

LAWYERS' CONFLICTS OF INTEREST
(with a proposal for the revision of art. 3.2 of the CCBE Code of Conduct,
a commentary to the ABA Model Rules
and some suggestions for global harmonization of rules)

by

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*"No man can serve two masters:
for either he will hate the one, and love the other;
or else he will hold to the one and despise the other"*
Matthew, 6:24

PURPOSE

*"The question of conflicts of interest may well be
the most controversial current issue in the legal profession"*
Working Group for the revision of the CCBE Code of Conduct
Final Report February 1998

This paper has four parts. The purpose of Part One² is four-fold: the first chapter considers conflicts of interest in life in general; the second addresses conflicts of interest in the legal profession; the third discusses the revision of art. 3.2 of the CCBE Code; and the fourth proposes a new text for art. 3.2. Part Two is an overview of conflicts of interest in the United States. Part Three makes a diverting incursion into the IBA Guidelines on Conflicts of Interest in International Arbitration 2004. Part Four contains some reflexions for a global harmonization of the rules.

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² Part One is an adaptation of a paper which the author wrote on the same subject in 2003. Parts Two to Four are inedit.

PART ONE

Conflicts of interests for lawyers in general

FIRST. CONFLICTS OF INTEREST

*“All men are liable to error,
and most men are, in many points,
by passion or interest, under temptation.”
John Locke³*

I. In general

Conflicts of interests are by no means restricted to the legal profession. Daily life is full of conflicts. Each person has his or her own interests, which often clash with the interests of other persons.

Generally, a conflict of interest is a situation in which a person (an individual, a public official, a businessman, a professional) has a private or personal interest sufficient to influence or at least appear to influence the objective exercise of his or her duties. A conflict of interests exists when the independence and the impartiality of decision-makers is compromised due to competing interests influencing the outcome of a decision, for personal benefit in particular⁴.

Conflicts of interest have always been in existence^{5 6}, but have become an important issue in today's complex and interrelated world. Enron/WorldCom/Arthur Andersen and subsequent scandals in the USA and in the EU that shook the world economy and the confidence of investors at the turn of last century, for instance, had their origin in unsettled conflicts of interest of managers, analysts, financial advisers, auditors and lawyers.

³ John Locke, An essay concerning human understanding, 1690, book 4, ch. 20, 17.

⁴ Jonathan Cohen, “Conflicts of interest” in Wayne Visser and al., The A to Z of Corporate Social Responsibility, 2007.

⁵ Jonathan Rose, “The ambidextrous lawyer: Conflicts of interest in the medieval legal profession”, University of Chicago Roundtable, vol. 7, Spring 2000. The author concludes that the medieval conduct was more egregious, the loyalty duties narrower and the liabilities more limited but more punitive.

⁶ Oliver W. Holmes, US Justice: “One of the eternal conflicts out of which life is made up is that between the efforts of every man to get the most he can for his services and that of society, disguised under the name of capital, to get his services for the least possible return”.

II. Personal interior conflicts

*"Video meliora, provoque,
deteriora sequor"
Publius Ovidius (Ovid)⁷*

Conflicts of interest do not exclusively affect bilateral or plurilateral relationships. Each individual has his own internal conflicts ("conflicts of conscience"). Everyone faces constant oppositions between incompatible tendencies, wishes or drives, often leading to states of emotional tension and ethical, moral or legal wrongs⁸.

Chesterton⁹ noticed that "the perplexity of life arises from there being too many interesting things in it for us to be interested properly in any of them". We are constantly subject to interior confrontations. We face conflicts between our good inclinations and our bad tendencies. Ovid, in the above quotation, said: "I see better things, try them, but follow worse". And along the same thought, St. Paul recognised that: "it is not the good my will prefers, but the evil my will disapproves, that I find myself doing"¹⁰.

In our daily life, as consumers, for instance, we try to get the best possible deals in the market without asking where and how the products we buy are made. At the same time, we try to do the right things. Unfortunately, our market desires and moral commitments often clash.

III. Bilateral or pluripersonal conflicts

*"[A compromise is] an adjustment of conflicting interests as gives each adversary the satisfaction of thinking he has got what he ought not to have, and is deprived of nothing except what was justly his due"
Ambrose Bierce¹¹*

Typical conflicts, however, arise when our own interest clashes with someone else's interest.

While it is hard enough to resolve internal dilemmas, real difficulties arise when we have to make decisions, which affect the interests of others. Through trial and error, we can work out what weight to give our own rules, but bilateral decisions require us to do the same for others by allocating weights to all the conflicting interests, which may be involved. For example, businessmen must balance the interests of employees (and other stakeholders) against those of shareholders. But even that sounds more straightforward than it really is, because there may well be differing views among

⁷ Publius Ovidius Naso, *Metamorphoses*, 7, 1, 20.

⁸ Anthony T. Kronman, *The lost lawyer. Failing ideals of the legal profession*, 1995, p. 79: "If we continue to think of the soul as a kind of city, we might describe the condition of regret, which divides the person against himself, as one of a civil war".

⁹ G. K. Chesterton, *Tremendous trifles*, 1909.

¹⁰ Paul, *Romans*, 7, 19. Robert Browning, *Men and women*, 1855: "When the fight begins within himself, a man's worth something".

¹¹ *The Devil's Dictionary* (definition of compromise).

the shareholders and the interests of past, present and future employees (and other stakeholders)¹² are unlikely to be identical¹³.

IV. Conflicts of interest in politics

*"Experience suggest that the first rule of politics is never to say never.
The ingenious human capacity for manoeuvre and compromise may make acceptable tomorrow what seems outrageous or impossible today".
William S. Shannon¹⁴*

Everybody who holds a public office or position is frequently at risk of finding himself or herself trying to solve conflicts of interest whether they be legislators¹⁵, politicians¹⁶, journalists, lobbyists, diplomats¹⁷ or sportsmen; all are targets of such opposing situations. Many codes of ethics¹⁸ and university policy rules¹⁹ have been established to regulate such conflicts.

Comment [r1]: You do not mention educators in the previous sentence, so this reference to university rules seems out of place.

Woodrow Wilson found it impossible to compromise on the location of Princeton University or on America's entry into the League of Nations. On one hand, it was expedient for him to resign from Princeton and, on the other, he brought on the worsening of his health, which shortened his life. Was he merely a poor diplomat, or was he illustrating that some issues do not lend themselves to compromise? He had to act, as every executive must, whether his constituents were ready to move with him or not²⁰.

Deleted: .

Recently, President Obama –a “pro-choice” politician- was confronted with a conflict when he was invited to speak on the abortion dilemma and receive an award in law at the University of Nôtre Dame²¹ –a “pro-life” education center.

Sometimes conflicts arise between state powers, like the judicial and the executive²².

¹² Linda O’Riordan and Jenny Fairbrass, “CSR models and theories in stakeholder dialogue”, Bradford University School of Management, Working paper no. 06/45, November 2006.

¹³ Adrian Cadbury, “Ethical managers make their own rules” in *Ethics in practice. Managing the moral corporation*, 1989, edited by Kennet R. Andrews, p. 71.

¹⁴ “Vietnam: America's Dreyfus Case”, *The New York Times*, 3 March 1968

¹⁵ Gerard Carrey, “Conflicts of interests: legislators, ministers and public officials”, *Transparency International*.

¹⁶ Andrew Stark, “Conflict of interest in American public life”, 2000.

¹⁷ Susan Schmidt, “Ex-diplomat pleads guilty to conflict of interest in Chang case”, *Washington Post*, 31 August 2001.

¹⁸ See for instance: US Senate Ethics Manual; Ethics manual for members, officers and employees of the US House of Representatives; Canadian Lobbyists Code of Conduct; Irish Ethics in Public Office, Code of Ethics of the Society of Professional Journalists. Canada Mad River Institute for Political Studies Code of Ethics, etc.

¹⁹ Stanford Research Administration, University of Illinois at Urbana-Champaign.

²⁰ Louis William Norris, “Moral hazards of an executive”, in *Ethics in practice...*, p. 35.

²¹ University of Nôtre Dame, Commencement ceremony, 17 May 2009.

²² Diana Woodhouse, “Politicians and the judges: A conflict of interest”, *Parliamentary Affairs*, vol. 62,3, July 2009.

V. Conflicts of interest in science

Conflicts of interest often occur in science and medicine in situations where professional judgement regarding a primary interest, such as research, education or patient care, may be unduly influenced by a secondary interest, such as financial gain or personal prestige. There is nothing unethical in finding oneself in a conflict of interests. Rather, the key issues are whether one recognises the conflict and then how one addresses it. Strategies include: disclosing the conflict, establishing a system of review and authorization, and prohibiting the activities that lead to the conflict²³.

The practice of medicine and pharmacy²⁴ is full of such conflicts as well. It has been suggested that Michael Jackson succumbed to a blatant conflict of interest: dangerous medical practice in exchange for dollars²⁵.

Many conflicts of interest emerge also from research discoveries. Researchers' objectivity is not only an essential value in the scientific world, it is also the basis for public confidence. Researchers should base findings on their data, not by ulterior interests that might undermine the scientific integrity of their work. The situations where financial considerations may compromise an investigator's professional judgement and independence in the design, conduct or publication of research raises concerns. Predetermined conclusions make bad science. Public health service regulations are promulgated and international review books are created to protect researcher's independence of judgement²⁶.

VI. Conflicts of interest in business

"Western doctors take the Hippocratic Oath before becoming physicians and lawyers swear to protect the rule of law, but business people have no comparable creed by which to live. Strictly speaking, the only obligation business people have is to obey the law and make a profit".
Kevin Voigt²⁷

In 1976, the Harvard Business Review submitted a questionnaire on business ethics and social responsibility to 5,000 managers. One of the questions asked if they had ever experienced a conflict between what was expected of them as efficient, profit-conscious managers, and what was expected of them as ethical persons. Four out of every seven of those who responded said that they had experienced such conflicts. The nature of compromising circumstances between company interests and personal ethics was characterized by honesty in communication (22.3%), followed by gifts,

²³ Trudo Lemmens and Peter Singer, "Bioethics for clinicians, 17 Conflict of interest in research, education and patient care" in Canadian Medical Association Journal, 20 October 1998. Bernard Lo and Marilyn Field, editors, Conflicts of interest in medical research, education and practice, Institute of Medicine, Washington.

²⁴ The law of some countries requires pharmacists to dispense "emergency contraceptives" even if it violates their deepest convictions.

²⁵ Carol Casella, "Michael Jackson: A victim of conflict of interest", The Huffington Post, 25 August 2009.

²⁶ NIH Guide, Financial conflicts of interest and research objectivity, 5 June 2000.

²⁷ Kevin Voigt, "Business people can strive to avoid common pitfalls through the 'three M's'". The Wall Street Journal Europe, 3 September, 2002.

entertainment and kickbacks (12.3%) and fairness and discrimination (7.0%)²⁸. The economic depression which started in September 2008 as a consequence of the failure of Lehman Brothers and the others which followed suit is full of unsettled conflicts especially among financial leaders.

Businessmen must continuously make compromises. First, they must choose between present and long-term values. Shall the dividends be higher or the capital improvements greater? Second, oftentimes a conflict between individual and institutional values must be resolved. Loyalty to an institution is fundamental to the institution's success. Yet, an individual can hinder its success in spite of his loyalty. It may be better for the company for the general manager to be dismissed, though this could ruin his health and reputation. Again, shall decisions be made in the interest of a few or many? Democratic morality commonly "sticks its nose up" when legislative or executive action is taken or threatens that which favours the few. Unquestionably, the most significant compromises are those that balance material and spiritual values.

It has been said²⁹ that in business every decision involves a conflicting set of forces. This is particularly true, where the businessman often finds himself forced to choose among personal values and ultimate loyalties that may sharply conflict with one another, with the values held by others, or with urgent organisational considerations. The terrible task of leadership is to live with conflicts and tensions, to make discriminating judgements where necessary, and to find mutual relationships where possible. More often than not, individual interests must be sacrificed for the good of the larger organisation.

The current expansion of Corporate Social Responsibility (CSR), whereby companies decide voluntarily to contribute to a better society and a cleaner environment³⁰, places company managers in constant conflicts of decisions between CSR management conduct to benefit all stakeholders or short term profits for the shareholders³¹. Will Hutton said that "one of the main obstacles to create visionary companies is the business culture... that declares that the maximization of shareholders value is the over-riding business objective... This doctrine completely reflects reality that business are organizations first and last. And organizations are peopled by human beings who need to be motivated, lead and trusted".

Martin Wolf, the Financial Times' columnist, writing about the flaws of modern capitalism in November 2002³² referred to the career businessman's lack of accountability, lack of transparency and institutional failure and added "everything is made far worse by a plethora of conflicts of interests: financial conglomerates are more concerned with pleasing corporate management than with maximising the values of funds they control; outside directors owe more loyalty to the managers who choose them than to the shareholders they represent; and accountants owe more to the people who employ them than to the investors who rely on their work".

²⁸ Steven N. Brenner and Earl A. Molander, "Is the ethics of business changing?" in Ethics in practice..., p. 122.

²⁹ Edmund P. Learned, Arch R. Dooley, and Robert L. Katz, "Personal values and business decisions", Ethics in practice..., p. 54.

³⁰ EU Commission Green Paper. Promoting a European framework for corporate social responsibility (2001), 366 final, 18 July 2001.

³¹ Ramon Mullerat, editor, Corporate social responsibility. The corporate governance of the 21st century. Kluwer, London, 2006.

³² Martin Wolf, "The flaws of modern capitalism", The Financial Times, 19 November 2002.

VII. Conflicts of interest and professionals in general

Professionals must place their clients' interests before their own interests³³. Insofar as a profession is successful at serving its chosen moral ideas, the profession provides alternatives to self-interest (the typical motive in an ordinary market)³⁴.

Professionals have to face cases of conflicts of interests often because a fundamental element in the professional-client relationship is loyalty and trust, which are the two sides of the same coin. Professionals' loyalty is an indispensable factor of the professional activity. Clients trust that the professional will contribute all his efforts to the relevant service without the interference of other aims and preoccupations.

Take as an example, medical doctors who are generally prohibited to hold interests in pharmaceutical laboratories. Consider also the accountants who, as judges in the economic sector, need to keep full independence and impartiality. They must deal with conflicts between the public interest and the best interests of its members and clients³⁵.

In a conflict for professionals, there are three key elements. First, there is a private or personal interest. Often this is a financial interest, but it could also be another sort of interest, say, to provide a special advantage to a spouse or child. Taken by themselves, there is nothing wrong with pursuing private or personal interests. Second, the problem arises when this private interest comes into conflict with the second feature -the duty to the profession you practice. As a professional you take on certain responsibilities, by which you acquire obligations to clients, employees or others. These obligations are supposed to trump private or personal interests. Third, conflicts of interest interfere with the ability of professional responsibilities in a specific way, namely, by interfering with professionals to be objective and independent. Factors, like private and personal interests, that either interfere or appear likely to interfere with objectivity are then a matter of legitimate concern to those who rely on professionals whether they are clients, employers, professional colleagues or the general public³⁶.

SECOND. CONFLICTS OF INTEREST IN THE LEGAL PROFESSION

*"Je jure, comme avocat, d'exercer mes fonctions avec dignité,
conscience, indépendance, probité et humanité"*
Oath of the Paris lawyer

"Dealing with conflicts of interest is inherent in a lawyer's life"

³³ Roscoe Pound, the dean of the Harvard Law School, said that the term profession "refers to a group... pursuing a learned art as a common calling in the spirit of public service -no less a public service because it may incidentally be a means of livelihood".

³⁴ Michael Davis and Andrew Kork, editors, Conflict of interest in the professions, 2001.

³⁵ Nigel Page, "Conflicting interests?", Legal business, September 1992, p. 42.

³⁶ Michael McDonald, Ethics and conflict of interests. Centre for Applied Ethics, 2001.

Geoffrey Hazard

I. In general

Judges must be independent and impartial. Lawyers must be independent but partial (defending partisan interests). Parties' disputes are the background of litigation and other legal services.

Although others face similar difficulties, the conflicts lawyers face are perhaps greater in number and intensity than those confronted by most people. The rules regarding conflicts in non-lawyer relationships are not a sure guide in analysing a lawyer's conflict of interest^{37, 38}. The lawyer-client relationship is unique by definition, i.e., it is a relationship whose objectives are the rendering of legal advice and counsel to the citizens³⁹ and the promotion of justice in the world.

Comment [r2]: Do you want to note that it is a fiduciary relationship?

However, globalisation, the expansion of large firms and the change of lawyers' practices have led to the call for a need to revise and harmonise conflict of interest rules. Although loyalty and the subsequent duty to avoid conflicts of interest are essential for the professional relationship, today some claim that traditional legal analysis has led conflicts of interests to legal rules that are too severe and inept to deal with the problems that arise in a modern sophisticated commercial society⁴⁰.

In addition, lawyers, as professionals who often face conflicts of interest, are in the best position to identify the conflicts that may occur to business clients. Sol M. Linowitz, senior partner of Coudert Brothers⁴¹, asked a colleague how it was that so many lawyers were becoming chairmen of companies, "not to deal with legal problems –he was told-, but to know when there is a legal problem". Linowitz further relates a personal experience when sitting on a board⁴², as he realised that there was a real conflict in a merger, which the management had not seen.

³⁷ Other professionals (bankers, auditors) like lawyers have rules prohibiting conflicts of interest, but they are not so strict and treated more commercially. Howard Davies, chairman of the Financial Services Executive, *op. cit.*, p. XVII: "The single most powerful constraint on firms acting against the interests of their clients must surely be the impact on repeat business".

³⁸ Graham Ward, President of the International Federation of Accountants, "How accountants have risen to the challenge" in Keith Clark, editor, *Conflicts of Interest Reference European Lawyer, 2005-2006*, p. XIX, "Audit does not involve either advocacy or negotiation for clients and an auditor can work for different clients who may have conflicting interests among themselves".

³⁹ Geoffrey Hazard and al., *op. cit.*, p. 620.

⁴⁰ Justice Aikens, Foreword to Charles Hollander and Simon Salzedo, *Conflicts of interest & Chinese walls*, Sweet & Maxwell, 2000.

⁴¹ Sol M. Linowitz, *The betrayed profession*, 1994, p. 64.

⁴² It is not uncommon for lawyers to be invited to serve on the boards of the clients they represent, and it has generally not been deemed to be unethical for them to do so. But such a dual role is fraught with potential perils, including an increased likelihood that the lawyer will be disqualified from representing the corporation in litigation.

In Europe, the Council of the Bars and Law Society of the European Union (CCBE) already created in 1999 a Working Group for the revision of the CCBE Code of Conduct for Lawyers in the European Union⁴³. The Working Group recognised that conflict of interests:

"... has become a subject of increased interest because of the trend towards bigger law firms. The bigger they get the more acutely they feel the conflicts of interest. Mergers between law firms create conflicts of interest because the merging firms often have clients that are in dispute with each other. It is necessary to discuss whether the current provisions are adequate when coping with the new developments in our profession... The rules on conflicts of interest are of fundamental importance to the trust of the public in the legal profession. Great care must therefore be exercised when looking at ways of coping with the development of the legal profession when writing the rules concerning conflicts of interest".

