and duties which do not necessarily derive from the client. By analyzing the differences in the conceptualization of the attorney-client relationship, this thesis may help to explain many of the substantive differences between the *CCBE Code* and the *Model Rules*.

For example, these differing views of the role of the lawyer might be used to explain the different approaches one sees to the issue of "substituted lawyers." In the United States, a lawyer would need the client's consent before retaining another lawyer (outside the lawyer's firm) to handle the client's affairs.²⁰⁰ The American rationale for this consent requirement is presumably that the lawyer is acting only as an agent of the client and that it is the client's decision whether and when to use additional lawyers.²⁰¹ In some EC countries, however, it is possible for a lawyer who is unable to make a court appointment to engage a "substitution lawyer" to handle that particular appearance.²⁰² Furthermore, no consent is required for this substitution and, indeed, the client may never know that such a substitution occurred because bills can be written in such a way as to obscure this fact.²⁰³ This author submits that the *CCBE Code* permits this substitution without client consent because a scheduling conflict which requires a lawyer to obtain a substitute is viewed as an issue that is the lawyer's business, rather than the client's business.²⁰⁴ In this perspective, the lawyer's business is not always derivative from the client's business. In other words, one could argue

200. The necessity for client consent before retaining another lawyer is demonstrated by a review of the *Model Rules* Rule 1.5(e) (requiring client consent before a division of fees with a lawyer in another firm can occur) and Rule 1.6 (setting forth a lawyer's duty of confidentiality). Unless a lawyer is "impliedly authorized" to reveal a client's confidences to a lawyer in another firm, Rule 1.6 effectively requires the lawyer to obtain the client's consent before retaining a lawyer not within the firm. None of the specific examples in the commentary following Rule 1.6 indicates that this type of disclosure was intended to be covered by the "implied authorization" language. MODEL RULE Rule 1.6 cmt. The conclusion that client consent is necessary is supported by the secondary authorities. See, e.g., *Laws. Man. on Prof. Conduct* (ABA/BNA) 55:501-504 (1984) ("A lawyer who, for one reason or another, has stopped representing a client may not, simply on his own initiative, reveal the client's confidences to the client's new attorney. Although there may be exceptions when a client's fraud is involved, the basic rule is that the first lawyer must obtain the former client's consent before he reveals anything to the substitute lawyer."); 1 GEOFFREY HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.6:201-05 (2d ed. Supp. 1992) (no comparable illustration listed).

201. This premise appears to be so basic to our system that virtually no discussion of this point is required. See, e.g., MODEL RULES ANN. 82-4. This lengthy discussion concerning the "Legal Background" of the fee sharing provision in Rule 1.5(e) explained in one sentence the requirement of client consent ("While the client must be advised of the arrangement and approve of the lawyer's participation in the representation, the lawyer is not required to disclose the particular allocation"), but required many sentences to explain and justify the requirements that the total fee be reasonable and that all lawyers assume joint responsibility for the representation when the fee is not proportional. *Id.*

202. See *supra* notes 112-16 and accompanying text.

203. CCBE CODE Rule 5.6; see *supra* notes 175-78 and accompanying text.

204. The substitution practice may also reflect the fact that in many civilian inquisitorial systems,

that the lawyer is viewed as independent of the client, having an interest and "business" which need not be viewed as the "business" or concern of the client.

These differing conceptions of a lawyer also may help to explain the differences between the *Model Rules* and the *CCBE Code* on the issue of whether a lawyer may have *ex parte* contacts with a judge. While such contact is prohibited in the United States, it is not prohibited in all Member States and *CCBE Rule 4.2* permits these *ex parte* contacts.²⁰⁵ One explanation for this difference could be that in the United States, a lawyer who speaks with a judge about a case is viewed as doing so on behalf of the client, i.e., as an agent of the client. Because of this view of due process, it would be unfair for a judge to hear only one client's perspective. Therefore, the American legal community historically has banned *ex parte* contacts.²⁰⁶ In contrast, if one views the lawyer not necessarily as only an agent of the client, but as an independent, trustworthy being, it is easier to justify a rule which permits such *ex parte* contacts unless they are "unfair."

The existence of this difference in approaches might also be supported by the fact that the *Model Rules* and the *CCBE Code* seem to be worried about very different kinds of conflicts of interest. While one could argue for labelling other provisions as "conflict of interest" provisions, there are five *CCBE Code* provisions which are the key "conflicts of interest" provisions. These five provisions include:

- 1) the requirement in *CCBE Rule 2.7* that a lawyer "must put [the client's] interests before his own interests or those of fellow members of the legal profession;"²⁰⁷
- 2) the requirements of *CCBE Rule 3.2* which forbid a lawyer from

much of what occurs happens in writing. Thus, the identity of the particular lawyer who shows up may not be as important as in the United States.

205. *CCBE CODE Rule 4.2.*

206. *Model Code DR 7-110(B); see also Model Rule 3.5* which provides:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate *ex parte* with such a person except as permitted by law; or,
- (c) engage in conduct intended to disrupt a tribunal.

MODEL RULES Rule 3.5. The Comment elaborates, "The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants." *Id.* cmt.

It is interesting to note that the rule does not prohibit *ex parte* contacts that are "permitted by law." Thus, it is necessary for an attorney to look at case law and court rules to ascertain whether certain *ex parte* communications are appropriate. See, e.g., FED. R. CIV. P. 65(b) ("Temporary Restraining Order; Notice; Hearing; Duration"); *In re Jordan*, 652 P.2d 1268 (Or. 1982) (holding statutory procedure authorized *ex parte* application for temporary restraining order).

207. *CCBE CODE Rule 2.7.*

advising, representing, or acting on behalf "of two or more clients in the same matter" and from accepting a new client "if there is a risk of a breach of confidences entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client;"²⁰⁸

3) *CCBE Rule 2.5* which requires a lawyer to comply with the applicable rules regarding "Incompatible Occupations;"²⁰⁹

4) *CCBE Rule 3.3* forbidding contingency fees;²¹⁰ and

5) *CCBE Rule 1.4* which adopts a definition of the "lawyers" to whom the *CCBE Code* applies and excludes, in many countries, "house counsel."²¹¹

The number and the nature of these conflicts of interest provisions are very different from the number and nature of the conflicts of interest provisions in the *Model Rules*.²¹² First, the general conflicts provisions in the *CCBE*

208. *CCBE CODE Rule 3.2.*

209. *CCBE CODE Rule 2.5.*

210. *CCBE CODE Rule 3.3.*

211. *CCBE CODE Rule 1.4.*

212. The major conflict of interest section states:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation

(f) A lawyer shall not accept compensation for representing a client from one other than the client