But this is easier said than done, because it depends to a considerable extent on the different legal cultures and perceptions. For example, as Hans-Jurgen Hellwig, former president of CCBE, clearly put, the rules on conflicts of interest should be seen in the context of the legal definition and public perception of a lawyer in any given jurisdiction. In the civil law tradition, a lawyer, with regard not only to his court work but also to his legal advice, is considered an instrument in the administration of justice, an officer of the legal system and a co-minister of justice and the clients' consent to representation of conflicting interests is therefore irrelevant. In common law countries, a lawyer has no such position, or has it only with regard to court work and not when advising a client out of court. In those countries conflict rules are primarily derived from the lawyer's contractual duties vis-à-vis his client and accordingly, the clients may, in many instances, waive the conflict. Therefore, there will be no significant harmonization of conflict rules unless there is harmonization of the underlying definition of the lawyer's role in a democratic society that follows the rule of law⁴⁴.

II. Definition of lawyer's conflict of interest

"Probably the chief problem with conflicts of interests lies in their identification"
*Nicholson and Webb*⁴⁵

Conflicts of interest are sometimes subtle and difficult to identify and to define, as Howar Davies, Chairman of the Financial Services Autonomy of the UK⁴⁶ said: "There may be difficulties in identifying their conflicts, and publicising them, but few of us would find it hard to say which behaviours were acceptable and which not". Sol M. Linowitz⁴⁷, speaking to a seminar on conflicts

⁴³ Council of the Bars and Law Societies of the European Union (CCBE), Code of Conduct for Lawyers in the European Union, revised version 1999. CCBE Working Group for the revision of the CCBE Code. The Working Group was chaired by the Norwegian lawyer Helge Kolrud, former president of the CCBE.

⁴⁴ Hans-Jürgen Hellwig, "Independence, conflicts and secrecy", European Lawyer, April 2001.

⁴⁵ Donald Nicholson and Julian Webb, Professional Legal Ethics. Critical Interrogations, 1999, p. 129, n. 41 who cite R. Gramston, Legal ethics and professional responsibility, 1995, p. 17, and A. Paterson, Legal ethics: its nature and place in the curriculum in Cranston, 1995, p. 17.

⁴⁶ Howar Davies, "Conflicts of interest for banks, auditors and law firms" in Conflicts of interest, Keith Clark, editor, European Lawyer Reference, 2005-2006, p. XVI.

⁴⁷ Sol M. Linowitz, op.cit. p. 228.

of interests at a 1972 ABA convention, recalls that Richard H. Paul of Paul Weiss said when he advised clients confronted with conflicts situations: "My one and only touchstone in this: in answering them, I ask myself, "how would it look in the New York Times?"

Defining conflicts of interest in general can be done in a positive way, as a struggle between opposing forces, but when referring to a lawyer's conflict of interests, it is generally defined negatively, as a prohibition to participating in such clashes of opposing interests. The lawyer can serve different clients, different masters, but not if they have opposing interests.

Conflicts are arrangements which are adverse to the interests or are to the disadvantage of present or former clients. A lawyer has a conflict of interest when he cannot give loyal service to a client because of obligations to others (including obligations to other clients), or from the lawyer's personal interests (such as the lawyer's ownership of a property interest that might be affected in the transaction for the client)⁴⁸. A conflict of interests exists if the interest of any other person or entity interferes with a lawyer's ability to provide objective representation to his or her client⁴⁹.

The CCBE Code (3.2.1) does not define conflicts of interests, but only succinctly prohibits conflicts ("to 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"). The ABA Model Rules (1.7) define concurring conflicts of interests as a prohibition of a lawyer representing one client in a manner "directly adverse to another client" or under circumstances causing the lawyer's representation of the client to "be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"⁵⁰.

Conflicts may affect any of the two basic functions of a lawyer: representation in court (a lawyer may not represent two clients who are adversaries in a case) and the advisory role, although the former is generally easier to detect. The fundament of loyalty differs in litigation and in legal advice. Professors Hazard and Dondi⁵¹ accurately say that the ultimate rationale for loyalty to the client in litigation is that it provides a check on the rectitude and proficiency of the judge. The

⁴⁸ Hazard and Dondi, *op. cit.*, p. 179.

⁴⁹ Karen Painter and Andrew Sayless, "Informed consent and legal malpractice", *For the defence*, May 2009, pp. 22-79.

⁵⁰ A description of conflict of interests can be found in the English Solicitor's Code of Conduct (amended in March 2009), "3.01: 1. Conflict is defined as a conflict between the duties to act in the best interests of two or more different clients, or between your interests and those of a client. The definition appears in 3.01(2). This will encompass all situations where doing the best for one client in a matter will result in prejudice to another client in that matter or a related matter. 2. The definition of conflict in 3.01(2) requires you to assess when two matters are "related". Rule 3.01(3) makes it clear that if the two matters concern the same asset or liability, then they are "related". Accordingly, if you act for one client that is negotiating with publishers for the publication of a novel, an instruction from another client alleging that the novel is plagiarised and breaches copyright would be a related matter. 3. However, there would need to be some reasonable degree of relationship for a conflict to arise. If you act for a company on a dispute with a garage about the cost of repairs to a company car, your firm would not be prevented from acting for a potential bidder for the company, even though the car is a minor asset of the company and would be included in the purchase. If you act for a client selling a business, you might conclude that your firm could also act for a prospective purchaser on the creation of an employee share scheme which would cover all the entities in the purchaser's group, this work perhaps requiring the future inclusion of the target within the scheme and consideration as to whether this raised any particular issues".

⁵¹ Hazard and Dondi, *op. cit.*, pp. 170-171.

ultimate rationale for loyalty to the client in office counseling is that a client has a right to manage his affairs with minimum adverse entanglement with the law.

III. Types of conflicts of interest

The four major types of lawyers' conflicts of interest are:

- a) Conflicts between the lawyer's personal interests and the interests of the client (concurrent representation) (e.g. the lawyer wishes to enter into business transactions with the client, or receive a gift from the client, etc.)
- b) Conflicts between the interests of two or more clients that the lawyer is concurrently representing (concurrent representation). Especially a problem in litigation matters, this now arises more and more in non-litigation situations. Another situation can arise with a lawyer representing opposing parties of different cases.
- c) Conflicts between the lawyer's duties to a present client and the lawyer's continuing duties to a former client⁵² (successive representation).
- d) Conflicts between the client's interests and those of third parties to whom the lawyer owes obligations, for instance, when a third party pays the lawyer's fee (e.g. a lawyer paid by the insurer but representing the insured)⁵³.

Other classifications only contemplate a tripartite classification of a) conflicts in concurrent representation, b) conflicts in successive representation and c) imputed conflicts⁵⁴.

IV. Proliferation of lawyers' conflicts of interests

Conflicts of interests in the legal profession are proliferating. Some of the factors that explain such proliferation are the following:

1. Globalization and economic and trade growth

In the hyperactive global village⁵⁵, there is an increase of competitive international transactions, and therefore the number of disputes rise. The more business, the more disputes.

⁵² Thomas D. Morgan, Legal ethics, 1996, p. 60.

⁵³ There is the risk that the insurer will only choose lawyers to defend the insured's rights who are willing to accept the fees offered by the insurer as well to accept that the insurer's interest is to be given priority in any case. See CCBE "Summary of the CCBE position of free choice of lawyers in legal expenses insurance", 29 November 2008. Recently, the European Court of Justice (C-199-08 of 10 September), based on art. 4 of Directive 344/1987 on coordination of laws in the legal defense insurance, has decided that the insurer cannot reserve the right to select the lawyer of all the affected insured.

⁵⁴ The principle of "imputation" is a stringent rule for lawyers. The majority of other professions (accountants, banking, securities underwriting, insurance) do not have such stringent rule.

⁵⁵ Marshall McLuhan, The global village.

2. Increase in conflicts of interest litigation

With the growth of the level of life, citizens' awareness of rights increases and so does litigation for professional breaches.

In the 1970's, malpractice claims against lawyers in the US were so rare that malpractice insurance coverage was generally unavailable. Today, more than 70% of the lawyers have malpractice insurance and 10% face malpractice suits⁵⁶.

3. Growth of size of firms

The conflict of interest issue has become vastly more complicated with the growth of size and technification of firms⁵⁷ and the increasing number and speed of modern commercial transactions, which obliges law firms to introduce sophisticated conflicts checking systems⁵⁸.

The larger the firm, the greater possibility to incur in conflicts of interest⁵⁹. Thirty years ago, the number of firms in the world exceeding 100 lawyers was low. Today, there are many firms exceeding 1,000, 2,000 and even 4,000 lawyers. There are also many global firms with branches in many countries in different continents. Distance diminishes the perception of conflict⁶⁰.

In an article "Takeover era increases risk of lawyer conflicts of interest", the New York Times⁶¹ publicized a number of conflicts incurred by large firms. The article also quoted a partner of

⁵⁶ Michelle Graven, "To the best of one's ability: a guide to effective lawyering", *Georgetown Journal of Legal Ethics*, Summer 2001.

⁵⁷ See Richard Susskind, *The future of law*, 1996, *Transforming the laws*, 2000, and *The end of lawyers*, 2009.

⁵⁸ A well known early case in American law is *Westinghouse Elec. Corp v. Kerr&McGe Corp.*, 580 F2d 13111 (7th Cir. 1978). A large and prominent law firm based in Chicago had an office in Washington. The Washington office undertook representation of a petroleum industry trade association, which commissioned the firm to show how intense was the competition within that industry. The Chicago office undertook representation of a company dealing with the energy industry, alleging that there was an antitrust conspiracy among energy companies –including oil companies. The law firm had not identified its conflict of interest in these two representations until the day the antitrust suit was filed. The oil companies protested and asked the court to exclude the law firm from prosecution of the antitrust case. The court's decision disqualified the law firm in the conflicting representations. Quoted by Hazard and Dondi, *op. cit.*, p. 185.

⁵⁹ My father was a practicing lawyer, solo practitioner in Tarragona (Spain) –a town of some 60,000 inhabitants at the time. He had very few conflicts.

⁶⁰ Some 20 years ago, I attended a conference at Fordham University in New York. A partner from a large firm who spoke before me confessed that he saw no problem in acting for the plaintiff in New York against a defendant represented by a partner of his firm in China. However, today distance has died with the internet (Francis Cairncross, *The death of distance*, 1977).

⁶¹ The New York Times, 21 May 1988. The article started saying that "John L. Duncan, president of the Murray Ohio Manufacturing Company, was shocked last month when an executive of the Electrolux Group told him it was making an unsolicited offer to buy Mr. Duncan's company. It was not the takeover bid that he said he found surprising, so much as which law firm was representing Electrolux: Sullivan & Cromwell, of New York. Fifteen months earlier, two Sullivan & Cromwell lawyers had been retained to advise Murray Ohio and had participated in a strategy session involving Mr. Duncan that was called to design ways to thwart hostile bids. Expressing skepticism over the law firm's behavior in advising Electrolux after it had assisted Murray Ohio, Judge Thomas A. Wiseman Jr. of the Federal District Court in Nashville stopped the takeover and ordered a hearing on Murray Ohio's accusation that Sullivan & Cromwell had used the company's confidential information to its detriment (...)".

Skadden Arps: "conflicts keep cropping up all the time... The whole area is an enormous problem today".

4. Mobility of lawyers

It used to be that a lawyer would work in one or two firms for his entire legal career. Now, lawyers change firms as often as four or five times in the same period. This has created a new problem regarding conflicts of interest since a lawyer with a conflict who moves to a new firm contaminates the rest of the lawyers in his new firm, since many courts allow the disqualification of counsel based on the imputation doctrine that each and every lawyer at a firm is deemed to know everything that the other lawyers at the firm know⁶².

5. Lawyers acting in dual roles

Conflicts of interest often arise in situations where lawyers act in dual roles; as where, for example, a lawyer simultaneously represents an entity client and serves on its board of directors or trustees. It is not uncommon for lawyers to be invited to serve on the boards of the clients they represent, and it has generally not been deemed to be unethical for them to do so. But such a dual role is fraught with potential perils, including an increased likelihood that the lawyer will be disqualified from representing the corporation in litigation.⁶³

6. Small jurisdictions or small sectors

In small jurisdictions (for example, Denmark, Scotland), where there is a relatively small number of firms dealing with commercial clients, it is not uncommon for a firm to be instructed by two or more clients seeking a bid for the same project. There is clearly a potential conflict and an obligation to keep matters confidential, which may give rise to tension with the duty of disclosure. Unless some forms of information barriers (Chinese walls) are allowed, the firm may not act for conflicting clients and clients cannot have the lawyers of their choice. Something comparable happens in larger jurisdictions when the number of highly specialized firms in some sectors (like in finance) is small.

In addition, some lawyers tend to ignore or dissimulate conflicts or justify their plural intervention in spite of the conflict. Sol M. Linowitz⁶⁴ exclaims: "Until recently, it would have been unthinkable that a lawyer would have interests that might conflict with those of his clients. Now, conflicts sometimes grow so severe that courts must remind lawyers that the privilege of confidentiality in communications between clients and lawyers exists to benefit the client, not the lawyer....".

⁶² SeLegue, Sean M., "Ethical Walls Find Acceptance in Ninth Circuit", Rogers Joseph O'Donnell & Phillips *Professional Liability News*, Issue 8, March 2002.

⁶³ Richard E. Flamm: "Conflicts of interest. Self study & self assessment test". Martha Edwards, "Is the City solicitor in conflicts of interest?", *Telegraph Journal*, 7 January 2009.

⁶⁴ Sol M. Linowitz, *op.cit.* 1994, p. 40. See the mentioned cases of highly distinguished lawyers who incurred in conflicts of interests.

Moreover, Heinz and Laumann⁶⁵ opine, conflicts of interest do not affect all lawyers equally, since “lawyers are likely to have greater freedom of action, greater control over how they practice law, if their clients are individuals rather than corporations and other large organizations... the lawyers who serve the more powerful, corporate clients are likely to be less “professional” in this respect than those who serve the less powerful clients, individuals”.

V. The values protected by the conflicts' prohibition

"When a client engages the services of a lawyer in a given piece of business he is entitled to feel that ... he has the undivided loyalty of the one upon whom he looks as his advocate and champion."
*Grievance Committee v. Rottner*⁶⁶

1. The lawyer's principles as supporting the duty to avoid conflicts

There are many systematizations of the lawyer's ethical duties. Nicholson and Webb⁶⁷, for instance, sustain that lawyers owe four types of duties: a) to clients; b) to the administration of justice; c) to specific third parties and d) the general public. Duties to clients, in turn, are further divided into: i) loyalty; ii) diligence; and iii) confidentiality. Loyalty itself is said to encompass its own set of duties, which are: x) zeal; y) integrity; and z) independence. In my view, lawyers have three basic duties: a) independence; b) confidentiality; and c) loyalty. All other duties are emanations of those three.

The obligation to avoid conflicts is a derivation of all and, at the same time, such duties (independence, confidentiality and loyalty) depending on the type of the conflict. In the case of the existing clients conflicts in particular, it is the principle of loyalty; it is the conflict between two competing obligations of loyalty. In the case of conflicts between existing clients and former clients, it is the conflict between the obligation of loyalty to the existing client versus the obligation of confidentiality to the former client⁶⁸. The lawyer has no fiduciary duties to former clients.

2. Independence

Independence is the quintessence of a lawyer's profession. There is no free society and no free man without independent lawyers⁶⁹. Independence is the absence of dependence. Independence means that lawyers must not allow themselves to be restricted in their acting on behalf of or in giving advice to their clients. Most of the lawyer's ethical duties are rooted in the need to act independently.

⁶⁵ Cited by Susan P. Shapiro, *Tangled loyalties. Conflict of interest in legal practice*, 2002, p. 17.

⁶⁶ *Grievance Committee V. Rottner*, 152 Conn. 59, 203 A.2d 82(1964) cited by Morgan and Rotunda, *op. cit.*, p. 55.

⁶⁷ Donald Nicholson and Julian Webb, *op.cit.*, 1999, p 104.

⁶⁸ Charles Hollander and Simon Salzedo, *Conflicts of interest and Chinese walls*, Sweet & Maxwell, London, 2000, p.11.

⁶⁹ Robert Martin (co-founder and former president of the UIA), “L’indépendance de la Justice” (opening speech 28th Congress of the UIA): “L’indépendance constitue la caractéristique la plus importante de l’avocat. L’indépendance est à la fois la force, le devoir et la raison d’être de l’avocat”. Piero Calamandrei, *Elogio dei giudici scritto da un avvocato*, 1993, XXVIII: “Solo la dove gli avvocati sono indipendenti, i giudici possono essere imparziali”.

Lawyers must avoid conflicts of interest in order to keep the necessary independence to carry out their function adequately. A lawyer cannot give independent advice in the case of opposing interests of his own or of others.

At a symposium held in Paris on transnational practice⁷⁰, it was declared that “the duty of independence constitutes the cornerstone of the profession. Every lawyer must act solely in the legitimate and lawful interest of his client and may not tolerate any third party interference from the authorities, special interest groups, etc... He must avoid all conflicts of interest”.

3. Confidentiality

The basis of confidentiality on the part of the lawyer is the need for the client to have total confidence in his lawyer and to rely on him to handle the matter he is charged with and therefore giving him all the information the representation requires.

Confidentiality ("professional secrecy" according to the civil law system, or "confidentiality" and "attorney-client privilege" according to the common law system) is one of the essential principles of the lawyer's function. The CCBE Code (art 2.3) proclaims that confidentiality is "a primary and fundamental right and duty of the lawyer" and that "it serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the state".

With regard to conflicts of interest, the CCBE Working Group submitted that the following provision should be included as an express reference to the importance to confidentiality and independence:

"In the field of conflict of interest, the lawyer must be especially attentive towards and maintain respect for his obligation of confidentiality towards his client and his duty to remain independent. The lawyer must not act in a way that may cause a risk of breach of his confidence or impairment of his independence".

4. Loyalty

The special feature of the fiduciary is the obligation of loyalty to the person for whom he acts. He has an obligation to defend and advance the interests of the persons to whom he owes the fiduciary obligation⁷¹. Client's trust is at the same time the cause and the effect of loyalty.

Lawyers owe loyalty to their clients because they are their fiduciaries. The definition of fiduciary and its duties were clearly expressed by Lord Millet⁷²:

⁷⁰ Symposium: Paris Forum in Transnational Practice for the Legal Profession, 18. Dick. J. International Law, 1999, 89, 91.

⁷¹ Hollander and Salzedo, op.cit. p.13.

⁷² Lord Millet in Bristol & West Building Society v Mathew [1998] Ch. 1.18, cited by Hollander and Salzedo, op.cit., p.14,

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter or circumstances which gives rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principle is entitled to the simple-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not place himself in a position where his duty and his interests may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his client... he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary".

The fiduciary relationship comes to an end with the termination of the retainer. The obligation of confidentiality survives the termination of the retainer. After termination of the retainer, the professional has no obligation to defend and advance the interests of his former client, although he has a continuing duty to preserve the confidentiality of information imparted during its subsistence.

VI. The rules

1. In general

When comparing the basic rules of the different legal traditions concerning conflicts of interests, I would like to make two preliminary remarks:

First, common law jurisdiction rules concerning legal ethics are generally more detailed and casuistic than the civil law rules, which tend to be conceptual, concise and aspirational⁷³. One must only contrast the ABA Model Rules, which dedicate 26 pages to conflicts of interest (with comments) or some 5 pages (without comments) and the CCBE Code, which only devotes 12 lines. There may be several reasons for the latter approach: for example, in Europe there are smaller firms, less litigation, the inductive approach of civil law system and the fact that creation and discipline of ethical rules is the field of bars rather than courts. The two systems have their own advantages and disadvantages. The disadvantage of the common law style is that it casts doubts on situations not covered in the detailed regulation. The disadvantage of the civil law concise writing is that it gives a wide space to interpretation both to the lawyer's conscience and to the disciplinary entities.