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client

MODEL RULES Rule 1.8; *see also* MODEL RULES Rule 1.7 (Conflict of Interest: General Rule); MODEL RULES Rule 1.9 (Conflict of Interest: Former Client); MODEL RULES Rule 1.10 (Imputed

Code might seem rather inadequate to an American. The general rule, for example, says nothing about avoiding influence from third parties.²¹³ Moreover, by providing such absolute, black and white rules, which have no provision for consultation and consent of the client, the *CCBE Code* may be providing less protection to the client.²¹⁴

What is most interesting, though, about these conflicts provisions is the matters which are covered by specific rules rather than the general provisions. The *CCBE Code* and the *Model Rules* are worried about, and want to specifically regulate, very different things. Two of the three topics which are covered by specific regulation in the *CCBE Code* (the house counsel²¹⁵ and contingency fees rules²¹⁶) involve issues that are perceived to be important in order to maintain the lawyer's independence and distance from the client. As explained above,²¹⁷ one of the concerns behind these prohibitions is that the lawyer will identify too much with the client and that this identification in turn will compromise the lawyer's independence and judgment. Indeed, the third topic covered by a specific rule, incompatible professions, probably stems as much from concerns about the reputation and view of the profession as it does from concerns about protecting the client because of a lawyer's conflict of interest.

With respect to specific "conflict of interest" provisions that are not included in the *CCBE Code*, as opposed to those that are, the *CCBE Code* simply does not have the plethora of rules which tell the lawyer how to behave when faced with situations which may tempt the lawyer. Thus, for example, there is no rule in the *CCBE Code* which tells the lawyer in which situations the lawyer may receive a bequest from a will the lawyer drafted; no rule which regulates a lawyer's book contract about a case; no rule regulating the conditions under which a lawyer and a client may enter into a business deal together.²¹⁸ In short, the silence of the *CCBE Code* reflects more trust in the judgment of the lawyer and the lawyer's ability to resist temptation. In contrast to the ABA's concerns, the conflicts that the *CCBE Code* worries about are not the specific temptations a lawyer may face, but situations that compromise the lawyer's independence and distance from the client.

Disqualification: General Rule); MODEL RULES Rule 1.11 (Successive Government and Private Employment); MODEL RULES Rule 1.12 (Former Judge or Arbitrator); MODEL RULES Rule 3.7 (Lawyer as Witness).

213. Compare *CCBE CODE* Rule 3.2 (Conflict of Interest) with MODEL RULES Rule 1.7(b) (Conflict of Interest: General Rule).

214. See *supra* note 122 and accompanying text.

215. See *supra* notes 68-70 and accompanying text.

216. See *supra* notes 124-30 and accompanying text.

217. See *supra* notes 68-70 and 124-30 and accompanying text.

218. But see *supra* note 206.

The *CCBE Code* and the *Model Rules* also differ in their treatment of rules that are promulgated for the benefit of lawyers in three concrete ways.

The first difference is a difference in attitude towards provisions that are promulgated for the benefit of lawyers. The American legal community often embodies a sense of embarrassment with respect to rules that are adopted for the benefit of the legal profession or lawyers. American practitioners have tended to reject the notion that a personal benefit may constitute a legitimate purpose which can override the interests of the client, the court, or the public.²¹⁹

In contrast to the American attitude towards rules which benefit lawyers, the *CCBE Code* reveals a distinct lack of embarrassment. While this lack of embarrassment may be due to a lack of being challenged, it may also be due to the different conception of the role of the lawyer underlying the *CCBE Code*. If the lawyer is viewed as a trustworthy, independent being (i.e., a member of a free profession²²⁰), it may then be appropriate to have rules which protect this person.²²¹ (One might argue that Americans may be moving in the direction exemplified by this European attitude, namely that it is permissible to have ethics rules which protect the interests of lawyers. Many of the provisions in the ABA's *Lawyer's Creed of Professionalism*²²² and other professionalism codes which have been recently adopted,²²³ arguably are provisions designed to protect the interests of lawyers. This may now be viewed as legitimate as it helps avoid a breakdown in the legal system and ultimately redounds to the benefit of the public and the clients.)

The second difference that appears in the ABA and CCBE ethics codes'

219. For a critique of American ethics rules as serving the lawyers' own interests, see Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 147 (1981); see also Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).

220. See *supra* note 198 and accompanying text.

221. Protection of the profession may also be viewed as ultimately redounding to the benefit of the client. See Letter from D.M. Donald-Little, to Laurel Terry, author (July 9, 1992) (on file with author).

222. LAWYER'S CREED OF PROFESSIONALISM (1988) reprinted in THOMAS MORGAN & RONALD ROTUNDA, 1993 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 595 (1993) (not adopted by the ABA House of Delegates). The Creed's Preamble provides:

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Creed of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Id.

223. See, e.g., KY. BAR ASSOCIATION CODE OF PROFESSIONAL COURTESY AND STANDARDS OF PRACTICE FOR THE NORTHERN DISTRICT OF TEX., reprinted in STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 1993 568-570 (1993).

treatment of rules designed for the protection of lawyers is organizational — the *CCBE Code* has an entire category of provisions expressly dealing with relations between lawyers.²²⁴ The *Model Rules* have no separate category for these types of rules.²²⁵

One might well disagree with this last statement and argue that *Model Rules* Article 8, titled “Maintaining the Integrity of the Profession,”²²⁶ is comparable to the “Relations Between Lawyers” section of the *CCBE Code*.²²⁷ However, one will notice a difference when one compares the subsections contained in *CCBE Rule 5* (Corporate Spirit of the Profession, Co-operation among Lawyers of Different Member States, Correspondence between Lawyers, Referral Fees, Communication with Opposing Parties, Change of Lawyer, Responsibility for Fees Training Young Lawyers, and Disputes amongst Lawyers in Different Member States) with the provisions contained under *Model Rules* Article 8 (a duty to be truthful in bar admission and disciplinary matters, an obligation to judges, a duty to report misconduct, acts which constitutes misconduct, and jurisdiction). As an example, one can compare the “Duty to Report” obligation in the *Model Rules*²²⁸ with the “Disputes amongst Lawyers in Different Member States” provisions in *CCBE Rule 5.9*.²²⁹ In determining the beneficiary of the provisions of the ABA’s Article 8, most often one would decide that these provisions were adopted for the benefit of the public at large. Thus, for example, the justification of the *Model Rules*’ requirement that lawyers report abuses by other lawyers to the bar association is based on the public’s right to protect the public by having a self-regulatory bar that works.²³⁰ The concern is not just to remedy a particular situation but to locate the “bad apple” lawyers so that future clients will be protected.