Second, the rules governing conflicts of interest should be applicable to all lawyers' activities, firms and areas of law. One cannot have separately drawn up rules for litigation, corporate, private client law, etc. The rules must be uniform and applicable throughout the profession activities. On the one hand, the division within the different areas is never clear cut, whereas on the other, having different sets of rules may help induce a division of the legal profession. If the rules are different for different types of lawyers, that could entail the split of the profession.

⁷³ This is an obstacle for the intent to create a global code of conduct. See Ramon Mullerat "Towards a harmonization of codes of legal ethics".

2. Some basic rules in particular

a) The CCBE Code⁷⁴ (art 3.2) regulates the conflicts of interest in Europe:

"3.2 Conflicts 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 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 or a breach of confidence entrusted to the lawyer by a former client of 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 and 3.2.3 above shall apply to the association and all its members".

b) The ABA Model Rules of Professional Conduct are more lengthy and detailed. The relevant rules are contained in section 1, Rules 1.7 through 1.12⁷⁵.

Rule 1.7: Conflict of Interest: Current Clients

- (a) *Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:*
- (1) the representation of one client will be directly adverse to another client;*
 - or*
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.*
- (b) *Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:*
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;*
 - (2) the representation is not prohibited by law;*
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal;*
 - and*
 - (4) each affected client gives informed consent, confirmed in writing.*

Rule 1.8: Conflict of interest: Specific Rules

- (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 unless:*

⁷⁴ CCBE Code, 1988, revised 1998.

⁷⁵ In addition, Rule 1.16 (Declining or terminating representation) and Rule 1.18 (Duties to prospective client) comprise some other complementary norms on conflicts of interest.

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*
- (b) *A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.*
- (c) *A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familiar relationship.*
- (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, except that:*
- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and*
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.*
- (f) *A lawyer shall not accept compensation for representing a client from one other than the client unless:*
- (1) the client gives informed consent*
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and*
- (3) information relating to representation of a client is protected as required by Rule 1.6.*
- (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, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.*
- (h) *A lawyer shall not:*
- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement, or*
- (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.*
- (i) *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, except that the lawyer may:*

- (1) *Acquire a lien authorized by law to secure the lawyer's fee or expenses;*
and
- (2) *Contract with a client for a reasonable contingent fee in a civil case.*
- (j) *A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.*
- (k) *While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to anyone of them shall apply to all of them.*

Rule 1.9: Duties to former clients

- (a) *A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.*
- (b) *A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client*
 - (1) *whose interests are materially adverse to that person; and*
 - (2) *about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.*
- (c) *A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:*
 - (1) *use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or*
 - (2) *reveal information relating to the representation except as these Rules would permit or require with respect to a client.*

Rule 1.10⁷⁶: Imputation of Conflicts of Interest: General Rule

- (a) *While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless*
 - (1) *the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or*
 - (2) *the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and*
 - (i) *the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;*
 - (ii) *written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any*

⁷⁶ This Rule was amended by the ABA in February and August 2009 at the recommendation of the Standing Committee on Ethics and Professional Responsibility.

- written inquiries or objections by the former client about the screening procedures;
and
- (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Rule 1.11: Special conflicts of interest for former and current government officers and employees

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
- (1) is subject to Rule 1.9(c); and
- (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing to the representation.
- (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
- (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interest are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. (...)
- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
- (1) is subject to Rules 1.7 and 1.9; and
- (2) shall not:
- (i) participate in a matter in which the lawyer participated personally and substantially while in private practice of nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer is serving as a law clerk to a judge, other adjudicative officer or arbitrator may be negotiated for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes: (...)

Rule 1.12: Former judge, arbitrator, mediator or other third-party neutral

- (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.*
- (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as law clerk to judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.*
- (c) if a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:*
(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.
- (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.*

VII. The client's consent

1. The client's waiver

The principle prohibiting lawyers to incur in conflicts of interest is based on the need to protect the client (current or former) so that the lawyer can devote his entire zeal and effort to defend the client's rights.

Therefore, in some jurisdictions, principally the common law jurisdictions⁷⁷, conflicts of interest can be waived by the protectable client ("client's consent") whose interests the prohibition intends to keep safe. Client's consent requires explaining to clients the implications of the opposing representations and the advantages and risks involved in the conflict and clients waiving to them.

⁷⁷ For example, Law Society of Scotland, Code of Conduct 2008, para. 6, 1. Canada Davis & Co. et al. v. 3463920 Canadian Inc. et al., 1 June 2007).

Consent to a conflict of interest can be either general or of limited scope. Broad and general consents require that the client consult with another lawyer about the advisability and terms of the consent itself.

The attitudes toward conflict of interests' waivers depend a great deal on the concept that each jurisdiction may have of the lawyer. Jurisdictions where the lawyer is fundamentally considered an element of the administration of justice, the client's consent as a means to neutralize the conflict is less relevant, while in jurisdictions which view the lawyer mainly as a service provider, the client's consent is more conclusive.

In order to avoid disqualifications, firms increasingly employ provisions in retainer agreements whereby the client agrees to waive certain future conflicts should they arise. These provisions usually relate to successive conflicts, i.e., conflicts that may occur after the firm has concluded addressing the client who signs the waiver. But the provisions sometimes apply to concurrent representation. In such cases courts have refused to enforce a release permitting the lawyer subsequently to represent his client's opponent in the same matter⁷⁸.

2. The consent needs to be informed

A. Informed consent in medicine

In many fields other than law, for instance in medicine, when clients' consent is discussed, it is generally requested to be duly "informed". The most important goal of informed consent is that the patient have an opportunity to be an informed participant in his health care decisions. It is generally accepted that complete informed consent includes a discussion of the following elements: a) the nature of the decision/procedure; b) reasonable alternatives to the proposed intervention; c) the relevant risks, benefits, and uncertainties related to each alternative assessment of patient understanding; d) the acceptance of the intervention by the patient. In order for the patient's consent to be valid, he must be considered competent to make the decision at hand and his consent must be voluntary⁷⁹.

B. Informed consent in conflicts in law

In the legal field, in England, Chester, Rowley and Harrison affirmed a few years ago that even when courts recognise that consent may neutralize potential conflicts, the requirements of "informed consent" are set high. They cite the Privy Council in Clark Boyce v. Moriat⁸⁰.

"Informed consent means consent given in the knowledge that there is a conflict between the parties and that as result the solicitor may be disabled from disclosing to each party the full

⁷⁸ Re Boone, 83 Fed. 944, 957 (N.D. Cal. 1897). The court said that "the client may waive a privilege which the relation of attorney and client confers upon him, but he cannot enter into an agreement whereby he consents that the attorney may be released from all the duties, burdens, obligations and privileges pertaining to the duty of attorney and client. ... Lawyers owe a duty to themselves, to the public, and to the profession which the temerity or improvidence of clients cannot supersede".

⁷⁹ "Ethics in Medicine", University of Washington, School of Medicine.

⁸⁰ Clark Boyce v. Moriat (1994), I.A.C. 428 at 435.

knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other " .

The client's consent is always likable to be withdrawn or challenged, unless it can be shown to have been freely given under circumstances of full disclosure and preferentially with the benefit of independent legal advice.

3. The consent needs to be in writing

Jurisdictions that allow the consent require it to be "confirmed in writing". The "confirmed in writing" should at least contain a statement of the facts constituting the conflict, refer to a consultation with the lawyer and the consent by the client⁸¹. The ABA Model Rules declare that this requirement denotes that informed consent is given in writing by the person or a writing that the lawyer promptly transmits to the person confirming an oral informal consent. Implied informed consent has been rejected by the courts⁸².

4. The non-consentable conflict

But even in jurisdictions where it is possible to waive conflicts, there are situations in which full disclosure and consent of both clients will not be sufficient for a lawyer to represent conflicting interests (the "non-consentable conflict").

In general, in litigation, the conflict of interest as a bar for the lawyer's intervention cannot be waived in any circumstance. Nobody can accept, for example, that a lawyer acts both for the criminal and the victim even if both parties would consent. Some litigations, however, i.e. divorces agreed by the parties could represent a different picture. In transactional commercial practice, the situation is more subtle. Under some legislations certain representatives by a former government, lawyers are prohibited despite the consent of the former client, and other comparable situations.

VIII. Imputation and Screening.

1. Imputation

In collective work in law firms, the principle in the field of conflicts of interest is that most conflictual circumstances attributable to one partner are attributable to all the partners of the firm because ethical rules consider a law firm as a single lawyer. This is called the "principle of imputation" ("one for all, all for me"). The CCBE Code (3.2.4) prescribes that "where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above (conflicts of interest) shall apply to the association and all its members" and the ABA Model Rules (1.10 Comment [2]) declare that "a firm

⁸¹ Karen Painter and Andrew Sayless, *op. cit.* p. 24.

⁸² *Unified Sewerage Agency v Jelco Inc.* 646 F.2d 1339, 1345-46 (9th Cir. 1981). *Centra, Inc v Estrin* 538 F.3d 402 (6th Cir. 2008) cited by Karen Painter and Andrew Sayless, *op. cit.* p. 24: "It is not sufficient that both parties be informed of the fact that the lawyer is undertaking to represent both of them... He must explain to them the nature of the conflict of interest in such detail so that they can understand the reasons [why] it may be desirable for each to have independent counsel, with undivided loyalty to the interest of each other".

of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client". Therefore the conflict of interests burdening one lawyer in a firm is "imputed" to all other lawyers in the firm.

2. Screening

In order to restrict the impact of "imputation" in professional firms, Chinese walls, more properly called "isolation", "insulation" or "screening" was invented^{83 84}.

In essence, Chinese walls consist of the separation of information regarding a particular matter from the rest of the information in a professional firm to prevent its free flow throughout the firm. It is a technique that intends to allow professionals within the same firm to advise clients with conflicting interests with the aim to protect client confidentiality, so that the firm can handle conflicting clients.

In the legal profession, the concept of Chinese walls is that lawyer A and lawyer B in the firm can handle matters involving an imputed conflict of interest through the introduction of "insulation

⁸³ A well-known case regarding Chinese walls is the Bolkiah case. KPMG was the accountancy firm for Prince Jefri Bolkiah, the brother of the Sultan of Brunei and the former chairman of the Brunei Investment Agency ('BIA'). Once Prince Jefri was removed from his position as chairman, his position in the BIA was taken over by partners from Arthur Andersen. The Brunei government wanted then KPMG to look into certain transactions of BIA, and KPMG created a Chinese wall in order to protect Prince Jefri's confidentiality during the investigation. KPMG did not contact Prince Jefri to seek his permission to work for the Brunei government in the investigation of the BIA. Prince Jefri then sought an injunction to prevent KPMG from further working on the project.

The Court of Appeal reversed the granting of the injunction on the grounds that there was no real risk of disclosure based on the facts of the case. The court held that this case was different from other similar cases in that it was a company working for the same client throughout, not working for one client and then that client's competitor. Lord Woolf stated the court decided the case based on three questions which dealt with whether the confidential information, if disclosed, would affect the former client, if a real or appreciable risk of disclosure existed and whether the confidential information is such that the court should protect its disclosure.

The House of Lords, however, overturned the Court of Appeals decision and granted the injunction. Lord Millet stated that this case was a conflict of a former client. KPMG did not owe a fiduciary duty to Prince Jefri and the question was a matter of confidential information. Relating KPMG's relationship to Prince Jefri to that of a solicitor and his client, the court found that KPMG would have most likely had a litigation privilege with Prince Jefri. As such, this relationship would be treated in the same manner as that of a solicitor and his client's litigation privilege. According to Lord Millet, the court should intervene unless to its satisfaction, there is no risk of disclosure. Since the duty of confidentiality owed to Prince Jefri by KPMG was unqualified, KPMG's protective measures were unsatisfactory, according to the House of Lords, to prevent a breach of the duty of confidentiality, the House of Lords granted the injunction.

Hollander and Salzedo outline five major principles of the Bolkiah case as follows: a. a clash between fiduciary obligations owed to two clients a professional acts for at the same time, with conflicting interests. This conflict is deemed an "existing client conflicts". If the professional chooses to represent both, he is in breach of his fiduciary duty and cannot represent both clients. The conflict is then a conflict of the company, firm, etc. and not just a conflict of the professional; b. even when a professional has informed consent to act for two clients with conflicting interests, there are circumstances where the professional will be unable to act for both parties; c. although a fiduciary duty does not exist in a situation where a professional acts for an existing and former client with conflicting interests, the breach is classified as that of fiduciary duty; d. a real risk must exist for a professional to not act for a client whose interests conflict with those of a former client; e. the professional may be able to utilise the concept of a Chinese wall to separate his client's interests from those of another of the firm's client's interests.

⁸⁴ The phrase "Chinese walls" came into wide use after the 1929 stock market crash, to describe an investment firm's internal efforts to isolate compromising information.

measures” (the lawyers do not talk to each other, the firm maintains separate files and supporting staff for each matter). The “insulation measures” are the “wall”⁸⁵.

Screening is a mechanism originally created by other professions, generally with a lower level of rigour in conflicts than in the legal profession. The legal profession has not considered their introduction until recently due to the changes of environment referred to above. Generally, the immense majority of jurisdictions do not regulate nor even contemplate Chinese walls and, those that do it, they do it rather restrictly.

3. Conditions for Screening

Not everybody is satisfied with the concept of Chinese walls, but even those who contemplate them, submit them to strict conditions, and at least the following:

- physical separation of the relevant departments/lawyers of the firm;
- intellectual separation of the lawyers who deal with the conflicted clients;
- prohibition to discuss the matter by the conflicting lawyers;
- training and education to ensure staff are aware of the need to keep confidential information secret;
- strict procedures and sanctions where the wall is crossed; and
- monitoring by compliance officers.

Varying physical insulation measures exist for implementing Chinese walls, including: locked rooms for containing relevant documents; restricted access to certain parts of buildings and monitoring any person who enters those areas; written rules on maintaining confidentiality; and separate teams working on the different sides to a matter⁸⁶.

In addition, there are several "surveillance methods" for monitoring information within firms during and after the establishment of Chinese walls. These include the on-line SWAT systems, employment of longer range computer analyses and reports to provide analysts with necessary information to identify and investigate for unusual activity or indications of rule violations and field examinations programmes. The latter is where regulators actually make on-site inspections of the firms to, amongst other things, examine Chinese walls and the other procedures in place for controlling the flow of information.

4. Risks of Chinese walls

The main argument for opposing Chinese walls is that they do not really solve the conflict nor do they protect the fundamental principles of the profession (independence, confidentiality and trust), which are vital factors to a client and cannot be circumvented in serving another client. Justice Megarry⁸⁷ said a "solicitor must be remarkable indeed if he can feel assured of holding the scales evenly between himself and his client".

⁸⁵ Hazard and Dondi, *op. cit.*, p. 185.

⁸⁶ Peter Smith, "Chinese walls: Maintaining client confidentiality". www.practicallaw.com/A9489.

⁸⁷ *Spector v Ageda* [1973] Ch 30,47.

Comment [r3]: I would suggest changing all references to screening as I do not think that "chinese wall" is typically used any more.

It has been said that Chinese walls test self-regulation to the limit. It is quite difficult to ensure the absolute confidentiality of each client's affairs where there are conflicting interests⁸⁸. In the case of Re A Firm of Solicitors⁸⁹, Justice Parker stated that in his "judgment, any reasonable man with knowledge of the facts in the case concerned, including the proposals for a Chinese wall, would consider that some confidential information might permeate the wall. I doubt very much whether an impregnable Chinese wall can ever be created".

Obviously, it is impossible to guarantee the impermeability of a fictitious wall intending to separate professionals and staff who work legally, physically and electronically integrated.

Even if allowed, Chinese walls should not be constructed solely for financial reasons, so that a firm may retain its clients and payment of fees. Barry Rithaltz, the CEO of the independent research firm Fusion IQ, said about Chinese walls in an interview: "Let us be honest, it's bullshit. They do not exist. They are theoretical, abstract legal construct that looks and sounds good when you are developing legal constructs". A corporate partner at a top 10 City firm⁹⁰ said once: "the simple truth is that turning down work due to conflicts is all well and good in a booming M&A market, but when it comes to a downturn, everyone's principles go out the window. Chinese walls are, in my experience, utterly pointless when you have IT systems that allow you to access information on any client or transaction within seconds".

X. The sophisticated client

Many ethical rules, like the ones on conflicts of interest, have become so difficult because they intend to comprise at the same time diverse type of clients (individuals, small shops and multinational corporations), diverse lawyers activities (court and advisory) and diverse law firms (solo practitioners and global mega-firms). To satisfactorily cover all this diversity has made the conflicts of interest issue so complex.

So much so, that it has been proposed and even adopted⁹¹ to establish different sets of rules for conflicts. One for sophisticated firms that deal with sophisticated clients, and another for non-sophisticated clients and non-sophisticated firms. The latter would be governed by the traditional rules and the former by less restrictive rules.

This change has been termed the "sophisticated client" exception. A sophisticated client exception replaces the presumption of impermissible conflicted representation with a rule of full disclosure of the conflict for certain kinds of clients in certain kinds of representation - typically large corporations with legal departments involved in non-adversarial transactions. Essentially, the sophisticated client exception for attorney conflicts of interest standards mirrors the conflicts of interest rules used in the accounting profession⁹².

⁸⁸ Smith, Peter. "Chinese walls: Maintaining client confidentiality". www.practicallaw.com/A9489.

⁸⁹ The Times, 20 June 1991.

⁹⁰ "Finns want new conflicts watchdog," Legal Week, 20 February 2003.

⁹¹ Law Society of England & Wales, Code of Conduct, Rule 4.04 34-35. See page 29.

⁹² Audrey Benison, The Georgetown Journal of Legal Ethics, Summer 2000, "Sophisticated client: A proposal for the reconciliation of conflicts of interest standards for attorneys and accountants".

Such an exception provides sophisticated clients with information to be able to evaluate the risks of conflicted representation themselves, unimpeded by court or attorney supervision. Though perilous in its potential for attorney abuse, client inaccuracy in weighing costs and benefits of conflicted representation, and impropriety of appearance, such an exception is responsive to the strain on lawyer competitiveness created by the current conflicts rules and is narrow enough in scope as to avoid misuse.

XI. Regulation of conflicts in Europe

Unlike the US jurisdictions that permit firms to act in conflict situations where the clients concerned are able to give informed consent and admit screens in some situations, the European position is varied and less clear. The rules of most EU jurisdictions (with the exception of the EU common law countries like England, Scotland) limit themselves to general rules with declaration of the main principles without entering into a comprehensive and itemized regulation. Moreover, comparisons with the different jurisdictions are difficult because the conflict rules have to be read in the context of the entire code they form part of and also in the context of the legal system of the country in question⁹³.

In regard to the CCBE Code, art. 3.2, as we have seen (Part One, Second, VI, 2 a)), it covers general principles prohibiting concurrent conflicts (3.2.1 and 3.2.2), successive conflicts (3.2.3) and the imputation principle (3.2.4) without reference to consent or screening.

In Spain, for instance, conflicts of interest are regulated by the Código de Deontología de la Abogacía Española⁹⁴. The Code covers the general obligation not to handle the representation of conflicting interests, with the obligation to refuse representation of both clients unless both clients expressly authorise the representation of one of them (13.4), the prohibition to act against a former client when there is a risk to damage confidential information (13.5), the prohibition of dual representation with conflicting interests (13.6) and a general rule of imputation (13.6). In principle, no consent (other than the two parties' agreement) and no screening mechanism are allowed.

⁹³ "Proposed amendments to rule 3 (conflicts of interest) and rule 4 (duties of confidentiality and disclosure) of the Solicitors' Code of Conduct 2007"

⁹⁴ Código Deontológico de la Abogacía Española, approved by Royal Decree 658/2001, of 22 June, arts. 13, 4-7: "4. *El Abogado no puede aceptar la defensa de intereses contrapuestos con otros que esté defendiendo, o con los del propio abogado. Caso de conflicto de intereses entre dos clientes del mismo Abogado, deberá renunciar a la defensa de ambos, salvo autorización expresa de los dos para intervenir en defensa de uno de ellos. Sin embargo el Abogado podrá intervenir en interés de todas las partes en funciones de mediador o en la preparación y redacción de documentos de naturaleza contractual, debiendo mantener en tal supuesto una estricta y exquisita objetividad.* 5. *El Abogado no podrá aceptar encargos profesionales que impliquen actuaciones contra un anterior cliente, cuando exista riesgo de que el secreto de las informaciones obtenidas en la relación con el antiguo cliente pueda ser violado, o que de ellas pudiera resultar beneficio para el nuevo cliente.* 6. *El Abogado deberá, asimismo, abstenerse de ocuparse de los asuntos de un conjunto de clientes afectados por una misma situación, cuando surja un conflicto de intereses entre ellos, exista riesgo de violación del secreto profesional, o pueda estar afectada su libertad e independencia.* 7. *Cuando varios Abogados formen parte o colaboren en un mismo despacho, cualquiera que sea la forma asociativa utilizada, las normas expuestas serán aplicables al grupo en su conjunto, y a todos y cada uno de sus miembros*".

Comparable rules govern the French profession⁹⁵. Client's consent (*accord des parties*) is contemplated but limited. Chinese walls are not mentioned. With regard to imputation, in France, the Supreme Court has considered that "a court must draw the conclusion that lawyers who work together exchange confidential information"⁹⁶.

Likewise, in other EU countries the prohibition of conflicts is also general and laconic. This is the case also for example in Portugal⁹⁷ or in Italy⁹⁸. In Belgium, both the francophone and the germanophone bars apply the CCBE Code.

XII. England & Wales ethical rules reform 2009

The Law Society of England & Wales Solicitors' Code of Conduct was amended on 31 March 2009 as part of a general updating of the rules to introduce firm-based regulation and legal disciplinary practices as provided for in the Legal Services Act 2007.

⁹⁵ Règlement Intérieur du Barreau de Paris, art. 4.1 and 4.2: "4.1 Principes. L'avocat ne peut être ni le conseil ni le représentant ou le défenseur de plus d'un client dans une même affaire s'il y a conflit entre les intérêts de ses clients ou, sauf accord des parties, s'il existe un risque sérieux d'un tel conflit. Sauf accord écrit des parties, il s'abstient de s'occuper des affaires de tous les clients concernés lorsque surgit un conflit d'intérêt, lorsque le secret professionnel risque d'être violé ou lorsque son indépendance risque de ne plus être entière. Il ne peut accepter l'affaire d'un nouveau client si le secret des informations données par un ancien client risque d'être violé ou lorsque la connaissance par l'avocat des affaires de l'ancien client favoriserait le nouveau client. Lorsque des avocats sont membres d'un groupement d'exercice, les dispositions des alinéas qui précèdent sont applicables à ce groupement dans son ensemble et à tous ses membres. Elles s'appliquent également aux avocats qui exercent leur profession en mettant en commun des moyens, dès lors qu'il existe un risque de violation du secret professionnel. Les mêmes règles s'appliquent entre l'avocat collaborateur, pour ses dossiers personnels, et l'avocat ou la structure d'exercice avec lequel ou laquelle il collabore. 4.2 Définition. Conflits d'intérêts. Il y a conflit d'intérêts: dans la fonction de conseil, lorsque, au jour de sa saisine, l'avocat qui a l'obligation de donner une information complète, loyale et sans réserve à ses clients ne peut mener sa mission sans compromettre, soit par l'analyse de la situation présentée, soit par l'utilisation des moyens juridiques préconisés, soit par la concrétisation du résultat recherché, les intérêts d'une ou plusieurs parties; dans la fonction de représentation et de défense, lorsque, au jour de sa saisine, l'assistance de plusieurs parties conduirait l'avocat à présenter une défense différente, notamment dans son développement, son argumentation et sa finalité, de celle qu'il aurait choisie si lui avaient été confiés les intérêts d'une seule partie; lorsqu'une modification ou une évolution de la situation qui lui a été initialement soumise révèle à l'avocat une des difficultés visées ci-dessus. Risque de conflit d'intérêts. Il existe un risque sérieux de conflits d'intérêts lorsqu'une modification ou une évolution prévisible de la situation qui lui a été initialement soumise fait craindre à l'avocat une des difficultés visées ci-dessus."

⁹⁶ Jean Yves Côté, "Le conflit d'intérêt de l'avocat", Le recherchiste, PF 7554.

⁹⁷ Codigo Deontologico dos Advogados, art. 15: "O advogado não deve aceitar mandato, nomeação oficiosa ou prestação de serviços: a) Em questão em que já tenha intervindo em qualquer outra qualidade ou seja conexa com outra em que represente ou tenha apresentado a parte contrária; b) contra quem noutra causa seja o seu mandante."

⁹⁸ Codigo deontologico forense, 2008, art. 37 "Conflitto di interessi": "L'avvocato ha l'obbligo di astenersi dal prestare attività professionale quando questa determini un conflitto con gli interessi di un proprio assistito o interferisca con lo svolgimento di altro incarico anche non professionali. I – Sussiste conflitto di interessi anche nel caso in cui l'espletamento di un nuovo mandato determini la violazione del segreto sulle informazioni fornite da altro assistito, ovvero quando la conoscenza degli affari di una parte possa avvantaggiare ingiustamente un altro assistito, ovvero quando lo svolgimento di un precedente mandato limiti l'indipendenza dell'avvocato nello svolgimento di un nuovo incarico. II – L'obbligo di astensione opera altresì se le parti aventi interessi confliggenti si rivolgano ad avvocati che siano partecipi di una stessa società di avvocati o associazioni professionali o che esercitino negli stessi locali."

Following the style of the common-law drafting of ethical rules, the Code contains a detailed and casuistic regulation of 42 pages of conflict of interest and 16 pages of confidentiality (where Chinese walls are regulated). Rules 3 and 4 of the Code of Conduct. Rule 3 sets out provisions for dealing with conflicts of interests. Conflicts between the duty of confidentiality and duty of disclosure owed to two or more clients are dealt with in Rule 4 (Confidentiality and disclosure). Rules 3.01 to 3.03 deal with conflicts generally. Rules 3.04 to 3.06 deal with conflicts in particular high risk situations – gifts from clients, public offices and appointments leading to conflict, and alternative dispute resolution (ADR). Rule 3.23 sets out that there is no power to waive 3.01 to 3.05.

The Code regulates important aspects like written informed consent (3.02), the exceptions to the general prohibition (3.02), the possibility to act for two bidders with the written consent of parties (3.02(2)), special situations like accepting gifts (3.04), appointments leading to conflicts (3.05), ADRs (3.06), acting for sellers and buyers in conveyancies (3.07), lending-mortgages (3.17), etc. Finally, the amended Code contemplates conflicts with sophisticated clients (3.01,6,IV), in-house (3.01,6,17-22), co-defendants (3.01.6, 23-35) and admits and regulates “information barriers” (Chinese walls) (3.01.6, 41-45)⁹⁹.

⁹⁹ 3.01 Duty not to act

(1) You must not act if there is a conflict of interest (except in the limited cases dealt with in 3.02)

3.02 Exceptions to duty not to act

(1) You or your firm may act for two or more clients in relation to a matter in situations of conflict or possible conflict if:

(a) the different clients have a substantially common interest in relation to that matter or a particular aspect of it; and

(b) all the clients have given in writing their informed consent to you or your firm acting.

(2) Your firm may act for two or more clients in relation to a matter in situations of conflict or possible conflict if:

(a) the clients are competing for the same asset which, if attained by one client, will make that asset unattainable to the other client(s);

(b) there is no other conflict, or significant risk of conflict, between the interests of any of the clients in relation to that matter;

(c) the clients have confirmed in writing that they want your firm to act in the knowledge that your firm acts, or may act, for one or more other clients who are competing for the same asset; and

(d) unless the clients specifically agree, no individual acts for, or is responsible for the supervision of, more than one of those clients.

(...)

4.01 You and your firm must keep the affairs of clients and former clients confidential except where disclosure is required or permitted by law or by your client (or former client).

4.04 Exception to duty not to put confidentiality at risk by acting - with clients' consent

(1) You may act, or continue to act, in the circumstances otherwise prohibited by 4.03 above with the informed consent of both clients but only if:

(a) the client for whom you act or are proposing to act knows that your firm, or a lawyer or other fee earner of your firm, holds, or might hold, material information (in circumstances described in 4.03) in relation to their matter which you cannot disclose;

(b) you have a reasonable belief that both clients understand the relevant issues after these have been brought to their attention;

(c) both clients have agreed to the conditions under which you will be acting or continuing to act; and

(d) it is reasonable in all the circumstances to do so.

(...)

(3) If you, or you and your firm, have been acting for two or more clients in compliance with rule 3 (Conflict of interests) and can no longer fulfil its requirements you may continue to act for one client with the consent of the other client provided you comply with 4.04.

4.05 Exception to duty not to put confidentiality at risk by acting – without clients' consent

You may continue to act for a client on an existing matter, or on a matter related to an existing matter, in the circumstances otherwise prohibited by 4.03 above without the consent of the client for whom your firm, or a lawyer or other fee earner of your firm, holds, or might hold, confidential information which is material to your client (in circumstances described in 4.03) but only if:

(a) it is not possible to obtain informed consent under 4.04 above from the client for whom your firm, or a lawyer or other fee earner of your firm, holds, or might hold, material confidential information;

(b) your client has agreed to your acting in the knowledge that your firm, or a lawyer or other fee earner of your firm, holds, or might hold, information material to their matter which you cannot disclose;

(c) any safeguards which comply with the standards required by law at the time they are implemented are put in place; and

(d) it is reasonable in all the circumstances to do so.

Acting with appropriate safeguards (information barriers) – 4.04 and 4.05

31 Rule 4.03 sets the basic standard that you should not normally act on a matter where material confidential information is held elsewhere in the firm and where the matter would be adverse to the interests of the client/former client to whom the duty of confidentiality is owed. To act in these circumstances might increase the risk that the confidential information could be put at risk. The firm can act if the confidential information is not material to the instructions. (...)

3 Rules 4.04 and 4.05 set out two situations where you can act even when material confidential information is held by another member of the firm. Both recognise for the first time that it can be acceptable to use information barriers. The first situation is where the party to whom the duty of confidentiality is owed consents. The second situation is where you are already acting and consent has not been given or cannot be sought.

33 Where the client consents as envisaged by 4.04 there is scope for more flexibility in the arrangements for the information barrier as the safeguards can be discussed with, and agreed by, the client. It is important, nonetheless, that the safeguards are effective to avoid a real risk of disclosure. A firm will be liable if confidential information does leak in breach of that agreement.

34 Rule 4.04 requires "informed consent" and one of the difficulties with seeking such consent of the client is that it is often not possible to disclose sufficient information about the identity and business of the other client without risk of breaching that other client's confidentiality. You will have to decide in each case whether you are able to provide sufficient information for the client to be able to give "informed consent". Every situation will be different but generally it will be only sophisticated clients, for example, a corporate body with in-house legal advisers or other appropriate expertise, who will have the expertise and ability to weigh up the issues and the risks of giving consent on the basis of the information they have been given. If there is a risk of prejudicing the position of either client then consent should not be sought and you and your firm should not act. It may, however, be possible to give sufficient information to obtain informed consent even if the identity of the other client(s) and the nature of their particular interest(s) are not disclosed. Wherever possible you should try to ensure that the clients are advised of the potential risks arising from your firm acting before seeking their consent.

35 In the case of sophisticated clients (such as those referred to in note 34 above) only, it may be possible to seek consent to act in certain situations at the start of and as a condition of your retainer and to do so through standard terms of engagement. For example, a sophisticated client may give its consent in this way for a firm to act for a future bidder for that client if, when the bidder asks the firm to act, a common law compliant information barrier is put in place to protect any of the client's confidential information which is held by the firm and which would be material to a bidder.

36 Where the client does not consent or does not know about the arrangements, an extremely high standard in relation to the protection of confidential information must be satisfied. In this situation, as has been demonstrated in recent case law, the client can have the firm removed from acting with all the attendant disruption for the other client, if there is shown to be a real risk of confidential information being leaked.

37 Where your firm holds material confidential information you may not without consent take on new instructions adverse to the interests of the client or former client to whom the duty of confidentiality is owed (4.04). However, where you are already acting and discover that your firm has - or comes to possess - such information, you may continue to act on that matter, or a related matter, in circumstances where the party to whom the duty of

confidentiality is owed refuses consent or cannot be asked (4.05). This may be because it cannot be contacted or because making the request would itself breach confidentiality. You should always seek consent when you can reasonably do so.

38 Where under 4.04 your firm has erected an information barrier without the consent of the party to whom the duty of confidentiality is owed, the firm should try to inform that party as soon as circumstances permit, and outline the steps which have been taken to ensure confidentiality is preserved. If some material points (such as the name of the client to whose matter the confidential information might be relevant, or the nature of that matter) still cannot be divulged for reasons of confidentiality and it is reasonably supposed that that party would be more concerned at news of your retention than if fuller details could be given, it might be appropriate to continue to wait before informing that party. There may be circumstances, however, where it is impossible to inform that party.

39 (...)

40 Confidential information may also be put at risk when partners or staff leave one firm and join another. This might happen where, for example, an individual joins a firm which is acting against one of the individual's former clients. An individual joining a new firm could not act personally for a client of the new firm where to do so would put at risk confidential information which he or she personally possesses about a client of the previous firm. In addition, the individual and the firm which the individual is joining must ensure that adequate safeguards are put in place in accordance with 4.04 or 4.05 to ensure that confidential information held by that individual is safeguarded.

Safeguards for information barriers

41 Rigid safeguards for information barriers have not been enshrined in the rules. Where 4.04 applies (i.e. consent has been given), it is for the firm to agree the appropriate safeguards, but it would normally be necessary to satisfy note 44 (a) to (f). Some of note 44 (g) to (n) may also be applicable. Where 4.05 applies, the firm must satisfy the requirements of common law and at least most, if not all, of note 44 (a) to (n) might be essential.

42 If, at any stage after an information barrier has been established, it becomes impossible to comply with any of the terms, the firm may have to cease to act. The possibility of this happening should always be discussed when instructions are accepted so that the client is aware of this risk, or addressed with reasonable prominence in standard terms of engagement.

43 Firms will always need to consider whether it is appropriate in any case for an information barrier to be used, and also whether the size or structure of a firm means that it could not in any circumstances be appropriate. It is unlikely that, for example, safeguards could ever be considered adequate where:

- (a) a firm has only one principal and no other qualified staff;
- (b) the solicitor possessing, or likely to possess, the confidential information is supervised by a solicitor who acts for, or supervises another solicitor in the firm who acts for a client to whom the information is or may be relevant; or
- (c) the physical structure or layout of the firm is such that confidentiality would be difficult to preserve having regard to other safeguards which are in place.

44 The following note 44 (a) to (f) would normally be appropriate to demonstrate the adequacy of an information barrier when you are proposing to act in circumstances set out in 4.04. It might also be appropriate to agree some or all of note 44 (a) to (f) where you are acting with consent in accordance with 4.05:

- (a) that the client who or which might be interested in the confidential information acknowledges in writing that the information held by the firm will not be given to them;
- (b) that all members of the firm who hold the relevant confidential information ("the restricted group") are identified and have no involvement with or for the other client;
- (c) that no member of the restricted group is managed or supervised in relation to that matter by someone from outside the restricted group;
- (d) that all members of the restricted group confirm at the start of the engagement that they understand that they possess or might come to possess information which is confidential, and that they must not discuss it with any other member of the firm unless that person is, or becomes, a member of the restricted group, and that this obligation shall be regarded by everyone as an ongoing one;
- (e) that each member of the restricted group confirms when the barrier is established that they have not done anything which would amount to a breach of the information barrier; and
- (f) that only members of the restricted group have access to documents containing the confidential information.

The following arrangements may also be appropriate, and might in particular be necessary where acting in circumstances set out in 4.05:

Ed Nally, the President of the Law Society of England & Wales¹⁰⁰ summarized the main changes proposed (pending approval of the Lord Chancellor) in the Solicitors' Code of Conduct in the last revision 2009, which are:

1. definition of conflict of interest for the first time, which restricts the definition to "the same or related matters";
2. setting up exceptions to the prohibition like: (a) where the clients have an overriding common interest (such as in setting up a business), and (b) where two clients are competing for the same asset (bidding); both exceptions require informed consent of the clients;
3. the rule that places an obligation on a solicitor to disclose to his client any material information which may be held within the solicitor's firm only applies where information is within the actual knowledge of the solicitor;
4. a firm can act where that firm holds confidential information in relation to a client which would be material to another client in an unrelated matter, provided the interest of the clients are not adverse;
5. up to the reform, "information barriers" (Chinese walls) were only permitted where two firms amalgamated. Under the new rule, if both clients are able to consent to the arrangement, information barriers can be used much more widely;
6. a firm is allowed to act through an information barrier, to complete an existing matter, where it becomes clear that there is adversity between the clients, without the consent of the client for whom the confidential information is held;

(g) that the restricted group is physically separated from those acting for the other client, for example, by being in a separate building, on a separate floor or in a segregated part of the offices, and that some form of "access restriction" be put in place to ensure physical segregation;

(h) that confidential information on computer systems is protected by use of separate computer networks or through use of password protection or similar means;

(i) that the firm issues a statement that it will treat any breach, even an inadvertent one, of the information barrier as a serious disciplinary offence;

(j) that each member of the restricted group gives a written statement at the start of the engagement that they understand the terms of the information barrier and will comply with them;

(k) that the firm undertakes that it will do nothing which would or might prevent or hinder any member of the restricted group from complying with the information barrier;

(l) that the firm identifies a specific partner or other appropriate person within the restricted group with overall responsibility for the information barrier;

(m) that the firm provides formal and regular training for members of the firm on duties of confidentiality and responsibility under information barriers or will ensure that such training is provided prior to the work being undertaken; and

(n) that the firm implements a system for the opening of post, receipt of faxes and distribution of e-mail which will ensure that confidential information is not disclosed to anyone outside the restricted group.

"Member", in the context of this note (...)

45 Where a firm proposes to erect an information barrier (whether under 4.04 or 4.05) it must first inform the client for whom it acts - or wishes to act - on the matter to which the confidential information might be material. The firm should not act - or continue to act - without that client's consent, with that client understanding that the firm holds information which might be material and which will not be communicated to it; see 4.04(1)(a) and 4.05(b). Although the rule does not require consent to be in writing, it is recommended that this be obtained for evidential purposes to protect both your client's position and your own position".

¹⁰⁰ Ed Nally, "proposed change for legal services in England & Wales" in Keith Clark, Conflicts of interest, European Lawyer Reference, 2005-2006, p. xxv.