While one might similarly conclude that the *CCBE Code*’s “reporting” provision is designed to protect the public, this conclusion is less clear. *CCBE Rule 5.9.1* requires a lawyer who thinks that a colleague has breached a rule of ethics to draw it to the attention of the colleague.²³¹ *CCBE Rule 5.9.2* indicates that if a personal dispute of a professional nature arises, the

224. CCBE CODE Rules 5.1-5.8. For a discussion of these provisions, see *supra* Part V.B.5.

225. The *Model Rules* certainly have individual provisions that address a lawyer’s relationship with other lawyers. The *Model Rules*, however, do not have an entire section or category devoted to such rules. See generally MODEL RULES.

226. MODEL RULES Rules 8.1-8.5.

227. CCBE CODE Section 5.

228. MODEL RULES Rule 8.3.

229. CCBE CODE Rule 5.9.

230. The first sentence of the Comment to *Model Rule 8.3* explains this purpose as follows: “Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct.” MODEL RULES Rule 8.3 cmt.

231. CCBE CODE Rule 5.9.1.

lawyers should try to settle it in a friendly way.²³² *CCBE Rule 5.9.3* prohibits a lawyer from commencing "any form of proceedings" against a colleague without first informing their bar associations in order to allow the Bars "an opportunity to assist in reaching a settlement."²³³ It is possible to view these provisions not as provisions designed to protect the public, but instead as rules which are designed to protect the interests of the lawyers involved by resolving disputes and handling problems confidentially and amongst the lawyers themselves. This observation is reinforced by the location of these rules in a section that is titled "relations among lawyers."

The third and final difference in the ABA and CCBE treatment of rules designed to protect lawyers arises the way in which the *Model Rules* and the *CCBE Rules* categorize certain multilateral relationships. In transactions where there is a multilateral relationship (e.g., a relationship among the lawyer, the lawyer's client, and the opposing lawyer or client), the *CCBE Code* is more likely to focus on the lawyer's relationship with opposing counsel.²³⁴ In contrast to this perspective, the American rules are usually analyzed either in terms of the lawyer's relationship with the client or the lawyer's obligations to the opposing client. American rules of ethics are rarely couched in terms of a lawyer's obligation to another lawyer. Even when one suspects that an American ethics rule was promulgated in order to further the interests of the legal profession or lawyers, one rarely sees this purpose explicitly stated.

Model Rule 4.1 provides a concrete example. The Comment to Rule 4.1, which governs a lawyer's conduct during negotiations with an opposing party, focuses on the rights of the opposing clients and the lawyer's relationship with these individuals.²³⁵ In the *CCBE Code*, this topic of the appropriate tactics during negotiation acknowledges the lawyer's interest as one interest of the rule.²³⁶

232. CCBE CODE Rule 5.9.2.

233. CCBE CODE Rule 5.9.3.

234. See *supra* note 172 and accompanying text. A somewhat analogous example is provided not in the *CCBE Code* itself, but by examining the treatment of confidentiality in some Member States. In some States, confidences belong to the lawyer, rather than the client, and thus may not be waived by the client. See Goebel, *Lawyers in the European Community*, *supra* note 4, at 630; see generally EDWARD, *supra* note 97.

235. Rule 4.1 states:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [Confidentiality of Information].

MODEL RULES Rule 4.1.

236. *CCBE Rule 5.5* provides that "[a] lawyer shall not communicate about a particular case or matter directly with any person whom he knows to be represented or advised in the case or matter by

In sum, there are several significant differences between the *CCBE Code* and the *Model Rules*. While it may be enough to simply note these differences and move on, it may also be possible to explain these differences by considering whether there is a subtly different conception of the lawyer that underlies the *CCBE Code of Conduct* and the *ABA Model Rules*. If one understands the perspective from which ethics rules emanate, one will better understand and untangle the differences between these rules.

VII. CONCLUSION

The *CCBE Code* presents the classic example of the half-full glass. One can either be quite optimistic and impressed with the progress that has been made in such a short time, or one can be pessimistic, focusing on the number and nature of the differences and disagreements that must still be overcome before European lawyers truly operate under a single harmonized legal ethics code. At the moment, it is probably not fair to say that a German lawyer interested in practicing law in France faces fewer ethical dilemmas posed by a multi-state practice (i.e. double deontology) than does a New Jersey lawyer interested in practicing in the District of Columbia. While *Model Rule* 8.5 continues to resist a clear resolution, it is nevertheless clear that the jurisdictional issues raised by the *CCBE Code* are at least equally, and probably much more, difficult to resolve. One thing is clear, however. There is an interest in Europe in harmonizing the codes of legal ethics of many very diverse legal professions and legal traditions. And there is talk of adding additional, former East Bloc Countries to the CCBE as Observer States.²³⁷ The collective American legal community should watch this movement carefully and with interest.²³⁸ Who knows? In the future the United States may be asked to join a community of world attorneys who share a single legal ethics code. It certainly behooves all American attorneys to understand where the *CCBE Code* differs from the legal ethics codes in the United States and to try to understand why these differences might exist.

another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications).” CCBE CODE Rule 5.5; see also CCBE EXPLANATORY MEMORANDUM, *supra* note 45, Rule 5.5.

237. In October, 1991, EC Commission President Delors told the EC to prepare for a Community of 24 or even 30 members, in view of the breakup of the East Bloc. See RICHARD OWEN & MICHAEL DYNES, *THE SINGLE EUROPEAN MARKET* 287 (1992). Regardless of whether this occurs, it should be noted that there already are liaisons between the bars of various East Block countries and the bars of certain CCBE Member or Observer States, and there is a CCBE Committee responsible for issues related to East Block Countries. See CCBE COMPENDIUM, *supra* note 4, ch. 3, at 21.

238. The ABA has appointed a committee, which is responsible for acting as liaison with the CCBE and for examining the *Model Rules* in light of possible harmonization with the *CCBE Code*. See CCBE COMPENDIUM, *supra* note 4, ch. 3, at 34-37. Indeed, one of the drafters of the *CCBE Code* has suggested that it could serve as the basis for a code among GATT nations or as the basis of an universal code. See Toulmin, *supra* note 4, at 675, 685.