As Nally says, with these changes, the Law Society wanted to strike a balance between a number of different objectives:

- a) clients receive impartial and independent advice untainted by conflicting loyalties on the part of the solicitor;
- b) subject to (a), that clients have access to the services of the solicitor of their choice;
- c) in the interests of convenience, economy and access to technical expertise and specialised advice, clients are not prevented unnecessarily from sharing the services of a single firm of solicitors;
- d) client have appropriate consumer protection but are not prevented from having informed choice; and
- e) the rules should reflect common law and impose additional restrictions only if necessary and proportionate to do so in order to protect clients.

XIII. New approaches to the regulation of conflicts

Due to the reasons we have analyzed, it has been sustained in the last decades that the strict traditional rules of conflicts of interests do not fit with many modern situations and, balancing the different interests involved, that the rules would need to be changed.

As Chester, Rowley and Harrison had put it: "The pressures facing the legal profession worldwide challenge old rules and long-standing patterns of behaviour. In a world in which law firms grow in size, power and revenue and as other professions converge into areas previously reserved to the legal profession, it is not surprising that ethical rules face reassessment"¹⁰¹. They also warned that the old rules were premised on the notion that lawyers would likely practice by themselves or in small firms in which lawyers were intimately involved in the practice, collaborating closely and sharing common knowledge and experience. They recognized that, while that model still dominated the profession in the world in pure numbers, where the majority of lawyers work in firms with fewer than ten lawyers -the market for legal services had resulted in large, economically powerful and professionally sophisticated firms. Ethical rules that presented few problems for solo practitioners or small firms fit uncomfortably into the larger legal landscape¹⁰².

Hollander and Salzedo also wrote that "one problem that bedevils this area of the law is that the rules are based on traditional rules related to fiduciaries developed in the distant past. These traditional rules, when taken with the rules that for the purpose of fiduciary obligations treat firm, partnerships or corporations on simple entities, are simply inadequate to cope with the sophistication of modern society, with huge multi-disciplinary partnerships and massive financial conglomerates". This trend is particularly supported when the conflict comes between partners of the same firm who defend conflicting interests. The same authors say that "the fact is that equitable rules, when coupled with the rules that focus on firm and partnerships rather than individuals owing fiduciary duties, have lagged behind modern commerce and need recommendations"¹⁰³.

¹⁰¹ R.S.G. Chester, J.W. Rowley and Brett Harrison, "Conflict of interest, Chinese walls and the changing business of law", B.L.J., issue 2, International Bar Association, 2000, p. 35.

¹⁰² Chester, Rowley and Harrison, op. cit., p. 36.

¹⁰³ Hollander and Salzedo, op.cit. pp. 11 and 33.

The Working Group that dealt with the revision of the CCBE Code recognized that the regulation of this matter in the Code was not satisfactory. A countering argument is a traditional one that has survived for many years and ought to be appropriate in the future. In the Working Group's view, such arguments overlook the continuous development of the legal profession started several decades ago. The traditional regulation of conflicts has as its basis, the traditional function of a lawyer as an advocate in the courts. For lawyers in other jurisdictions, doing mostly litigation, the problem is easy at the outset -you cannot represent both the claimant and the defendant in the same case. However, this is an oversimplified way of looking at the problem within the legal profession of today.

Firstly, it overlooks the fact that the legal profession has moved away from having its primary role as trial lawyers change to a predominantly advisory role. Unlike the situation fifty years ago, the prototype of a lawyer today is the "transactional lawyer", rather than the "trial lawyer" and the number of transactional lawyers exceeds the number of trial lawyers in the world. This leads to a far more complex question of when the conflict of interests occurs or, in other words, a far more difficult definition of conflicts of interests. Secondly, it overlooks the clear public interest aspects involved. This is not just a question of whether new fast-growing law firms should be allowed to retain clients in a way that would otherwise contravene the traditional conflict of interests principle. Nor is it just an internal matter of competition between lawyers, rather it is a serious question of considerable public interest concerning access to expertise or even access to justice. Therefore, it cannot be treated as an internal affair of the legal profession. Thirdly, the traditional regulations of conflicts of interests prevent us from conducting an adequate analysis of the problems raised by the developments of the legal profession. The different forms of activity within the profession lead to more problems of defining conflicts of interest properly; the development towards large law firms and more sophisticated lawyer - client relations; and the whole development of the profession into larger units, etc.

Some bars have been sensitive to this preoccupation. In England, for instance, the need of a new regulatory approach was especially recognised because critics of the traditional rules claimed they failed to reflect the modern business practices of today, along with the demands and needs of large corporate clients, the increase in firms' sizes and the global nature of today's practice of the profession. Therefore, the Law Society amended the Code of Conduct in 2009 (See Part One, Second, IX). Some other jurisdictions feel similar needs.

THIRD. ATTEMPTS TO REVISE THE CCBE CODE OF CONDUCT

"The rules of conflicts of interest are of fundamental importance to the trust of the public in the legal profession. Great care must therefore be exercised when looking for ways of coping with the development of the legal profession when writing the rules concerning the conflict of interest"
CCBE Working Group, Report, February 1998

I. The CCBE Code of Conduct and its revisions

When the Council of the Bars and Law Societies of the European Union (CCBE) (at the time "Commission Consultative des Barreaux Europeens") was formed forty years ago it was evident that the lawyers of the new European Community needed a common code of ethics. The CCBE Code was unanimously adopted by all 12 national delegations representing the Bars and Law Societies of the EC at the CCBE plenary session in Strasbourg on 28 October 1988. Eight years later, the CCBE appointed a Working Group to review the CCBE Code, which made a report in 1996 and a final report in February 1998.

The CCBE Working Group analyzed art 3.2 CCBE Code on conflicts of interests and made several proposals (pages 71-86 of the final report). The Working Group was not in agreement on how conflicts of interests should be regulated in the CCBE Code and except for a new sub-article 3.2.1 (in order to note positively what lawyers can do in situations where doubts may arise), the Working Group did not propose changes in the current text. This did not mean that the Working Group considered the text adequate but that the question needed a more thorough consideration.

Following the Directive of Services in the Internal Market 2004, which required professional bodies "to implement at national level the codes of conduct adopted at community level", the CCBE Presidency asked the author of this paper to prepare a report on the changes to be introduced in the CCBE Code –which only applies in cross-border legal services- to be implemented at a national level¹⁰⁴.

II. The CCBE Working Group's works

1. The current conflicts of interest provision of the CCBE Code

Art 3.2 CCBE Code is very concise (see Part One, Second VI, 2a). The Working Group raised the issue of the necessity to update and revise the article to embrace new legal practices and to provide fuller definitions of its constituent parts. It may be useful to summarize some of the conclusions for the update of the Code. The Working Group considered that the Code's provisions could be updated and revised in the following areas:

- 1) Definition of conflict of interest;
- 2) Conflict of interest and the public interest of access to expertise;
- 3) Conflict of interest and confidentiality and independence;
- 4) Conflict of interest and the consent of the client; and
- 5) Conflict of interest and lawyers practicing in association.

2. Defining conflicts of interest

The Working Group made, in its November 1996 proposal, a step forward in affirmatively defining conflicts of interests by proposing the introduction of a new subarticle 3.2.1. This sub-article

¹⁰⁴ Ramon Mullerat, Report on the changes to be introduced in the CCBE Code to be implemented at a national level. 2005.

described what a lawyer could do by way of representing or acting as legal advisor for more than one client without a conflict of interest occurring:

"A lawyer may act as a legal adviser for several persons or other legal entities when they ask the lawyer to assist in the realisation of a common project. A lawyer may act as representative, adviser or defender for more than one client in the same matter when the interests of the clients are the same".

Although there were some negative comments from national delegations to this approach, the Working Group in 1998 believed that, with so many varying activities by lawyers, it was important to define as precisely as possible, affirmatively and negatively, what is and what is not a conflict of interest. Therefore, the Group proposed to introduce in art. 3.2 (Conflicts of interest) a new sub-article 3.2.1. describing what amounts to a conflict of interest and what does not:

"1. A conflict of interest exists where:

1.1 When acting as an adviser for several clients, the lawyer, having the obligation to give his clients complete and loyal information without any reservations, be it through factual analysis, cannot do so without compromising the interests of one or several of his clients.

1.2 In his function as representative or defender of several clients, the lawyer has to present a defence or pleading which in its development, argumentation or final presentation is different from what it would have been if he had only represented one of his clients.

2. A conflict of interest does not exist where:

2.1 A lawyer acts as a legal adviser for several persons or other legal entities when they ask the lawyers to assist them in realisation of a common project between clients.

2.2 A lawyer acts as a representative, adviser or defender of more than one client in the same case or matter where the interests of the clients are the same.

2.3 A lawyer who with their express consent acts as mediator, conciliator or arbitrator between two or more clients with conflicting interests, cfr. 1.1 and 1.2 above".

This proposed sub-article only contemplated one type of conflicts: the one between existing clients and did not regulate other types like conflicts between client and the lawyer's own interest, with third parties to whom the lawyer owes an obligation and with a former client (see Part One, Second, III, a, c, d).

3. The conflict of interests and the public interest of access to expertise

The CCBE Working Group considered the need to introduce the possibility to erect Chinese walls. The argument put forward was specially grounded on the right of clients to hire the services of a lawyer of their choice and the principle of access to justice¹⁰⁵:

"On many occasions the CCBE has discussed those characteristics of the legal profession that sets it apart from other liberal professions, particularly from other professions engaged in the provision of legal, financial and other business advice. The strict rules against avoidance by lawyers of conflicts of interest are one of those characteristics. Those rules

¹⁰⁵ Review of the CCBE Code of Conduct Final Report by the Working Group, nominated by the CCBE's Standing Committee, February 1998, p. 77.

are one of the foundations upon which "secret professional" and its common law equivalents are based. However, there are cases in which these rules provide tensions with the practise of the law in everyday circumstances. Such examples focus on cases involving the difficulties created by e. g., the emergence of very large firms, with clients bases deriving from the goodwill of the firm's constituent parts; the possible exclusion of clients from specialised advice concentrated within one group; and the definition of circumstances in which a client of today is no longer a client tomorrow for the purposes of such rules. It appeared to the Working Group that the problems posed by these examples are not merely problems caused to the lawyer by the restructuring of his or her professional firm, which are necessarily the means of the lawyer to render his or her livelihood. There are also problems that bring into question the ability of the lawyer to render his or her services in the public interest and in the interests of the proper functioning of the legal and justice systems. It is not in the public interest or in the interest of the administration of justice that, without good reason the client is deprived if the representation of his or her choice".

The Working Group expressed its concerns over the possible exclusion of clients from specialist advice concentrated within one specialist group, as the Report says, it is not in the public interest nor in the interest of the administration of justice that, without good reason, the client is deprived of the representation of his or her choice. The Working Group put forth the following proposal to introduce "a necessary flexibility in the wider interests of the public", and sanctioning the use of Chinese walls:

"In the application of the provisions of Article 3.2 of the Code and subject to relevant rulings of his own competent professional authority or authorities, the lawyer shall not normally be considered to have acted in breach of those provisions if, exceptionally, in the interests of

- a. allowing a client access or continued access to the lawyer of his or her choice, who is also better able than any other lawyer of comparable standing to handle the relevant matter competently and without the duplication of costs that would be occasioned by refusing or discontinuing a relevant retainer, and/or*
- b. permitting the client to have access to a limited number of specialist lawyers available in the relevant locality, and having*
 - i. taken all measures required for the protection of confidences and*
 - ii. made full disclosure of relevant facts to each client concerned the partner or associate of that lawyer accepts instructions to act for another client with a conflicting interest in any relevant matter.*

It will normally be appropriate that the burden of establishing that factors 1, 2, a) and b) are satisfied in any given case should be upon the lawyer, lawyers or firm whose conduct falls into question in this respect".

The Working Group also suggested in an explanatory memorandum that the above sub-article should state the following:

"in the discussions leading to the adoption of this Code, the CCBE has been guided in all cases by the overriding objective that the Code should operate

- in the interests of the client, and*
- in the furtherance of the good administration of justice "*

However, it further stated that in order:

"to avoid those rules becoming the instruments of injustice in exceptional cases, the CCBE has decided on sub-article 3.2.4 as an emergency valve to be used in exceptional situations".

4. Conflicts of interest and lawyers values in the proposal

The Working Group recognized that the client's trust and the lawyer's obligation to independence and confidentiality lie at the basis of the conflicts of interest problem. If a lawyer can act "against" (be it in litigation, negotiation, by giving advice, etc.) a former or old client without breaking his duties of confidentiality, discretion and independence, the problems of conflicts of interest may be overcome. If it cannot be done without breaching such duties, the traditional regulation seems inadequate. The distinction along these lines is, again, dependent upon how conflicts of interests are defined.

On this basis, the Working Group submitted that the following provision should be included as an express reference to the importance to confidentiality and independence:

"In the field of conflict of interest the lawyer must be especially attentive towards and maintain respect for his obligation of confidentiality towards his client and his duty to remain independent. The lawyer must not act in a way that may cause a risk of breach of his confidence or impairment of his independence".

5. Conflicts of interests and the consent of the client

A. In general

The revised text of the CCBE Code 1998 reproduced section 3.2 of the original Code 1988. Such a text does not refer to the possibility that the lawyer obtains the client's permission to act in a situation of conflicts with the client's consent.

The Explanatory Memorandum of the CCBE Code only refers to clients' consent with regard to the possibility to act as mediator of the two conflicting clients:

"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 judgement 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 a mediator to resolve the difference between them, and only if this attempt to mediate, to cease to act for them".

B. The proposal of the Working Group

The CCBE Code has no provisions nor reference concerning the client's consent to the lawyer acting in a conflict of interests. In the Working Group's point of view, this makes the provisions unrealistic. It should be contemplated that the lawyer could ask for and get the consent of his client to act.

The Working Group proposed that the Code accepts that, by giving his consent, the client entitles the lawyer to act in a way that otherwise would contravene the conflicts of interest prohibition. The Working Group added that the consent must be given only after a full and open disclosure of the problem and its consequences by the lawyer. The Code does neither require conditions for the consent to be valid other than the client requests independent advice. The lawyer must be responsible for proving that consent has been given in the required conditions.

The provision cannot, however, be generally applicable. In the view of the Working Group, the client's consent cannot help the lawyer where his acts would breach the confidence towards the client or impair his independence. Therefore, it proposed to agree to informed consent (without requiring to be in writing) and that the following provision be included in art. 3.2:

"1. If a lawyer is prohibited from performing any acts for one or more clients in accordance with this Clause, the prohibition shall not be effective to the extent the client or clients give his or their consent to such acts.

2. Even if the clients give their consent, the lawyer is still prohibited from acting if his obligation of confidence is breached or his independence impaired by such acts.

3. A valid consent by the client must be based on a request from the lawyer that gives the client a full and open disclosure of the problem ".

6. Conflicts of interest and lawyers practicing in association (imputation)

The CCBE Code sets out in its sub-article 3.2.4 that the regulation applies to "the association and all its members" when lawyers "are practising in association". There is no definition of what an "association" is. In the view of the Working Group, the expression should be interpreted in its broadest sense, ranging from the informal and very loosely organised group of lawyers to the firms organised as ordinary companies¹⁰⁶. The Working Group also pointed out (with reference to a study carried out by the Conseil National des Barreaux Français) that the provision should apply from the moment when inside such a group there exists a risk of violation of confidentiality or impairment of the lawyer's independence. Therefore, on this basis, it did not propose an amendment as long as it was interpreted this way.

7. Possibility to act as a mediator, councillor or arbitrator when conflicts exist

The Working Group, in its report of 18 November 1996, proposed that a provision be inserted regarding when a lawyer may act as a mediator, counsellor or arbitrator. However, this was surprisingly omitted in the alternatives proposed by the Working Group.

8. Lawyer acting for more than one client in the same matter

¹⁰⁶ The Paris Regulation (4.1) includes lawyers' associations in which their members practice putting physical elements (premises, library) in common, without becoming a partnership.

The original proposed text by the Working Group was the following:

"A lawyer may act as legal advisor for several persons or other legal entities when they ask the lawyer to assist in the realisation of a common project. A lawyer may act as a representative, advisor or defender for more than one client in the same matter when the interests of the clients are the same. "

I was inclined to favour an addition to this wording, namely that there needs to be recognition that the two or more parties may have conflicting interests. The issue of conflicting interests could be resolved by the client's express consent (as would be in any circumstance when considering the ability to work for two parties) and therefore should not face any problems to be included.

The proposed text could therefore read:

"A lawyer may act as legal advisor for several persons or other legal entities when they ask the lawyer to assist in the realisation of a common project. A lawyer may act as a representative, advisor or defensor for more than one client in the same matter when the interests of the clients are the same and even though they have conflicting interests."

9. Personal interests and financial and business relationships

In Europe, contingency fees and similar arrangements (*pactum de quota litis*) used to be generally prohibited as contrary to the proper administration of justice because they are deemed to encourage speculative litigation and are liable to be abused¹⁰⁷. For example, in a litigation case a client may want to seek more damages while the lawyer may be ready to accept the settlement offered to collect his fees sooner. A conflict therefore clearly emerges as to the interests of both parties. Today, however, this prohibition is not so generalised. Some countries allow contingency fees (i.e. Finland), and in some others the prohibition has been challenged by the courts (Spain).

It is also been debated whether law firms can accept payment of fees by means of shares in the company. The advantage of such forms of payment is clear, the company obtains legal advice for no or little immediate cost. However, conflicts of interests may arise if a lawyer, give an independent advice, when he is also a shareholder of the firm. For example, when faced with two business proposals, one potentially more riskier and beneficial to the company than the other, a potential conflict would exist in deciding which would be in the best interests of the company and what would be in the best interests of the lawyer.

¹⁰⁷ CCBE Code of Conduct, art. 3.3: "A lawyer shall not be entitled to make a *pactum de quota litis*", Hamelin et Damien, *op.cit.*, p. 338: "[L'avocat] doit assurer son indépendance matérielle en ce sens que les honoraires ne doivent pas être liés de manière étroite au profit pecuniaire que le client tire du procès". In the United Kingdom a "conditional fee" has been authorized.

III. The Working Group's alternative proposals

The Working Group proposed three alternatives to the conflicts of interests rule. Alternative 1 was the article in its original form. Alternative 2 was the original article, but, with the important addition of the "emergency provision" or, in other words, the permission of Chinese walls in emergency circumstances. Alternative 3, described as "a radical change in wording", was the combination of the measures discussed in third chapter of this paper, plus the original wording of the article. In other words, Alternative 3 proposed an express reference to confidentiality and independence, a definition of a conflict of interest, provision for the express consent of the client and finished with the original wording of the article.

Alternative 1 (art. 3.2 in its present form). See text in Second, VI, 2, a.

Alternative 2 (art. 3.2 plus Chinese walls in emergency circumstances):

"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 client 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 confidence 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 In the application of the provisions of Article 3.2 of the Code and subject to relevant rulings of his own competent professional authority or authorities, the lawyer shall not normally be considered to have acted in breach of those provisions if, exceptionally, in the interests of

1. allowing a client access or continued access to the lawyer of his or her choice, who is also better able than any other lawyer of comparable standing to handle the relevant matter competently and without the duplication of costs that would be occasioned by refusing or discontinuing a relevant retainer, and/or

2. permitting the client to have access to a limited number of specialist lawyers available in the relevant locality, and having

a) taken all measures required for the protection of confidences and

b) made full disclosure of relevant facts to each client concerned

the partner or associate of that lawyer accepts instructions to act for another client with a conflicting interest in any relevant matter. It will normally be appropriate that the burden of establishing that factors

1, 2, a) and b) are satisfied in any given case should be upon the lawyer, lawyers or firm whose conduct falls into question in this respect".