APPENDIX A

A COMPARISON OF THE *CCBE CODE OF CONDUCT* WITH THE *ABA MODEL RULES OF PROFESSIONAL CONDUCT*

PREPARED BY LAUREL S. TERRY

<i>CCBE RULE</i>	<i>COMPARABLE MODEL RULE</i>
1.1 — The Function of the Lawyer in Society	The Preamble of the <i>ABA Model Rules</i>
1.2 — The Nature of Rules of Professional Conduct	The "Scope" section of the <i>ABA Model Rules</i>
1.3 — The Purpose of the Code	The "Scope" section of the <i>ABA Model Rules</i>
1.4 — Field of Application Ratione Personae	No counterpart
1.5 — Field of Application Ratione Materiae	No direct counterpart; see Rule 8.5
1.6 — Definitions	The "Terminology" section of the <i>ABA Model Rules</i>
2.1 — Independence	Rule 1.7, Rule 2.1
2.2 — Trust & Personal Integrity	No direct counterpart; see Rule 1.7, Rule 8.4
2.3 — Confidentiality	Rule 1.6; see also Rule 3.3, Rule 1.2(d)(and in some states Rule 4.1) which may override Rule 1.6
2.4 — Respect for the Rules of Other Bars	Rule 8.5, Rule 5.5

<i>CCBE RULE</i>	<i>COMPARABLE MODEL RULE</i>
2.5 — Incompatible Occupations	No direct counterpart; see Rule 1.7(b), Rule 1.13, and Rule 5.4(c)
2.6 — Personal Publicity	Rules 7.1, 7.2, 7.3, 7.4, 7.5
2.7 — The Client's Interests	Rule 1.7(b), Rule 1.8
3.1 — Acceptance & Termination of Instructions	Rules 1.1, 1.2, 1.3, 1.4, and Rule 1.16
3.2 — Conflict of Interest	Rule 1.7, Rule 1.8(b), Rule 1.9, and Rule 1.10; see also Rule 1.11 and Rule 1.12
3.3 — Pactum de Quota Litis [Contingency Fees]	Rule 1.5(c) & (d)
3.4 — Regulation of Fees	Rule 1.5(a)
3.5 — Payment on Account	Rule 1.16(b)(4) & (b)(5); see also Rule 1.15
3.6 — Fee Sharing [with Non-lawyers]	Rule 5.4(a)
3.7 — Legal Aid	No direct counterpart; see Rule 6.1, Rule 6.2
3.8 — Clients' Funds [with audit provision]	Rule 1.15
3.9 — Professional Indemnity Insurance	No counterpart
4.1 — Applicable Rules of Conduct in Court	Rule 3.4(c); see also Rule 3.5
4.2 — Fair Conduct of Proceedings	Rule 3.5
4.3 — Demeanor in Court	Rule 3.5(c); see also Rules 3.1, 3.3, and 3.4

<i>CCBE RULE</i>	<i>COMPARABLE MODEL RULE</i>
4.4 — False or Misleading Information	Rule 3.3; see also Rule 1.2(d) and Rule 8.4(c)
4.5 — Extension to Arbitrators etc.	No counterpart
5.1 — The Corporate Spirit of the Profession	No direct counterpart; see Rule 1.7(b) and Rule 4.4
5.2 — Co-operation among Lawyers of Different Member States	No direct counterpart; see Rule 1.1
5.3 — Correspondence between Lawyers	No counterpart
5.4 — Referral Fees	Rule 7.2(c) and Rule 1.5(e)
5.5 — Communication with Opposing Parties	Rule 4.2; see also Rule 4.3
5.6 — Change of Lawyer	No counterpart
5.7 — Responsibility for Fees	No counterpart
5.8 — Training Young Lawyers	No direct counterpart; see Rule 5.1
5.9 — Disputes among Lawyers	Rule 8.3(a)

APPENDIX B

CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY (CCBE CODE)

Rule 1: Preamble

- 1.1 — The Function of a Lawyer in Society
- 1.2 — The Nature of Rules of Professional Conduct
- 1.3 — The Purpose of the Code
- 1.4 — Field of Application Ratione Personae [defining the category of professionals to whom the rules apply]
- 1.5 — Field of Application Ratione Material [defining the cross-border practice situations in which the rules apply]
- 1.6 — Definitions

Rule 2: General Principles

- 2.1 — Independence
- 2.2 — Trust and Personal Integrity
- 2.3 — Confidentiality
- 2.4 — Respect for the Rules of Other Bars and Law Societies
- 2.5 — Incompatible Occupations
- 2.6 — Personal Publicity [Advertising]
- 2.7 — The Client's Interests

Rule 3: Relations with Clients

- 3.1 — Acceptance and Termination of Instructions
- 3.2 — Conflict of Interest
- 3.3 — Pactum de Quota Litis [Contingency Fees]
- 3.4 — Regulation of Fees
- 3.5 — Payment on Account
- 3.6 — Fee-Sharing with Non-Lawyers
- 3.7 — Legal Aid
- 3.8 — Client Funds
- 3.9 — Professional Indemnity Insurance

Rule 4: Relations with the Courts

- 4.1 — Applicable Rules of Conduct in Court

- 4.2 — Fair Conduct of Proceedings
- 4.3 — Demeanor in Court
- 4.4 — False or Misleading Information
- 4.5 — Extension to Arbitrators Etc.

Rule 5: Relations Between Lawyers

- 5.1 — Corporate Spirit of the Profession
- 5.2 — Co-operation Among Lawyers of Different Member States
- 5.3 — Correspondence Between Lawyers
- 5.4 — Referral Fees
- 5.5 — Communication with Opposing Parties
- 5.6 — Change of Lawyer
- 5.7 — Responsibility for Fees
- 5.8 — Training Young Lawyers
- 5.9 — Disputes Amongst Lawyers in Different Member States

1. PREAMBLE

1.1. *The Function of the Lawyer in Society*

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

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

the client;

the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf;

the legal profession in general and each fellow member of it in particular; and

the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.

1.2. *The Nature of Rules of Professional Conduct*

- 1.2.1. Rules of professional conduct are designed through their willing acceptance by those to whom they apply to ensure the proper performance by the lawyer of a function which is recognised as

essential in all civilised societies. The failure of the lawyer to observe these rules must in the last resort result in a disciplinary sanction.

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

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

1.3. *The Purpose of the Code*

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

- 1.3.2. The organisations representing the legal profession through the CCBE propose that the rules codified in the following articles:
- be recognised at the present time as the expression of a consensus of all the Bars and Law Societies of the European Community;
 - be adopted as enforceable rules as soon as possible in accordance with national or Community procedures in relation to the cross-border activities of the lawyer in the European Community;
 - be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation.

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

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

1.4. *Field of Application Ratione Personae*

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

1.5. *Field of Application Ratione Materiae*

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

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

1.6. *Definitions*

In these rules:

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

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

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

2. GENERAL PRINCIPALS

2.1. *Independence*

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

2.1.2. This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to his client has no value if it is

given only to ingratiate himself, to serve his personal interests or in response to outside pressure.

2.2. Trust and Personal Integrity

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

2.3. Confidentiality

- 2.3.1. It is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.
- 2.3.2. A lawyer shall accordingly respect the confidentiality of all information given to him by his client, or received by him about his client or others in the course of rendering services to his client.
- 2.3.3. The obligation of confidentiality is not limited in time.
- 2.3.4. A lawyer shall require his associates and staff and anyone engaged by him in the course of providing professional services to observe the same obligation of confidentiality.