Alternative 3

"3.2. Conflict of interest

3.2.1. *In the field of conflict of interest the lawyer must be especially attentive towards and maintain respect for his obligation of confidentiality towards his client and his duty to remain independent. The lawyer must not act in a way that may cause a risk of breach of his confidence or impairment of his independence.*

3.2.2. *A conflict of interest exists where:*

3.2.2.1.1. *When acting as an adviser for several clients, the lawyer, having the obligation to give his clients complete and loyal information without any reservations, be it through the factual analysis, through the submission of the specific result gained, cannot do so without compromising the interests of one or several of his clients.*

3.2.2.1.2. *In his function as representative or defensor for several clients, the lawyer has to present a defence or pleading which in its development, argumentation or final presentation is different from what it would have been if he had only represented one of the clients.*

3.2.3. *A conflict of interest does not exist where:*

3.2.3.1.1. *A lawyer acts as a legal adviser for several persons or other legal entities when they ask the lawyer to assist them in realisation of a common project between the clients.*

3.2.3.1.2. *A lawyer acts as a representative, adviser or defensor for more than one client in the same case or matter where the interests of the clients are the same.*

3.2.3.1.3. *A lawyer who with their express consent acts as a mediator, conciliator or arbitrator between two or more clients with conflicting interest, cfr. 3.2.2. above.*

3.2.4. *If a lawyer is prohibited from performing any acts for one or more clients in accordance with this Clause 3.2., the prohibition shall not be effective to the extent the client or clients give his or their consent to such acts.*

Even if the clients give their consent, the lawyer is still prohibited from acting if his obligation of confidence is breached or his independence impaired by such acts.

A valid consent by the client must be based on a request from the lawyer that gives the client a full and open disclosure of the problem.

3.2.5. *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.*

3.2.6. *A lawyer must cease to act for both client when a conflict of interests arises between those clients.*

3.2.7. *A lawyer must also refrain from acting for a new client if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.*

3.2.8. *Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.7 above shall apply to the association and all its members. "*

IV. Proposal of revision

On the basis of the work done by the CCBE Deontology Committee in the revision of the CCBE Code, I proposed at the time that the Deontology Committee would consider the following proposal:

"3.2 Conflicts of interest

3.2.1 A lawyer shall not advise or defend a client if such advice or defence gives rise to a conflict of interest or a risk of a conflict with the lawyer's interests or with the interests of a current client or with a former client of such lawyer.

3.2.2 In the field of conflict of interest the lawyer must be especially attentive towards and maintain respect for his professional duties to remain independent and of loyalty and confidentiality towards his or her client or former client. The lawyer must not act in a way that may result in impairing his or her independence or a breach of his or her loyalty or confidentiality.

3.2.3 A conflict of interest exists where:

3.2.3.1 When acting as an adviser for several clients, the lawyer, having the obligation to perform his or her duties in the best interests of his other clients, cannot do so without compromising the interests of one or more of his or her clients.

3.2.3.2 When acting as defender of several clients, the lawyer has to present a pleading which in its development, argumentation or final presentation is different from what it would have been if they had only represented one of his or her clients.

3.2.4 A conflict of interest does not exist where:

3.2.4.1 A lawyer acts as an adviser or defender for several persons or other legal entities when they ask the lawyers to assist them in realisation of a common project between clients, and so long as their interest remains common.

3.2.4.2 A lawyer acts as a representative or adviser of more than one client in the same case or matter where the interests of the clients are the same, even if they have competing interests.

3.2.4.3 A lawyer acts as a mediator, conciliator or arbitrator between two or more clients with competing interests, with their informed consent.

3.2.5 A lawyer may not advise, defend 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.

3.2.6 A lawyer must cease to act for both clients when a conflict of interests arises between those clients.

3.2.7 If a lawyer is prohibited from performing any acts for one or more clients in accordance with this sub-article 3.2, the prohibition shall not be effective to the extent the client or clients give his or their informed consent to such acts.

3.2.8 In no circumstances shall a lawyer act for several clients if the advice or defence includes the assertion of a claim by one client against another client represented by the lawyer in the same legal proceeding. Even if the clients give their consent, the lawyer is still prohibited from acting if his or her obligation of confidence is breached or his or her independence is impaired by such acts, or continuing to act if such a breach or impairment occurs after the clients have given their consent.

3.2.9 A lawyer must refrain from acting for a new client if the knowledge which the lawyer possesses of the affairs of the former client would give an advantage to the new client at the expense of the former client.

3.2.10 Where lawyers are practising in association, paragraphs 3.2.1 and 3.2.5. 7 above shall apply to the association and all its members.

3.2.11 For the purposes of this clause, "informed consent" shall mean the agreement by a client to a lawyer's proposed professional activity after the client has acquired full and adequate disclosure about the relevant circumstances and the risks of the proposed lawyer's activity. "

PART TWO

Conflicts of interests for lawyers in the United States

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.

*ABA Model Rules*¹⁰⁸

I. Lawyers in the United States

Someone said that diversity is the principle feature that portrays the world. The world society is diverse and, therefore, lawyers who serve society in different social environments are necessarily diverse. Therefore, although all lawyers in the world have basic similarities, the identity of lawyers and methods of work in each tradition and jurisdiction vary.

All lawyers have the same mission: the defense of the rights and liberties of citizens and the same functions: defense in court and legal advice. But as I say, they have different characteristics which differ tradition by tradition, jurisdiction by jurisdiction. However, in a globalized world like ours, there is a strong support to unify/harmonize lawyers' profile and particularly the ethical rules that govern them as an "international framework of legal ethics" as most lawyers' associations are proposing¹⁰⁹.

Let us concentrate here in the main legal traditions: common law and civil law. The US ethicist Richard L. Abel¹¹⁰ said that "the civil law world is dramatically different from its common-law counterpart in every respect". Even if I do not agree with the melodramatic remark, I admit that there are conspicuous differences.

In general terms, some of the differences between the common law lawyer (particularly the US lawyer) and the civil law lawyer (particularly the EU lawyer) are the following:

- a. in the US, law, lawyers and courts awake a higher awareness than in Europe¹¹¹. It made Thomas Paine¹¹² exclaim that "in America law is king". Moreover, the US is one of the most litigious countries in the world¹¹³ due to a number of cumulative factors, like punitive

¹⁰⁸ ABA Model Rules, 1.7, Comment [1].

¹⁰⁹ "The New World. Lawyer Ethics are getting more attention as a matter of international law", ABA Journal Law News Now, May 2006.

¹¹⁰ Richard L. Abel, "Using the theories: comparing legal professions" in Richard L. Abel, editor, Lawyers: a critical reader, 1997, p. 133.

¹¹¹ An example, just look at consumer book stands at the airports. In the US airports, some 25% of the consumption books deal with lawyers and courts. You do not find the same proportion in European airports.

¹¹² Thomas Paine, Common sense, 1782, 10.

¹¹³ Jethro K. Lieberman, The litigation society, Basic Books, 1981. Walter K. Olson, The litigation explosion, Dutton, 1991, etc.

Comment [r4]: This appears to be a statement from an article, and not a summary of ABA policy. As such, this should be clear. Any reference to ABA policies should cite directly to the policy.

damages, class tort actions¹¹⁴, contingency fees, jury trials in civil cases, losing party not required to pay the prevailing party's legal fees, that deters frivolous law suits, etc., which are alien to the European legal tradition.

- b. civil-law countries recognize two categories of lawyers, one more inclusive than the common-law concept and the other less so. The first category is the jurist. Many such graduates pursue occupations unrelated to law. The second category is the private practitioner –a concept with clear equivalent in all European languages and sharply defined boundaries. By contrast, the dominance of common-law professions by private practitioners is symbolized by the appointment of their most senior and respected members to the bench¹¹⁵;
- c. in civil law countries, the state plays a significant active role in controlling legal education and determining the curriculum, while in the common law system law schools are more autonomous and “accredited” by the ABA;
- d. the training of lawyers differs. After the secondary education, US lawyers are trained at the university and a subsequent law school, while civil lawyers are educated at a single 4-5 year of university legal studies¹¹⁶. The education of lawyers in the US is more complete than in the EU (where it is variable according to each country), but in any case it is more expensive than in Europe. It is not uncommon to see graduates coming out from US law schools with a debt of over \$ 100.000.
- e. common-law lawyers are trained to apply case-centred law, while civil-law lawyer to apply codified law of rather abstract principles, which control the exercise of judicial discretion. The difference is intimately connected with their different modes of procedure (adversarial/inquisitorial) and with the different degree of respect to technical forms;
- f. in the common-law world, private practitioners traditionally form voluntary associations, a central goal of which is to control entry into and competition within the profession. In the civil-law one, by contrast, the state historically control the entry into the core of the profession by appointing judges, prosecutors and civil servants;
- g. the civil law concept gives a broader range of authority to the lawyer, recognizing the lawyer's distinctive status as a professional than is entitled in the common law client-lawyer relationship^{117 118}. Lawyers in Europe tend to have a more professional character while in the US they are more service and business oriented^{119 120}. An important manifestation of this

Comment [r5]: In the U.S. entry is controlled by each states' highest court of appellate jurisdiction, not the bar.

¹¹⁴ Class actions, for instance, allow in many cases that lawyers' windfall recoveries far exceed a reasonable return. Alison Frankel, “Greedy, greedy, greedy”, *American Lawyer*, 1976, p. 71, refers to a class action case in which the lawyer represented some eighty thousand clients with the same basic claim of leaky plumbing. Despite the minimal work required for duplicative actions, he sought over a hundred million dollars in fees and expenses, totaling about two-thirds of the class settlement fund. John Grisham's novel, *The King of Torts*, refers to a mass tort lawyer, who settles with a pharmaceutical company on behalf of tens of thousands of victims (most of whom never met) of a purported defective drug for a relatively low compensation, insufficient to cover the damages suffered by some of his clients who later on sue their own lawyer.

¹¹⁵ Richard L. Abel, *op. cit.*, p. 134.

¹¹⁶ The Bologna programme, recently introduced, intends to unify the training of all lawyers in the EU.

¹¹⁷ Piero Colomandri, *op. cit.*, XXIX: “l'avvocatura risponde ... a un interesse essenzialmente pubblico”.

¹¹⁸ It is clear that in both traditions, lawyers have a duty to society and a duty to the client (among others). It may not be important, but let us remark the order in which such duties are mentioned: in the CCBE Code (1.1) “A lawyer must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend”. The ABA Model Rules, Preamble [1]: “A lawyer ... is a representative of clients, an officer of the legal system...”

¹¹⁹ Hazard and Dondi, *op. cit.*, p. 170.

fact appears in confidentiality/attorney client privilege. In the US (as in other common-law jurisdictions), the privileged information can be waived by the client, who is considered to be the “owner” of the information, while in the civil-law tradition the client can not release the lawyer from the confidentiality duty because the “professional secrecy” belongs to society and not to the client.

- h. in the civil law tradition, a lawyer, with regard not only to his court work but also to his legal advice, is considered an instrument of the administration of justice, an officer to the legal system and a *co-ministre de la justice*. In common law countries, a lawyer has no such position, or has it only with regard to court work and not when advising a client out of court^{121 122};
- i. in common law systems, a lawyer is understood to be an agent for the client. Under civil law, the engagement is “*locatio conductio operarum*”, that is a contract that engages services¹²³. Agency law prescribes that, unless the proposed action is illegal, an agent is obliged to follow the directions of the principal. By contrast, in civil law ones, in litigation matters the advocate is said “master of the argument”—the final authority over the contentions to be advanced before the court and the responsibility for strategy and tactics in a litigated matter is reposed in the advocates¹²⁴;
- j. adopting and sanctioning legal ethics in the US is basically in the hands of courts while in Europe is generally in the hands of bars;
- k. common law lawyers (other than barristers) always have been able to form true partnerships, while civil law lawyers allowed to do so only recently; professional organizations could permit associations of up to 5 lawyers in France in 1954, but true partnerships without a numerical ceiling were allowed only in 1972; Italian lawyers could not form loose professional associations until 1939 and partnerships until 1973¹²⁵. The situation in Spain was comparable;
- l. although generally lawyers are not popular and do not enjoy high reputation anywhere (Henry IV recommended that “the first thing we do let us kill all the lawyers”¹²⁶), US lawyers have a bad reputation due to their apparent greed¹²⁷ even at the view of their own judges¹²⁸ including the Federal Supreme Court judges¹²⁹. A US News and World Report

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¹²⁰ Mike Costello Agreeco, says that American businessmen are often frustrated when a civil law advisor does not perceive it as his/her role to create a means of achieving a commercial role.

¹²¹ Hans-Jurgen Hellwig, “Independence, conflicts and secrecy”, European Lawyer, April 2001.

¹²² However, in the US, although lawyers are referred as “client’s hired gun”, they are also referred to as “officer to the Court” (Roscoe Pound), “lawyer for the people” (Brandeis), “counsel for the situation” (Frank), “friend” (Fried) and as “minister” (Shaffer). See Theodore Schneyder, “Professionalism as policy, the making of a modern ethical code”, in Nelson, Trubek, Solomon (ed.), Lawyers ideals / lawyers practices, 1992, p. 123.

¹²³ Hazard and Dondi, op. cit., p. 170.

¹²⁴ Hazard and Dondi, op. cit., p. 177. However, these authors add that, in all regimes a lawyer is a special kind of instrument by virtue of being an “officer to the Court”. In the ABA Rules of Professional Conduct the lawyer is described more generally as an “officer to the legal system”. This phrase, vague as it is, implies that the lawyer has responsibilities, particularly in dealings with courts and other parties, that govern the measures taken on behalf of clients.

¹²⁵ Richard L. Abel, op. cit., p. 137.

¹²⁶ William Shakespeare, Henry IV.

¹²⁷ W. Kent Davis, “The international view of attorneys’ fees in civil suits: Why is the US the ‘Old Man Out’ in how it pays its lawyers?”, Arizona Journal International and Comparative Law, 1999, pp. 361-371.

¹²⁸ The Chief Justice of the New York Supreme Court once stated that “if lawyers grab, grab, grab, they may be killing the goose that lays the golden egg”.

¹²⁹ Justice Warren Burger cautioned that the land “might be overrun by hordes of lawyers hungry as locusts”.

study found that 56% of Americans think that lawyers manipulate the legal system to get rich¹³⁰. Similarly, a National Law Journal survey revealed that for the most part, Americans view lawyers as greedy and insensitive^{131 132}. Although the reputation of lawyers in Europe is not high and varies country by country, it is generally higher than in the US. The Austrian Constitutional Court, for instance, stated that lawyers are “well-respected by the public”¹³³.

II. Legal Ethics in the US

Defending liberty, pursuing justice
ABA motto

Ethics rules in the USA¹³⁴ are not the only ones nor uniform for the whole country, but legal ethics is regulated differently in each one of the 50 states. In each U.S. jurisdiction the highest court of appellate jurisdiction has the inherent and/or constitutional authority to regulate the practice of law. In each jurisdiction the court has adopted rules of professional conduct and have adopted an enforcement mechanism by which violations of those rules are investigated, prosecuted and disciplined¹³⁵.

The ABA, a voluntary professional association of lawyers which gathers some 400.000 of the 1,300,000 lawyers in the US¹³⁶, develops model rules of ethics, the *Model Rules of Professional Conduct*¹³⁷ which, although not obligatory, have great reputation, inside and even outside the US. They serve as a model adoption by the US. state supreme courts.

The majority of states have adopted the Model Rules fully, others only partially, and only a few have not adopted them¹³⁸. Therefore we cannot speak of a single regulation, even a general regulation of ethics for the whole of the US since, as I say, there is a diversity of regulatory states

¹³⁰ Bill Ramkin, Journal-Constitution/Georgia State poll down on lawyers, Atlanta Constitution, 3 September 1995.

¹³¹ Amy E. Black and Stanley Rothman, “Shall we kill all the lawyers first? : Insider and outsider views of the legal profession”, 21 *Harvard J.L. & Public Policy*, 1998, 835.

¹³² Deborah Rhode, “In the interest of Justice”, p.4. says that “only a fifth of those surveyed by the ABA felt that lawyers could be described as “honest and ethical”. And in other studies, the ratings are even lower. Lawyers’ ethics rank substantially below those of other occupations, including doctors, police officers and business executives. Attorney still edge of used car salesmen, but not by much”.

¹³³ Kurt Heller, address at the law offices of Heller, Lober, Bahn and Partners in Vienna, Austria to Georgia State University law students in the Austrian-American Comparative Dispute Resolution Program, 4 June 1966

¹³⁴ In the USA, the term “legal ethics” is rather used, while “legal deontology” is preferred in Europe. Deontology (from the Greek “deon” obligation and “logy” study) is the ethics (as a generic term) applied to the liberal professions.

¹³⁵ See ABAMcKay Report and ABA Model Rules for Lawyer Disciplinary Enforcement. See also 1994 article by Mary M. Devlin in the *Gerogetown Journal of Legal Ethics*.

¹³⁶ US is the country with the highest number of lawyers in the world and growing. In 1960, the lawyer population was 285,933; by 2000 there were 1,066,288 lawyers. See ABF, *Researching Law*, vol. 16, nr. 1, winter 2005.

¹³⁷ The precursors of the *Model Rules* are the following: in August 1908 the ABA promulgated the *Canons of Professional Conduct*. In 1969, the *Model Code of Professional Responsibility* succeeded the *Canons* and, finally, in 1983 the *Model Code* gave place to the approval of the *Model Rules of Professional Conduct*. These *Model Rules* are norms that rule currently and have been the object of several amendments, the last of which took place in August 2009. The ABA *Standing Committee on Ethics and Professional Responsibility* issues opinions to interpret the *Model Rules*.

¹³⁸ California, Maine y Nueva York. The Supreme Court of California, for example, does not follow the ABA *Model Rules* but the autoctones *California Rules of Professional Conduct*.

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Comment [r6]: In each U.S. jurisdiction the highest court of appellate jurisdiction has the inherent and/or constitutional authority to regulate the practice of law. In each jurisdiction the court has adopted rules of professional conduct and have adopted an enforcement mechanism by which violations of those rules are investigated, prosecuted and disciplined. See ABAMcKay Report and ABA Model Rules for Lawyer Disciplinary Enforcement. See also 1994 article by Mary M. Devlin in the *Gerogetown Journal of Legal Ethics*.

Comment [r7]: I think there is only one jurisdiction left that has not. George can tell you.

and states resolve ethics problems in a different manner. The majority of states dedicate enormous efforts to improve their rules, although some of them are leaders in such evolution and are often taken as a model¹³⁹.

The Model Rules are amended from time to time. With regard to the matter discussed in this paper, in 2002 the ABA introduced an amendment incorporating the ability of a client to waive future as-yet-determined conflicts known as “advanced waiver”¹⁴⁰ and in February and August 2009 it introduced the possibility of curing conflicts through screening in a particular situation.

IV. Types of conflicts of interests in the ABA Model Rules

The ABA Model Rules¹⁴¹ distinguishes three types of conflicts of interests:

- a. Concurrent conflicts of interests is a conflict of interests between two present obligations of a lawyer, such as two present clients, a present client and a prospective client, or a present client and the lawyer’s interests (1.7-1.8).
- b. Successive conflicts of interests exists between an obligation to a present client and a former client (1.9).
- c. Imputed conflicts of interests are conflicts of interest between obligations of associated lawyers. The US courts have often extended the disqualified lawyer to entire firms¹⁴² (1.10).

III. Conflicts of interests defined

“The term is one that is if often used and seldom defined”.
Justice Marshall¹⁴³

The ABA Model Rules¹⁴⁴ that: “a concurrent conflict of interest exists if (1) the representation of a client will be directly adverse to another client or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, to a former client or a third person or by a personal interest of the lawyer”¹⁴⁵. Duties to former clients are regulated (1.9) but not defined.

ABA Rule 1.7 provides as follows:

¹³⁹ Ramon Mullerat, “Internet and the lawyer’s deontology in the US”, *La Ley*, 2009.

¹⁴⁰ Alice E. Brown, “Advanced waivers of conflicts of interest: are the ABA formal ethics opinions advanced enough themselves?”, *Georgetown Journal of Legal Ethics*, Summer 2006, cited by Karen Painter and Andrew Sayless, *op. cit.* p. 23.

¹⁴¹ ABA Model Rules 1.8-1.10.

¹⁴² In *Roberts v. Hutchins*, 572 So 2d 1231 Ala 1990) a law firm was disqualified in representing the plaintiff in a wrongful death action because of his previous role as the defendant’s attorney. Despite the law firm’s efforts to screen the attorney from participation in the action, the attorney’s disqualification was extended to the law firm.

¹⁴³ Justice Marshall, *Cuyler v. Sullivan*.

¹⁴⁴ ABA Model Rules, 1.7(a)(2).

¹⁴⁵ Richard E. Flamm, *Lawyers disqualification: conflicts of interests and other basics*, 2007.

Rule 1.7 Conflict of Interest: Current Clients

- (a) *Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:*
- (1) the representation of one client will be directly adverse to another client; or*
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.*
- (b) *Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:*
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;*
 - (2) the representation is not prohibited by law;*
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and*
 - (4) each affected client gives informed consent, confirmed in writing.*

In order, then, for a conflict may prevent the lawyer to act, the representation must be “directly adverse” to another client or may “materially limit” the representation. Rule 1.7, Comments [6] and [7] discuss the scope of the term directly adverse”¹⁴⁶.

V. The Model Rules regulation of conflicts of interests

As we have seen in Part One, Second, VI, 2, b, the Model Rules regulate conflicts of interests in 1.7 through 1.12 (see text in Part One, Second, VI, 2, b).

The Model Rules start with the general principle for simultaneous clients: “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest” (1.7.a). Then they state that there will be a conflict of interests: “when the representation of a client will be directly adverse to another client; or there is a significant risk that the representation of one or more clients will be materially limited to the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer” (1.7.a). They also prohibit multiple representations of parties in the same side when there is a conflict between them. The Model Rules set up some cases when, notwithstanding the existence of a conflict of interests, a lawyer may represent a client (as when the lawyer reasonably believes that he will be able to provide competent and diligent representation) (1.7.b).

The Model Rules contain specific rules to avoid conflicts between the client and the lawyer’s personal interest (like acquiring assets from, receiving gifts from, providing financial assistance to, or having sexual relationship with a client) (1.8).

¹⁴⁶ In addition, Rule 1.16 (Declining or terminating representation) and Rule 1.18 (Duties to prospective client) contain some other complementary norms on conflicts of interest.

Duties to former clients, and particularly confidentiality duties, which prevent lawyers from representing current clients, are dealt in 1.9. The imputation of conflicts of interest affecting one lawyer to all the members of his firm –which was amended in February and August 2009- is regulated in 1.10. Finally, Rules 1.11 and 1.12 address conflicts of lawyers former and current government officers and former judges, arbitrators and neutrals.

VII. Client's consent

1. Principle

Bearing in mind that in the US the lawyer is his client's agent, clients have the power to waive the conflicted lawyer's obligation to refuse the representation, thus consenting to it in spite of the clash¹⁴⁷. A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the consent of each client¹⁴⁸. If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the consent of the client¹⁴⁹.

The client's consent may neutralize the conflict of concurrent clients as we have seen (1.7), including lawyers entering into business transactions with clients (1.8(a)), giving information relating to a client (1.8(b)), accepting compensation from one other than the client (1.8(f.1)), participating in making an aggregated agreement of the claims or against two clients (1.8(g)), representing a person with interest adverse to the former client (1.9), etc.

2. The consent must be informed

The Model Rules (1.0.e) require "informed consent" and defines it as "the agreement by a person to a proposed cause of conduct after the lawyer has communicated adequate information and explanation about the risks of reasonably available alternatives to the proposed course of action".

Informed consent requires that the client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.

Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed

¹⁴⁷ Recently, Yra Sorkin, Bernard Maddoff's lawyer, has faced a conflict because his loyalties were divided between Maddoff on the one hand and his sons (who have a \$ 900,000 trust with Maddoff) on the other hand, although the prosecution said that Maddoff could waive any potential conflict of interest arising. [Fox News](#), "Maddoff appears in Court to address his lawyer's conflicts of interest", 10 March 2009.

¹⁴⁸ ABA Model Rules, 1.7, Comment [3].

¹⁴⁹ ABA Model Rules, 1.7, Comment [4].

decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests¹⁵⁰.

3. The consent must be in writing

Rule 1.7 (b) orders that the informed consent of the client be confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer records and transmits to the client following an oral consent. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened by a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing^{151 152}.

4. The non-consentable conflict

Not all conflicts can be waived. The Model Rules (1.7.b.3) describe as non-consentable “the assertion of a claim against another client represented by the lawyer in the same litigation or other proceedings before a tribunal”. The key issue in “consentability” is then if “the interest of the clients will be adequately protected if the clients are permitted to give them informed consent to representation burdened by a conflict of interest” (1.7 Comment [15]). The US courts¹⁵³ have recently declared that a defendant cannot waive his lawyer's potential conflicts of interests where the lawyer had previously represented two co-defendants and shared an office suit with her father, who represented a third co-defendant.

5. The dual representation

A usual example of conflict arise from the “dual representation”. In immigration practice, for instance, a situation arises where the lawyer is providing services to two parties seeking an immigration benefit in one single case¹⁵⁴. The rule is that when representing multiple parties,

¹⁵⁰ ABA Model Rules, 1.7, Comments [18] and [19].

¹⁵¹ ABA Model Rules, 1.7, Comment [20].

¹⁵² Hans-Jurgen Hellwig, *op. cit.*: “In the civil law tradition, a lawyer, with regard not only to his court work but also to his legal advice, is considered an instrument of the administration of justice, an officer to the legal system and a co-minister of justice and the client's consent to representation of conflicting interests is therefore irrelevant. In common law countries, a lawyer has no such positions, or has it only with regard to court work and not when advising a client out of court. In those countries conflict rules are primarily derived from the lawyers' contractual duties vis-à-vis his client and accordingly, the clients may waive the conflicts rules”.

¹⁵³ *US v. Rueva*, 2009 WL 1059641 (SDNY, April 13 2009).

¹⁵⁴ This is the case where a lawyer represents a petitioner in the country and a foreign beneficiary like when a corporation sponsors a foreign national for a legal permanent residence in which the employer looks to benefit for the foreign national's skill and experience and the foreign national seeks to obtain the residence. In these cases information is requested from petitioner and beneficiary. The conflict can emerge in the immigration process which can take a few years in which many changes can occur like the company encountering financial difficulties that culminate in layoffs

lawyers have to be equally loyal to each party. Some immigration practitioners believe that they represent only one client generally the company (“simple solution”), but most practitioners assume their full responsibilities under dual representation obtaining advance waivers to future conflicts (the “golden mean” approach)¹⁵⁵.

VII. Imputation and Screening

1. The principle of imputation

The principle of imputation is laid down in Rule 1.8(k): “while lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) applies to anyone of them shall apply to all of them” and confirmed in Rule 1.10(a): “when lawyers are associated in a law firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9”. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with the conditions in paragraph (a) (informed consent), even if the first lawyer is not personally involved in the representation of the client¹⁵⁶.

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2. The screening

In the US, opinions on screening are divided among experts, states and courts. Many judges¹⁵⁷ dislike screens because they see in them an artificial and often insufficient mechanism to avoid the

and termination of the foreign national, on the other hand the employee might be faced with a better job opportunity with another company.

¹⁵⁵ Maria Glinsmann, “Practical guide to dual representation and advance conflict waivers for the immigration practitioner”, Immigration and nationality handbook, 2009, 88, note 12.

¹⁵⁶ ABA Model Rules, 1.8, Comment [20].

¹⁵⁷ Justice Low in Peat, Marwick, Mitchell & co v. Supreme Court, 200 cal. App.3d 272, 293-294 (1988) said that: ““Chinese walls” is [a] piece of legal flotsam which should be emphatically abandoned. The term has an ethnic focus which many would consider a subtle form of linguistic discrimination. Certainly the continued use of the term would be insensitive to the ethnic identity of the many people of Chinese decent. Modern courts should not perpetuate the biases which creep into language from outmoded, and more primitive, ways of thought”. In Klein v. Superior Court, 198 Cal. App.3d 894 (6th Dist. 1988), after the lower court allowed the use of a Chinese walls, the appellate court reversed that decision and ordered disqualification of the entire firm from representing the plaintiff after one of the firm’s partners was disqualified as a result of his prior employment with a firm that represented the defendants in several matters which substantially related to litigation at issue. The defendant was the brother of the plaintiffs and he was involved with the distribution of his deceased father’s state. The plaintiffs subsequently brought an action against the defendant for misappropriating their father’s assets. The trial court disqualified the attorney but held that a Chinese wall should resolve the conflicts of interests and would allow the law firm to continue representation. The appellate court affirmed the disqualification of the attorney but held that the entire firm must be disqualified because there was no screening measures in place prior to the trial court’s order for a Chinese walls. The appellate court said that confidences may be betrayed and a Chinese wall would be ineffective. In Moriglio s.p.a. v. Morgan Fabrics Corp., 340 F Supp.2d 510 (S.D.N.Y. 2004), the court held that a Chinese walls would be an ineffective resolution of a conflict of interests where an attorney was personally involved as a partner at a firm representing a copyright holder in an infringement action against an alleged copyright infringer who the attorney had previously represented. The court found that after the alleged infringer raised the conflict issue, the law firm took no measures to establish a screen to prevent the conflicted attorney from betraying his former client’s confidences.

prohibition. But other judges¹⁵⁸ have admitted screening is a way to resolve the conflict issue. Today 50% of the state rules permit the screening of lawyers but only if the lawyer had no substantial information from or played no substantial role in matters that represented potential conflicts¹⁵⁹.

3. The ABA allows Screening in limited situations

Screening had not been explicitly prohibited by the Model Rules although the imputation rule contains an implicit general prohibition.

However, the screening process was already introduced in the Modern Rules for moving situations in 1987 to cure conflicts created when government officials, and in 2002 when judges moved to private practice. A new situation of screening has been recently admitted by the ABA Model Rules as a consequence of an amendment introduced by the ABA House of Delegates in 16 February 2009¹⁶⁰.

When a lawyer has been associated within a firm but then ends his association and joins another firm, the question of whether he/she should create conflicts within the lawyers of the new firm is complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty is not compromised. Second, the rule should not be broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, today many lawyers practice in firms, many lawyers to some degree limit their practice to one field

¹⁵⁸ In Kassiv. Teacher's Ins and Annuity Ass'n, 243 A.D. 2d 191 (N.Y. App. Div.1 Dept., 1998) the court held that a Chinese walls established by an attorney's law firm was sufficiently to prevent a conflicts of interests between a property owner that the attorney represented at his previous firm and the defendants in that action, who were represented by the attorney's current firm. The Chinese walls prevented the attorney from touching the case file or discussing the matter with anyone at the firm. Disqualification would have caused undue delay and would have been extremely burdensome to both parties. In Jenson v. Touche Ross & Co., 335 N.W.2d 720 (Minn. 1983), the court held an entire law firm representing the defendant did not need to be disqualified although an attorney with that firm previously represented the plaintiff in matters that substantially overlapped the matters handled by his current law firm. The court held that the law firm could continue its representation of the defendant as long as a Chinese walls was established to separate the conflicted attorney from the matter. The court based his decision on the long standing professional relationship between the law firm and the defendant, the economic burden that the defendant would suffer if its entire law firm were disqualified and the large size of the law firm which made the Chinese walls a reasonable method of resolving the conflict. In Illinois Wood Energy :Partners, L.P. v. County of Cook, 281, III App.3d 841 (ist Dist. 1995) the court held that an entire law firm was not disqualified for its representation of developers in a zoning matter even though a member of the zoning board of appeals was a member of the law firm as well. The court said that the firm's representation was sufficient so long as the board members abstained from discussions about developers' request for a zoning certificate and as long as he did not vote on any related matter. The 2000 case of County of Los Angeles v. United States District Court held that law firms in California may use Chinese Walls to prevent a conflict of interest of one lawyer being imputed to the entire firm. This is especially important as many firms are so large that its members don't know, even by sight, all the people working within the firm, and numerous firms have several branches of the main office. In the latter situation, a lawyer from an office in the States may never have physical contact with any matter that the office in Abu Dhabi deals with. However, with the technological advancements of today, with shared file servers etc., attorneys in a firm can access information from another of the firm's office instantaneously.

¹⁵⁹ George A. Kuhlman, "Follow the middle road", ABA Journal, May 2009.

¹⁶⁰ ABA Model Rules, 1.10 amended 20 July 2009, http://abajournal.com/109_revised.PDF.

or another, and many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel¹⁶¹.

This problem was already discussed at the ABA in 2007 but not decided. Now in 2009 it was again taken and the screening mechanism introduced. The amended text reads as follows:

Rule 1.10: Imputation of Conflicts of Interest: General Rule

- (a) *While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless*
- (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or*
 - (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and*
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;*
 - (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and*
 - (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.*

A. The principle

The principle remains the rule of imputation whereby a lawyer with a conflict working in a firm contaminates all the other lawyers in the firm is contained in 1.8(k) and 1.10(a) and is based on the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty. With regard to former clients, Rule 1.9(a) provides that “a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same ... matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing”.

¹⁶¹ ABA Model Rules, 1.9, Comment [4].

B. First exception

This principle contained already one exception (1.10(a)(1)) when the conflict only affects “a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers of the firm”.

C. Second exception. Lawyer moving firms

The last amendment, introduced in February 2009, addressed the situation in which one lawyer moves from one firm to another firm. A lawyer who has represented a client cannot reveal that former client’s confidential information to the former client’s disadvantage. To guard against violation of this continued duty of confidentiality, the lawyer must not undertake a matter adverse to a former client if it is substantially related to a matter that the lawyer handled for the former client, unless the former client consents. The issue is what the other lawyers in his new firm may do if they are asked to handle a matter that their new lawyer could not take on personally because of the work he did at his prior firm. The amended Rule 1.10(a)(2) allows the other members of the firm to accept the matter. However, the firm has to make sure that the disqualified lawyer is “timely screened” from any participation on the matter and they have given written notice to any affected former client.

The new rule cures then the conflict through the isolation of the moving lawyers, provided three conditions set up in Rule 1.10(a)(2) are met: i) the disqualified lawyer is timely screened from any participation in the matter and is apportionate no part of the fee therefore; ii) written notice is given to any affected former client with a description of the screening to enable him to ascertain compliance with the provision of Rule 1.10, and a statement that review may be available before a tribunal, and iii) certification of compliance with the screening procedures is provided to the former client upon his request. In August 2009, language precisions were further introduced in the rule¹⁶².

The amended rule sought to strike a balance among four interests: a) the interest of the former client in having its confidential information respected; b) the new client’s interest in having the lawyers that he wants; c) the interest of the lawyer moving to a new firm; and d) the new firm’s interest in hiring the new lawyer.

The possibility to use a screen to overcome a conflict has been subject then to several conditions, like:

- a) the screening itself from participating in the matter and in the fees;
- b) the need to advise the client in writing about the screening;
- c) the former client may put objections to the screening procedure;
- d) the screening may be reviewed by a tribunal who may impose more stringent obligations including disqualifying the lawyer or the firm¹⁶³;

¹⁶² The amendment consisted in substituting the term “disqualified lawyer” for the term “prohibited lawyer”.

¹⁶³ If the lawyer moves to another firm and has not been screened, he may be subject to professional discipline; if the screening was made and in spite of it the court disqualifies the firm, the lawyer is not subject to this discipline.

D. Criticism

The introduction of the screening mechanisms by the ABA has been limited and cautious. In spite of this, the last amendment did not pass peacefully and important objections were made by well-known ethicists, who argued that the screening procedure may:

- a) promote excessive lawyer's mobility;
- b) allow lawyers switching sides in cases;
- c) the screening should require the client's consent, since imposing it to the client with a mere notice is not sufficient;
- d) it is a foot in the door to expand Chinese walls to other situations;
- e) it can be used in a law firm mergers, to avoid the cleaning of conflicts;
- f) a client may never be happy to see a lawyer joining a firm that is opposing him.

In addition to the above opposing reasons, it is clear that the screening rules are "pro-lawyer" and not "pro-client". It is difficult that the screening may be satisfactorily efficient. To secure that a conflictual partner is apportioned no part of the fee in the conflicted matter is also difficult. It is also concerning that the screening is not subject to the former client's consent but imposed on him with a mere communication.

In my view, like in mergers, the risk of conflicts imputation should be evaluated before admitting the new lawyer as a decisive pre-condition to joining the new firm. The perill lies that this amendment may play like a Trojan horse and facilitate a future general admission of screening not restricted to moving lawyers. If the screening mechanism is successful, what would preclude to apply it to concurrent conflicts with lawyers staying within the firm? In my view, screening should only be acceptable with the express written consent of the affected former client.

VIII. Main differences in conflict regulation between USA and the EU

1. Persecution. Breaches of conflicts of interests are more rigidly persecuted in the US than in the EU. The profuse intervention of the judicial courts to sanction these kinds of breaches in the US is manifestly more numerous in comparison with what happens in the EU¹⁶⁴.
2. Regulation. The ABA Model Rules regulate conflicts of interest with great detail and exhaustion compared to a short-principled regulation of the CCBE Code. As we have seen in Part One, the CCBE Code on conflicts of interests limits itself to declare the prohibition for lawyer to incur into conflicts of interest, but does not define them nor specifies concrete situations. European (civil law) national codes take this position as well.
3. The ABA Model Rules (1.18) has particular rules addressing specific conflicts of interest's problems. Including the following: business transactions between the lawyer and the client; accepting compensation for a third party for carrying on the representation without informed consent by the client; making a contract with a client that would exclude malpractice liability; and improper sexual relations with a client. This is not the case in Europe (except for the UK).

¹⁶⁴ However, European courts are also severely punishing conflicts breaches. Timesonline, 2 August 2007, "Conflict of interest costs Freshfields lawyer £ 59,000".