2.4 Respect for the Rules of Other Bars and Law Societies

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

2.5. Incompatible Occupations

- 2.5.1. In order to perform his functions with due independence and in a manner which is consistent with his duty to participate in the administration of justice a lawyer is excluded from some occupations.
- 2.5.2. A lawyer who acts in the representation or the defence of a client in legal proceedings or before any public authorities in a Host Member State shall there observe the rules regarding incompatible occupations as they are applied to lawyers of the Host Member State.
- 2.5.3. A lawyer established in a Host Member State in which he wishes to participate directly in commercial or other activities not connected

with the practice of the law shall respect the rules regarding forbidden or incompatible occupations as they are applied to lawyers of that Member State.

2.6. *Personal Publicity*

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

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

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

2.7. *The Client's Interests*

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

3. RELATIONS WITH CLIENTS

3.1. *Acceptance and Termination of Instructions*

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

3.1.2. A lawyer shall advise and represent his client promptly, conscientiously and diligently. He shall undertake personal responsibility for the discharge of the instructions given to him. He shall keep his client informed as to the progress of the matter entrusted to him.

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

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

3.1.4. A lawyer shall not be entitled to exercise his right to withdraw from a case in such a way or in such circumstances that the client may be

unable to find other legal assistance in time to prevent prejudice being suffered by the client.

3.2. *Conflict of Interest*

- 3.2.1. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.
- 3.2.2. A lawyer must cease to act for both clients when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where his independence may be impaired.
- 3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of a breach of confidences entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.
- 3.2.4. Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

3.3. *Pactum de Quota Litis*

- 3.3.1. A lawyer shall not be entitled to make a *pactum de quota litis*.
- 3.3.2. By 'pactum de quota litis' is meant an agreement between a lawyer and his client entered into prior to the final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.
- 3.3.3. The *pactum de quota litis* does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the competent authority having jurisdiction over the lawyer.

3.4. *Regulation of Fees*

- 3.4.1. A fee charged by a lawyer shall be fully disclosed to his client and shall be fair and reasonable.
- 3.4.2. Subject to any proper agreement to the contrary between a lawyer and his client, fees charged by a lawyer shall be subject to regulation in accordance with the rules applied to members of the Bar or Law Society to which he belongs. If he belongs to more than one Bar or Law Society the rules applied shall be those with the closest connection to the contract between the lawyer and his client.

3.5. *Payment on Account*

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

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

3.6. *Fee Sharing with Non-Lawyers*

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

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

3.7. *Legal Aid*

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

3.8. *Client Funds*

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

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

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

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

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

- 3.8.1.5. That payments made from clients' funds on behalf of a client to any other person including
 - a) payments made to or for one client from funds held for another client and
 - b) payment of the lawyer's fees, be prohibited except to the extent that they are permitted by law or have the express or implied authority of the client for whom the payment is being made.
- 3.8.1.6. That the lawyer shall maintain full and accurate records, available to each client on request, showing all his dealings with his clients' funds and distinguishing clients' funds from other funds held by him.
- 3.8.1.7. That the competent authorities in all Member States should have powers to allow them to examine and investigate on a confidential basis the financial records of lawyer's clients' funds to ascertain whether or not the rules which they make are being complied with and to impose sanctions upon lawyers who fail to comply with those rules.
- 3.8.2. Subject as aftermentioned, and without prejudice to the rules set out in 3.8.1 above, a lawyer who holds clients' funds in the course of carrying on practice in any Member State must comply with the Rules relating to holding and accounting for clients' funds which are applied by the competent authorities of the Home Member State.
- 3.8.3. A lawyer who carries on practice or provides services in a Host Member State may with the agreement of the competent authorities of the Home and Host Member States concerned comply with the requirements of the Host Member State to the exclusion of the requirements of the Home Member State. In that event he shall take reasonable steps to inform his clients that he complies with the requirements in force in the Host Member State.

3.9 *Professional Indemnity Insurance*

- 3.9.1. Lawyers shall be insured at all times against claims based on professional negligence to an extent which is reasonable having regard to the nature and extent of the risks which lawyers incur in practice.
- 3.9.2.1. Subject as aftermentioned, a lawyer who provides services or carries on practice in a Member State must comply with any Rules relating to his obligation to insure against his professional liability as a lawyer which are in force in his Home Member State.
- 3.9.2.2. A lawyer who is obliged so to insure in his Home Member State and who provides services or carries on practice in any

Host Member State shall use his best endeavours to obtain insurance cover on the basis required in his Home Member State extended to services which he provides or practice which he carries on in a Host Member State.

- 3.9.2.3. A lawyer who fails to obtain the extended insurance cover referred to in paragraph 3.9.2.2 above or who is not obliged so to insure in his Home Member State and who provides services or carries on practice in a Host Member State shall in so far as possible obtain insurance cover against his professional liability as a lawyer whilst acting for clients in that Host Member State on at least an equivalent basis to that required of lawyers in the Host Member State.
- 3.9.2.4. To the extent that a lawyer is unable to obtain the insurance cover required by the foregoing rules, he shall take reasonable steps to draw that fact to the attention of such of his clients as might be affected in the event of a claim against him.
- 3.9.2.5. A lawyer who carries on practice or provides services in a Host Member State may with the agreement of the competent authorities of the Home and Host Member States concerned comply with such insurance requirements as are in force in the Host Member State to the exclusion of the insurance requirements of the Home Member State. In this event he shall take reasonable steps to inform his clients that he is insured according to the requirements in force in the Host Member State.

4. RELATIONS WITH THE COURTS

4.1. *Applicable Rules of Conduct in Court*

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

4.2. *Fair Conduct of Proceedings*

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

4.3. *Demeanour in Court*

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

4.4. *False or Misleading Information*

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

4.5. *Extension to Arbitrators Etc.*

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

5. RELATIONS BETWEEN LAWYERS

5.1. *Corporate Spirit of the Profession*

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

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

5.2. *Co-operation among Lawyers of Different Member States*

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

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

5.3. *Correspondence Between Lawyers*

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

- 5.3.2. If the recipient of the communication is unable to ensure its status as confidential or without prejudice he should return it to the sender without revealing the contents to others.

5.4. *Referral Fees*

- 5.4.1. A lawyer may not demand or accept from another lawyer or any other person a fee, commission or any other compensation for referring or recommending a client.
- 5.4.2. A lawyer may not pay anyone a fee, commission or any other compensation as a consideration for referring a client to himself.

5.5. *Communication with Opposing Parties*

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

5.6. *Change of Lawyer*

- 5.6.1. A lawyer who is instructed to represent a client in substitution for another lawyer in relation to a particular matter should inform that other lawyer and, subject to 5.6.2. below, should not begin to act until he has ascertained that arrangements have been made for the settlement of the other lawyer's fees and disbursements. This duty does not, however, make the new lawyer personally responsible for the former lawyer's fees and disbursements.
- 5.6.2. If urgent steps have to be taken in the interests of the client before the conditions in 5.6.1. above can be complied with, the lawyer may take such steps provided he informs the other lawyer immediately.

5.7. *Responsibility for Fees*

In professional relations between members of Bars of different Member States, where a lawyer does not confine himself to recommending another lawyer or introducing him to the client but himself entrusts a correspondent with a particular matter or seeks his advice, he is personally bound, even if the client is insolvent, to pay the fees, costs and outlays which are due to the foreign correspondent. The lawyers concerned may, however, at the outset of the relationship between them make special arrangements on this matter. Further, the instructing lawyer may at any time limit his personal responsibility to the amount of the fees, costs and outlays incurred before intimation to the foreign lawyer of his disclaimer of responsibility for the future.

5.8. *Training Young Lawyers*

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

5.9. *Disputes Amongst Lawyers in Different Member States*

- 5.9.1. If a lawyer considers that a colleague in another Member State has acted in breach of a rule of professional conduct he shall draw the matter to the attention of his colleague.
- 5.9.2. If any personal dispute of a professional nature arises amongst lawyers in different Member States they should if possible first try to settle it in a friendly way.
- 5.9.3. A lawyer shall not commence any form of proceedings against a colleague in another Member State on matters referred to in 5.9.1. or 5.9.2. above without first informing the Bars or Law Societies to which they both belong for the purpose of allowing both Bars or Law Societies concerned an opportunity to assist in reaching a settlement.

APPENDIX C

EXPLANATORY MEMORANDUM AND COMMENTARY ON THE CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY

This Explanatory Memorandum and Commentary is prepared at the request of the CCBE Standing Committee by the CCBE's Deontology Working Party, who were responsible for the drafting of the Code of Conduct itself. It seeks to explain the origin of the provisions of the Code, to illustrate the problems which they are designed to resolve, particularly in relation to cross-border activities, and to provide assistance to the competent authorities in the Member States in the application of the Code. It is not intended to have any binding force in the interpretation of the Code.

The original versions of the Code are in the French and English languages. Translations into other Community languages are being prepared under the authority of the National Delegations concerned.

1. PREAMBLE

1.1 The Function of the Lawyer in Society

The Declaration of Perugia, adopted by the CCBE in 1977, laid down the fundamental principles of professional conduct applicable to lawyers throughout the European Community. The provisions of Article 1.1 reaffirm the statement in the Declaration of Perugia of the function of the lawyer in society which forms the basis for the rules governing the performance of that function.

1.2 The Nature of Rules of Professional Conduct

These provisions substantially restate the explanation in the Declaration of Perugia of the nature of rules of professional conduct and how particular rules depend on particular local circumstances but are nevertheless based on common values.

1.3 The Purpose of the Code

These provisions introduce the development of the principles in the Declaration of Perugia into a specific Code of Conduct for Lawyers throughout the European Community, with particular reference to their cross-border activities (defined in 1.5 below).

The provisions of Article 1.3.2 lay down the specific intentions of the CCBE with regard to the substantive provisions in the Code.

1.4 *Field of Application Ratione Personae*

The rules are here stated to apply to all the lawyers of the European Community as defined in the Lawyers Services Directive of 1977. This includes lawyers of the Member States which subsequently acceded to the treaty, whose names have been added by amendment to the Directive. It accordingly applies to all the lawyers represented on the CCBE, namely:

Belgium	Avocat/Advocaat/Rechtsanwalt
Denmark	Advokat
France	Avocat
Germany	Rechtsanwalt
Greece	Dikigoros
Ireland	Barrister Solicitor
Italy	Avvocato Procuratore
Luxembourg	Avocat-Avoue/Rechtsanwalt
Netherlands	Advocaat
Portugal	Advogado
Spain	Abogado
United Kingdom	Advocate Barrister Solicitor

Although the competence of the CCBE extends only to Member States, representatives of the observer delegations to the CCBE from European States which are not members of the Community (Austria, Norway, Sweden, Switzerland, Finland and Cyprus) have participated in the work on the Code. It is believed that its provisions are acceptable in those States and it is hoped that the Code can be applied as between them and the Member States by appropriate conventions. It is also hoped that the Code will be acceptable to the legal professions of other non-Member States in Europe and elsewhere so that it could also be applied in the same way between them and the Member States.

1.5 *Field of Application Ratione Materiae*

The rules are here given direct application only to 'cross-border activities,' as defined, of lawyers within the European Community. (See also on 1.4 above as to possible extensions in the future to lawyers of other States). The

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

1.6 *Definitions*

This provision defines 3 terms used in the Code, "Home Member State", "Host Member State" and "competent authority". The references to "Member State" include, where appropriate, separate jurisdictions within a single Member State. The reference to "the bar or law society to which the lawyer belongs" includes the bar or law society responsible for exercising authority over the lawyer. The reference to "where the lawyer carries on cross-border activities" should be interpreted in the light of the definition of "cross-border activities" in Article 1.5, in particular 1.5(b).

2. GENERAL RULES

2.1 *Independence*

This provision substantially reaffirms the general statement of principle in the Declaration of Perugia.

2.2 *Trust and Personal Integrity*

This provision also restates a general principle contained in the Declaration of Perugia.

2.3 *Confidentiality*

This provision first restates, in Article 2.3.1, general principles laid down in the Declaration of Perugia and recognized by the European Court of Justice in the *AM&S Case* (157/79). It then, in Articles 2.3.2/4, develops them into a specific rule relating to the protection of confidentiality. Article 2.3.2 contains the basic rule requiring respect for confidentiality. Article 2.3.3 confirms that the obligation remains binding on the lawyer even if he ceases to act for the client in question. Article 2.3.4 confirms that the lawyer must not only respect the obligation of confidentiality himself but must require all members and employees of his firm to do likewise.

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

Article 4 of the Lawyers Services Directive of 1977 contains the provisions with regard to the rules to be observed by a lawyer from one Member State providing services by virtue of Article 59 of the Treaty in another Member State as follows:

1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each Host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State.
2. A lawyer pursuing these activities shall observe the rules of professional conduct of the Host Member State, without prejudice to his obligations in the Member State from which he comes.
3. When these activities are pursued in the United Kingdom, 'rules of professional conduct of the Host Member State' means the rules of professional conduct applicable to solicitors, where such activities are not reserved for barristers and advocates. Otherwise the rules of professional conduct applicable to the latter shall apply. However, barristers from Ireland shall always be subject to the rules of professional conduct applicable in the United Kingdom to barristers and advocates.