4. Interpretation of conflicts of interests. In spite of their detailed regulation, the interpretation of conflicts of interests in the US in general is more flexible than in the EU. For example, the contingent fee agreement, which entitles a plaintiff's attorney to a percentage of the funds a plaintiff wins from a defendant as a payment of the attorney's services clashes with the general prohibition of *pactum de quota litis* (CCBE Code, art. 3.3) because it creates a conflict between the client and the lawyer (since their interests can diverge, particularly if they are presented with a settlement proposal that the client and the lawyer evaluate differently), promotes unethical conduct and motivate lawyers to act in their own self-interest¹⁶⁵. Thus, contingent fees generate circumstances where a client's and attorney's interests come in direct conflict as an attorney may put their own payday in front of their client's goals^{166 167}. Since the cost of legal education in the US is expensive, young American lawyers may be more likely to settle cases hastily in order to make quick cash and ease the burden of their loans.
5. Involvement of lawyers in clients' business. There are divergent professional traditions concerning the involvement of lawyers in business transactions with clients. In many systems it is regarded simply as wrong for a lawyer to have any financial or business relationship with a client. But in the US lawyers are often involved in their client business affairs. Indeed, it has been common for transaction lawyers to provide with legal services to newly organized business without charging immediate fees but in return for a fractional share of the enterprise¹⁶⁸.
6. Imputation. Although I am not totally in agreement with this opinion, some authors¹⁶⁹ sustain that in many European systems, there is no rule of imputation of a conflict if the matters are unrelated in subject matter and that it can be said that imputation under the American rule operates automatically, unless consent from the client is obtained, whereas imputation under the rule prevailing elsewhere is that imputation is only a basis for client objection.

¹⁶⁵ Richard M. Bimholz, "The validity and propriety of contingent fee controls", *37 UCLA Law Review*, 1990, 949, 952-54.

¹⁶⁶ Davis, *op cit.*, at 136.

¹⁶⁷ Deborah Rhode, *In the interests of justice. Reforming the legal profession*, 2000, p. 175: "Contingency fees often create conflicts of interests between lawyers and clients. Attorneys' interests lie in gaining the highest possible return on their work; clients' interests lie in gaining the highest possible recovery. Most research suggests that for claims of low or modest value, lawyers generally want a quick settlement; it does not pay to prepare a case throughout and hold out for the best terms available for the client. Conversely, in high stakes cases, once the lawyers have invested substantial time, they have more to gain for gambling for a large recovery than client with limited incomes and substantial needs. Even well-intentioned attorneys may have difficulty preventing their own interests from affecting their advice. And many unsophisticated clients necessarily rely on that advice in evaluating settlement offers"

¹⁶⁸ Geoffrey Hazard and Angelo Dondi, *op.cit.*, p. 179. Many of the technology companies in Silicon Valley, California obtained their initial legal assistance with this kind of arrangements.

¹⁶⁹ Geoffrey Hazard and Angelo Dondi, *op.cit.*, p. 194.

PART THREE

The IBA Guidelines on conflicts of interest^{170, 171}

I. Conflicts of interest for arbitrations

Although independence and impartiality of arbitrators are different from the independence of lawyers, since the arbitrators' function is closer to judges than to lawyers, taking into consideration that arbitrators are mainly chosen within the lawyers' ranks, it could be useful to say a few words on the IBA Guidelines on Conflicts of Interest in International Arbitration 2004¹⁷².

II. Different perceptions on the circumstances affecting arbitrators independence and impartiality

Independence and conflicts of interest – in politics, in business, in professional practice - are issues which raise difficult problems and attract the attention of lawmakers, ethicists and the public. Problems of independence increasingly challenge international arbitration. Arbitrators are often unsure about which circumstances need to be disclosed, and they may make different choices about disclosures than other arbitrators in a similar situation. The growth of international business,

¹⁷⁰ On the Guidelines, see Tore Wiwen-Nilsson, "IBA Draft Guidelines on Impartiality, Independence and Disclosure", *Stockholm Arbitration Newsletter*, 2, 2003. About the IBA Guidelines, see Otto de Witt Wijnen (the chair of the Working Group), Nathalie Voser and Neomi Rao, "Background information on the IBA Guidelines on Conflicts of Interest in International Arbitration", *Business Law International*, vol. 5, no. 3 September 2004, pp. 433-458. Simon Rober Tissot and Lydia Hanssell, "UK challenging a Judge or Arbitrator for Bars", *Monday*. David A. Lawson, "Impartiality and Independence of International Arbitrators. Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration", *ASA Bulletin*, vol. 23, no 1, 2005, p. 22, 55. Nicholas Longley, "The IBA Guidelines on Conflicts of Interest in International Arbitration". Available at <http://www.tannerdewitt.com/index.php> Click "Publications" select "February 2005". Markham Ball, "Probity Deconstructed: How Helpful, Really, Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?", *Arbitration International*, 2005, pp. 223 – 341. Gary Born and Rachael Kent, "The Internationalisation of International Commercial Arbitration", *Wilmer*, 22 February 2005. Loretta Malintoppi, "Independence, Impartiality and the Duty of Disclosure in Investment Arbitration" *ILA Committee on Investment Law*, 22 July 2005. Anne Hoffman, "Duty of Disclosure and Challenges of Arbitration: The standards applicable under the new IBA Guidelines on conflicts of interest and the former approach", *Arbitration International*, 1 November 2005. Fernando de Trazegnies Granda, "Conflictuando el conflicto. Los conflictos de interés en el arbitraje", *Lima Arbitration*, no. 1, 2006, p. 163. Leon Trakman, "The Impartiality and Independence of Arbitrators Reconsidered", *University of New South Wales Faculty of Law Research Series*, 2007, paper 25. Dana Freyer and Julie Bédard, "The Concept of Ethical Rules or the New IBA Guidelines on Conflicts of Interest in International Arbitration", in AAA. *ADR & The Law*, 21st Edition, March 2007. Tom Canning, "International Arbitrators: Conflicts of Interests and Bars", *DLA Piper International Arbitration Newsletter*, 25 May 2007. Lewis Silkin, "Arbitrators, Mediators and Conflicts of Interest", available at www.Legal500.com, June 2007. Matthias Scherer, "The new case law firm Austria, Switzerland and Germany regarding the IBA Guidelines on Conflicts of Interest in International Arbitration", *Transnational Dispute Management*, 2008, vol. 5, Issue 4.

¹⁷¹ Detailed background information to the Guidelines has been published in "Business Law International", vol. 5, no 3, September 2004, pp. 433-458 and is available at the IBA website www.ibanet.org

¹⁷² IBA, Guidelines on Conflicts of Interest in International Arbitration, 22 May 2004.

including interlocking corporate relationships and larger international law firms, has required more disclosures and, as a result, has created more difficult independence issues to evaluate.

Particularly in international arbitration, it is difficult to determine the criteria that must be followed *urbi et orbi* in order to evaluate the arbitrator's independence and impartiality. Different cultures have different perceptions on particular circumstances. Thus, parties, arbitrators, institutions and courts face complex decisions about what to disclose and what standards to apply. The complexity of these varying standards creates a tension on the balance between the parties' rights to a fair hearing, which embodies the disclosure of facts that may reasonably call into question an arbitrator's independence or impartiality, and the parties' right to select arbitrators of their choice. Even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and a lack of uniformity in their application. As a result, members of the international arbitration community frequently apply different standards in making decisions concerning disclosure, objections and challenges.

III. Developing international standards

The Committee on Arbitration and ADR of the International Bar Association appointed a Working Group (the "WG") of 19 experts in international arbitration, with the intent of helping this decision-making process, national laws, judicial decisions, arbitration rules and practical considerations regarding independence and impartiality and disclosure in international arbitration. In an effort to introduce some international uniformity and provide guidelines, the WG believed that greater consistency, fewer unnecessary challenges, and arbitrator withdrawals and removals could be achieved by providing lists of specific situations that do or do not warrant disclosure or disqualification of an arbitrator. Designated Red, Orange and Green (the "Application Lists").

Unlike other lists of disclosures, which require enforceable disclosures¹⁷³, "the Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, the WG hopes that these Guidelines will find general acceptance within the international arbitration community" (Introduction 6).

The WG released two drafts of the Guidelines (on 7 and 15 October 2002 and 22 August 2003¹⁷⁴). The WG received many conflicting comments about which situations should fall within the different lists. While judicial independence can remain, in large part, a matter for national jurisdictions taking into account local customs, culture and legal history, the formulation of universal standards of independence and impartiality requires the balancing of many different interests. The IBA Council finally approved the draft on 22 May 2004 and adopted it as "Guidelines on Conflicts of Interest in International Arbitration"^{175, 176}.

¹⁷³ Like the California Ethical Standards for Neutral Arbitrators in Commercial Arbitration, 2002. See James Schwarz, "California's Pioneering Spirit", ICC United Kingdom, vol. VI.

¹⁷⁴ In the second draft, the WG developed the objective and subjective test for disqualification, it moved to the Orange List some Green Lists situations and divided the Red List into non-waivable and waivable circumstances.

¹⁷⁵ The final text included all arbitration and not just commercial arbitration.

¹⁷⁶ At the 27th Annual Award Programme of the CPR Institute for Dispute Resolutions, the IBA was presented with the "2004 Outstanding Practice Achievement Award".

The Guidelines consist of an Introduction; Part I: General Standards Regarding Impartiality, Independence and Disclosure; and Part II: Practical Applications of the General Standards (including the Application Lists).

IV. Practical application of the General Standards

1. In general

In Part I, the Guidelines set up the General Standards regarding independence, impartiality and disclosure. Part II contains the Practical Application of the General Standards (the “Application Lists”).

2. The Application Lists

The Application Lists consist of 4 lists: 1. The Non-waivable Red List; 2. The Waivable Red List; 3. The Orange List; and 4. the Green List. The Guidelines following the first draft only contained one Red List which consisted of two parts. But in its final text, the Non-waivable List and the Waivable List are two separate lists. The language of Part I, 2, which says that “the Red List has two parts,” should be amended, because each former part has become a list of its own.

- a. The Non-Waivable Red List (see GS-2(c)) is an enumeration of situations, which give rise to justifiable doubts as to the arbitrator’s impartiality and independence; i.e., in these circumstances an objective lack of independence exists from the point of view of a reasonable third person having knowledge of the relevant facts (see GS-2(b)). It includes situations deriving from the overriding principle that no person can be his or her own judge. The Guidelines (Part II, 2) erroneously refer to GS-2(c) and 4(b) since the reference should be to GS-2(d) and 4(b).
- b. The Waivable Red List (GS-4 (c)) encompasses situations that are serious but not as severe as those in the Non-Waivable Red List. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable only if and when the parties, being aware of the situation, nevertheless expressly state their willingness to have such a person act as arbitrator.
- c. The Orange List is an enumeration of situations which, in the eyes of the parties, may give rise to justifiable doubts as to the arbitrator’s independence or impartiality. It thus reflects situations that would fall under GS-3(a), therefore, the arbitrator has a duty to disclose such situations. In all of them, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made (GS-4(a)). Such disclosure does not automatically result in a disqualification of the arbitrator. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively — i.e., from a reasonable third person’s point of view having knowledge of the relevant facts — there is a justifiable doubt as to the arbitrator’s independence or impartiality. Then, if the conclusion is negative, the arbitrator can act. He can also act if there is no timely objection by the parties or, in situations covered by the Waivable Red List, a specific acceptance by the parties in accordance with GS 4(c).

- d. The Green List contains an enumeration of situations where no appearance of lack of independence or impartiality exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List.

V. Practical experience

The Guidelines have been very well received by the arbitration community, including lawyers who work in arbitration, by the commentators and also by the courts of different countries that have used the Guidelines in their reasoning. Therefore, the Guidelines are proving an excellent instrument for harmonisation of arbitrators' conflicts of interest rules.

Several courts in different countries have already taken the Guidelines in their decisions, thus converting this "soft law" into judicial law.

At present, a Subcommittee of the ABA Committee of Arbitration and ADR is working on a possible revision of the Guidelines.

Comment [r8]: The official name of the entity should be used. Is it a Section Committee/

PART FOUR

Some reflexions with a view to harmonize conflicts of interest rules internationally

Today, all lawyers' associations, including the CCBE and the ABA, through its new Commission Ethics 20/20, are seriously committed to review the ethical rules for the 21st century legal profession. It would be useful that they would not work with total separation but cooperating with the aim of a future global regulation. The regulation of conflicts of interest regulation will undoubtedly be an essential part of those revisions.

Comment [r9]: You can reference the new ABA Commission on Ethics 20/20. See, www.abanet.org/ethics2020 for information.

First. Conflicts of interest is an issue inherent to the human nature. Within the legal profession the prohibition to incur in such conflicts is a consequence of the three fundamental principles of legal ethics: independence, confidentiality (attorney-client privilege, professional secrecy) and loyalty.

Second. Conflicts of interest is undoubtedly one of the most difficult issues that affect the legal profession particularly at the outset of the 21st century with the world globalization and interdependence and expansion of law firms. Conflicts of interest is a matter of public interest. It affects at the same time the interests of the clients, the legal profession, access to justice, the administration of justice and the rule of law.

Third. The complexity of modern society requires the review of the rules. Existing rules need to be reconsidered because of the changes that have operated in the society and in the profession in the last decades. Most of the traditional rules were designed (and many recent revisions have not changed the initial notions) when society was less complex, less interrelated and less interconnected, with legal services basically linked to representation for or in contemplation of litigation (not transactional operations), lawyers' function was to advocate before the courts and law firms were smaller and less sophisticated.

Fourth. The two principal legal systems coexisting in the 21st century (common law and civil law) conceive lawyer's identity, role and function differently. It is difficult to give a uniform regulation of legal ethical rules unless and until the lawyers of both traditions are not further harmonized. We should make an effort to achieve such harmonization soon.

Fifth. Conflicts of interest need to be clearly defined, since their interpretation –as prohibitive rules– will always be restrictive (*odiosa sunt restringenda*). Only conflicts which affect or may affect adversely the interests of a client must be prohibited. Defining conflicts of interest is not easy. In general, conflicts in litigation are easier to detect than conflicts in transactional work.

Sixth. When a conflict of interest appears, in addition to the conflicted interests (adversary current clients, former client/current client, client/lawyer, etc.), several private interests are affected and basically the interest of the client to select the lawyers of his choice and the interest of the lawyer/firm to retain the new client. Resolving a conflict of interests in the sense of allowing a lawyer of a firm to retain the two clients and avoid the prohibition to serve two masters, the latter

interests must be pondered. When working towards the harmonization of regulation of conflicts of interests the interest of clients and society should prevail over the interests of lawyers and law firms.

Seventh. When intending to harmonize or unify the rules of conflicts of interest, as any other ethical rule, some important issues need to be decided and mainly:

- a. From a drafting perspective, shall we adopt the concise aspirational style familiar to the civil law system or shall one adopt the lengthy, casuistic and detailed of the common law style? Both have their own advantages and disadvantages. However, if the harmonization/unification of the principles will already be difficult, more difficult will it be to reach a world consensus on detailed rules. Therefore, it would be advisable in a first step to agree on the principles, leaving for further steps to agree on details as the harmonization progresses.
- b. From a substantial perspective, shall one adopt a rigorous “pro client” position of prohibiting *de radice* all conflicts of interest and restrict all mechanisms to neutralize the conflict or shall one adopt a position taking into consideration the interest of both the client and the lawyer/law firm in the same level?

Eighth. Once the concept of conflicts of interest may be duly defined (definition and exceptions), in my view there exist two main issues which need special attention: the consentability (client’s waiver) and the imputation- possibility of screening.

Ninth. As far as the possibility that the client waives and consents the conflict, the client should have the right to consent the conflict of interest bearing in mind that the lawyer’s duty of loyalty and the prohibition to intervene when a conflict arises is exclusively in the benefit of the client.

The consent should always be informed, so that the client sufficiently knows and understands the existence of the conflict, the possible negative consequences of the consent and the possible alternatives. It should be recommendable but not required that the consenting client receives the advice of a second lawyer over the consent.

The consent should always be in writing, either drafted by the client, the conflicted lawyer or a third party. The writing should contain an explicit declaration of the information received and the signature of the client. Some conflict situations can not be consented.

Tenth. Concerning imputation and screening or information barriers (insulation measures), the principle of imputation whereby law firms are considered as a single lawyer and therefore any circumstances creating a conflict to a lawyer contaminate the rest of the lawyers should be strengthened.

The reasons which support the possibility of screening are basically the advantage for clients which allow them to select the lawyer of their choice, particularly in commercial matters and the advantage for the lawyer/law firm who can handle more than one client with conflict of interests and the remuneration involved.

Deleted:

Many are sceptical about screens. When conflicts of interests exist the lawyer should stop acting for the client by virtue of the essential principles of independence, confidentiality and trust. These are the vital ingredients of the profession, and, when one of these elements is compromised, so is the lawyer's ability to represent his client. It may not make business sense to turn away a client, but it makes sense to keep the profession ethical.

Screens may be perfectly acceptable for other professions which do not require the same level of independence or confidentiality as lawyers. Screens, if set with all the precautions and securities, may in some cases alleviate the conflict. But if accepted they must be allowed in very restricted cases, with all necessary protective conditions and with the consent of the involved parties.

In any case, my concern is that allowing screening methods to neutralize conflicts and therefore permitting some firms to deal with conflicting interests plays against the good image and the public perception of the lawyer and trust. Even with precautions, the profession will move away from professionalism and come closer to commercialism¹⁷⁷.

In my view, all changes introduced in the regulation of conflicts of interest must attempt to balance the various interests of parties and lawyers to ensure the integrity and efficiency of the administration of justice. But not a simple balance but an "unbalanced balance" of such interest. We should not introduce rules to give solution to the lawyers' firms restricting the interest of clients. The profession (and lawyers and firms) was created to serve the clients and not the other way around so in case of a conflict of conflicts let us take the harder way. "Per ardua, ad astra" (to the stars through hardships), the Romans said.

US justice Benjamin Cardozo, remembered for his significant influence on the development of American common law in the 20th century, said once that "membership in the bar is a privilege burdened with conditions". I am afraid that in this case we are facing one of these conditions

¹⁷⁷ The ABA's Commission on Professionalism (the Stanley Commission) launched a campaign in 1981: "Has our profession abandoned principle for profit, professionalism for commercialism?"

Ed Nally, the President of the Law Society of England & Wales¹⁷⁸ summarized the main changes proposed (pending approval of the Lord Chancellor) in the Solicitors' Code of Conduct in the last revision 2009, which are:

7. definition of conflict of interest for the first time, which restricts the definition to "the same or related matters";
8. setting up exceptions to the prohibition like: (a) where the clients have an overriding common interest (such as in setting up a business), and (b) where two clients are competing for the same asset (bidding); both exceptions require informed consent of the clients;
9. the rule that places an obligation on a solicitor to disclose to his client any material information which may be held within the solicitor's firm only applies where information is within the actual knowledge of the solicitor;
10. a firm can act where that firm holds confidential information in relation to a client which would be material to another client in an unrelated matter, provided the interest of the clients are not adverse;
11. up to the reform, "information barriers" (Chinese walls) were only permitted where two firms amalgamated. Under the new rule, if both clients are able to consent to the arrangement, information barriers can be used much more widely;
12. a firm is allowed to act through an information barrier, to complete an existing matter, where it becomes clear that there is adversity between the clients, without the consent of the client for whom the confidential information is held;

As Nally says, with these changes, the Law Society wanted to strike a balance between a number of different objectives:

- f) clients receive impartial and independent advice untainted by conflicting loyalties on the part of the solicitor;
- g) subject to (a), that clients have access to the services of the solicitor of their choice;
- h) in the interests of convenience, economy and access to technical expertise and specialised advice, clients are not prevented unnecessarily from sharing the services of a single firm of solicitors;
- i) client have appropriate consumer protection but are not prevented from having informed choice; and
- j) the rules should reflect common law and impose additional restrictions only if necessary and proportionate to do so in order to protect clients.

¹⁷⁸ Ed Nally, "proposed change for legal services in England & Wales" in Keith Clark, Conflicts of interest, European Lawyer Reference, 2005-2006, p. xxv.