When these activities are pursued in Ireland 'rules of professional conduct of the Host Member State' means, in so far as they govern the oral presentation of a case in court, the rules of professional conduct applicable to barristers. In all other cases the rules of professional conduct applicable to solicitors shall apply. However, barristers and advocates from the United Kingdom shall always be subject to the rules of professional conduct applicable in Ireland to barristers.

4. A lawyer pursuing activities other than those referred to in paragraph 1 shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the Host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the Host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.

In cases not covered by this Directive, the obligations of a lawyer under Community law to observe the rules of other bars and law societies are a matter of interpretation of the applicable provisions of the Treaty or any other relevant Directive. A major purpose of the Code is to minimize, and if possible eliminate altogether, the problems which may arise from "double deontology", that is the application of more than one set of potentially conflicting national rules to a particular situation (see Article 1.3.1).

2.5 Incompatible Occupations

There are differences both between and within Member States on the extent to which lawyers are permitted to engage in other occupations, for example in commercial activities. The general purpose of rules excluding a lawyer from other occupations is to protect him from influences which might impair his independence or his role in the administration of justice. The variations in these rules reflect different local conditions, different perceptions of the proper function of lawyers and different techniques of rule-making. For instance in some cases there is a complete prohibition of engagement in certain named occupations, whereas in other cases engagement in other occupations is generally permitted, subject to observance of specific safeguards for the lawyer's independence.

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

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

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

2.6 Personal Publicity

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 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.

2.7 The Client's Interests

This provision emphasises the general principle that the lawyer must always place the client's interests before his own interests or those of fellow members of the legal profession.

3. RELATIONS WITH CLIENTS

3.1 Acceptance and Termination of Instructions

The provisions of Article 3.1.1 are designed to ensure that a relationship is maintained between lawyer and client and that the lawyer in fact receives instructions from the client, even though these may be transmitted through a duly authorized intermediary. It is the responsibility of the lawyer to satisfy himself as to the authority of the intermediary and the wishes of the client.

Article 3.1.2 deals with the manner in which the lawyer should carry out his duties. The provision that he shall undertake personal responsibility for the discharge of the instructions given to him means that he cannot avoid responsibility by delegation to others. It does not prevent him from seeking to limit his legal liability to the extent that this is permitted by the relevant law or professional rules.

Article 3.1.3 states a principle which is of particular relevance in cross-border activities, for example when a lawyer is asked to handle a matter on behalf of a lawyer or client from another State who may be unfamiliar with the relevant law and practice, or when a lawyer is asked to handle a matter relating to the law of another State with which he is unfamiliar.

A lawyer generally has the right to refuse to accept instructions in the first

place, but Article 3.1.4 states that, having once accepted them, he has an obligation not to withdraw without ensuring that the client's interests are safeguarded.

3.2 *Conflict of Interest*

The provisions of 3.2.1 do not prevent a lawyer acting for two or more clients in the same matter provided that their interests are not in fact in conflict and that there is no significant risk of such a conflict arising. Where a lawyer is already acting for two or more clients in this way and subsequently there arises a conflict of interests between those clients or a risk of a breach of confidence or other circumstances where his independence may be impaired, then the lawyer must cease to act for both or all of them.

There may, however, be circumstances in which differences arise between two or more clients for whom the same lawyer is acting where it may be appropriate for him to attempt to act as a mediator. It is for the lawyer in such cases to use his own judgment on whether or not there is such a conflict of interest between them as to require him to cease to act. If not, he may consider whether it would be appropriate for him to explain the position to the clients, obtain their agreement and attempt to act as mediator to resolve the difference between them, and only if this attempt to mediate shall fail, to cease to act for them.

Article 3.2.4 applies the foregoing provisions of Article 3 to lawyers practising in association. For example a firm of lawyers should cease to act when there is a conflict of interest between two clients of the firm, even if different lawyers in the firm are acting for each client. On the other hand, exceptionally, in the "chambers" form of association used by English barristers, where each lawyer acts for clients individually, it is possible for different lawyers in the association to act for clients with opposing interests.

3.3 *Pactum de Quota Litis*

These provisions reflect the common position in all Member States that an unregulated agreement for contingency fees (*Pactum de Quota Litis*) is contrary to the proper administration of justice because it encourages speculative litigation and is liable to be abused. The provisions are not, however, intended to prevent the maintenance or introduction of arrangements under which lawyers are paid according to results or only if the action or matter is successful, provided that these arrangements are under sufficient regulation and control for the protection of the client and the proper administration of justice.

3.4 *Regulation of Fees*

Article 3.4.1 lays down a general standard of disclosure of a lawyers' fees to the client and a requirement that they should be fair and reasonable in amount. Article 3.4.2 deals with the question of the machinery for regulating the lawyers' fees. In many Member States such machinery exists under national law or rules of conduct, whether by reference to a power of adjudication by the "Batonnier" or otherwise. Article 3.4.1 applies the rules of the bar or law society to which the lawyer belongs (see on Article 1.6 above) unless this has been varied by an agreement between lawyer and client which is in accordance with the relevant law or rules of conduct. It goes on to provide a "choice of law" rule to deal with cases when the lawyer belongs to more than one bar or law society.

3.5 *Payment on Account*

Article 3.5 assures that a lawyer may require a payment on account of his fees and/or disbursements, but sets a limit by reference to a reasonable estimate of them. See also on Article 3.1.4 regarding the right to withdraw.

3.6 *Fee Sharing with Non-Lawyers*

In some Member States lawyers are permitted to practise in association with members of certain other approved professions, whether legal professions or not. The provisions of Article 3.6.1 are not designed to prevent fee sharing within such an approved form of association. Nor are the provisions designed to prevent fee sharing by the lawyers to whom the Code applies (see on Article 1.4 above) with other "lawyers", for example lawyers from non-Member States or members of other legal professions in the Member States such as notaries or conseils juridiques.

3.7 *Legal Aid*

Article 3.7 requires a lawyer to inform his client of the availability of legal aid where applicable. There are widely differing provisions in the Member States on the availability of legal aid. In cross-border activities a lawyer should have in mind the possibility that the legal aid provisions of a national law with which he is unfamiliar may be applicable.

3.8 *Clients' Funds*

The provisions of Article 3.8.1 reflect the Recommendation adopted by the CCBE in Brussels in November 1985 on the need for minimum regulations to be made and enforced governing the proper control and disposal of clients' funds held by lawyers within the Community. In some Member

States such regulations have not yet been introduced for internal purposes. Article 3.8.1.2-7 lays down minimum standards to be observed, while not interfering with the details of national systems which provide fuller or more stringent protection for clients funds.

The provisions of Articles 3.8.2 and 3.8.3 deal with questions which arise where the rules on clients' funds of more than one Member State may be applicable.

3.9 Professional Indemnity Insurance

Article 3.9.1 reflects a Recommendation, also adopted by the CCBE in Brussels in November 1985, on the need for all lawyers in the Community to be insured against the risks arising from professional negligence claims against them.

Again in some Member States such an obligation has not yet been introduced for internal purposes. Article 3.9.2 deals with questions which arise when the risks to be insured relate to more than one Member State.

4. RELATIONS WITH THE COURTS

4.1 Applicable Rules of Conduct in Court

This provision applies the principle that a lawyer is bound to comply with the rules of the court or tribunal before which he practises or appears.

4.2 Fair Conduct of Proceedings

This provision applies the general principle that in adversarial proceedings a lawyer must not attempt to take unfair advantage of his opponent, in particular by unilateral communications with the judge. An exception however is made for any steps permitted under the relevant rules of the court in question (see also on 4.5 below).

4.3 Demeanour in Court

This provision reflects the necessary balance between respect for the court and for the law on the one hand and the pursuit of the client's best interests on the other.

4.4 False or Misleading Information

This provision applies the principle that the lawyer must never knowingly mislead the court. This is necessary if there is to be trust between the courts and the legal profession.

4.5 *Extension to Arbitrators Etc.*

This provision extends the preceding provisions relating to courts to other bodies exercising judicial or quasi-judicial functions.

5. RELATIONS BETWEEN LAWYERS

5.1 *Corporate Spirit of the Profession*

These provisions, which are based on statements in the Declaration of Perugia, emphasise that it is in the public interest for the legal profession to maintain a relationship of trust and co-operation between its members. However this cannot be used to justify setting the interests of the profession against those of justice or of clients (see also on Article 2.7 above).

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

This provision also develops a principle stated in the Declaration of Perugia with a view to avoiding misunderstandings in dealings between lawyers of different Member States.

5.3 *Correspondence between Lawyers*

In certain Member States communications between lawyers (written or by word of mouth) are normally regarded as confidential. This means that lawyers accept that those communications may not be disclosed to others and copies may not be sent to the lawyers' own client. This principle is recognised in Belgium, France, Greece, Italy, Luxembourg, Portugal and Spain. Such communications if in writing are often marked as "confidential" or "sous la foi du Palais".

In the United Kingdom and Ireland the notion of "confidentiality" is different in that it refers not to such communications between lawyers but to the lawyer's right and duty to keep his client's affairs confidential. However communications between lawyers made in order to attempt to settle a dispute are normally not regarded by a court as admissible evidence and the lawyer should not attempt to use them as evidence. If a lawyer wishes to indicate that he regards a document as such a communication he should indicate that it is sent "without prejudice". This means that the letter is sent without prejudice to and under reservation of the client's rights in the dispute.

In Denmark as a general rule, a lawyer has a right and duty to keep his client informed about all important correspondence from a lawyer acting for an opposing party, in practice normally by sending photocopies. This rule applies whether or not the letter is marked "without prejudice" or "confidential". As an exception, lawyers may exchange views — normally by

word of mouth only — on a case with a view to finding an amicable settlement, on the mutual understanding that such communications should be kept confidential and not disclosed to the clients. A lawyer is not legally bound by such a confidence, but to break it would prejudice his future participation in such confidential exchanges. Some lawyers do not wish to receive such communication in any form without having the right to inform their clients; in that event they should inform the other lawyer before he makes such a confidential communication to them. As a general rule also, all correspondence between lawyers may be freely produced in court. Normally, however, if such correspondence is marked “without prejudice” or, even if not so marked, it is clearly of a “without prejudice” nature, the court will disregard it and the lawyer producing it will be treated as being in contravention of the rules of Professional Conduct.

In the Netherlands legal recourse based on communications between lawyers may not be sought, unless the interest of the client requires it and only after prior consultation with the lawyer for the other party. If such consultation does not lead to a solution, the advice of the Dean should be sought before recourse to law. The content of settlement negotiations between lawyers may not be communicated to the court without the permission of the lawyer for the other party, unless the right to do so was expressly reserved when the settlement proposal in question was made. There is however no general rule preventing a lawyer from sending copies of such communications to his client.

In Germany communications between lawyers are not confidential. The lawyer has an obligation to communicate them to his client and they may be admitted as evidence in court.

These differences often give rise to misunderstandings between lawyers of different Member States who correspond with each other. For this reason lawyers should be particularly careful to clarify the basis upon which correspondence with lawyers in other Member States is sent and received. In particular a lawyer who wishes to make a confidential or “without prejudice” communication to a colleague in a Member State where the rules may be different should ask in advance whether it can be accepted as such.

5.4 Referral Fees

This provision reflects the principle that a lawyer should not pay or receive payment purely for the reference of a client, which would risk impairing the client’s free choice of lawyer or his interest in being referred to the best available service. It does not prevent fee sharing arrangements between lawyers on a proper basis (see also on Article 3.6 above).

In some Member States lawyers are permitted to accept and retain

commissions in certain cases provided the client's best interests are served, there is full disclosure to him and he has consented to the retention of the commission. In such cases the retention of the commission by the lawyer represents part of his remuneration for the service provided to the client and is not within the scope of the prohibition on referral fees which is designed to prevent lawyers from making a secret profit.

5.5 Communication with Opposing Parties

This provision reflects a generally accepted principle, and is designed both to promote the smooth conduct of business between lawyers and to prevent any attempt to take advantage of the client of another lawyer.

5.6 Change of Lawyer

This provision is designed to promote the orderly handing over of the business when there is a change of lawyer. It also reflects the commonly accepted principle in Member States that there is some duty on the new lawyer in respect of the settlement of the former lawyer's account. This duty is not, however, generally accepted as being more than a duty to ascertain that arrangements have been made for the settlement.

5.7 Responsibility for Fees

These provisions substantially reaffirm provisions contained in the Declaration of Perugia. Since misunderstandings about responsibility for unpaid fees are a common cause of difference between lawyers of different Member States, it is important that a lawyer who wishes to exclude or limit his personal obligation to be responsible for the fees of his foreign colleague should reach a clear agreement on this at the outset of the transaction.

5.8 Training Young Lawyers

This provision is by way of an exhortation emphasising the general obligation of the members of the legal profession in the European Community to ensure that future generations of lawyers in each Member State have knowledge of the laws and procedures in other Member States.

5.9 Disputes amongst Lawyers in Different Member States

A lawyer has the right to pursue any legal or other remedy to which he is entitled against a colleague in another Member State. Nevertheless it is desirable that, where a breach of a rule of professional conduct or a dispute of a professional nature is involved, the possibilities of friendly settlement should be exhausted, if necessary with the assistance of the bars or law societies concerned, before such remedies are exercised.