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CONFLICTS AND CONVERGENCE

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The Right to Exercise the Profession of a Lawyer Throughout Europe

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REMARKS BY LAUREL TERRY*

CONFLICTS AND CONVERGENCE IN THE ETHICAL REGULATION OF INTERNATIONAL LAWYERS

1. INTRODUCTION

The theme of this conference is 'Contemporary International Law Issues: Conflicts and Convergence.' The topic of this panel is 'The Right to Exercise the Profession of Lawyer Throughout Europe'. Mr. Toulmin has discussed the European Union's proposed legislation relevant to this topic, along with the efforts of the CCBE to promote the right to exercise the profession of a lawyer throughout Europe. Mr. Griffin has discussed the recent agreement which was entered into by the American Bar Association and the French and the Dutch Language Bar Associations of Brussels; this Agreement sets forth the conditions under which American lawyers can practice law in Brussels. As Mr. Griffin's comments demonstrate, the 'right to exercise the profession of a lawyer throughout Europe' is not limited to European lawyers, but also includes, in certain circumstances, US lawyers.

My role in this program is to discuss the impact of such multi-jurisdictional practice on the regulation of lawyers. Once a lawyer – European or American – is given the right to practice the profession throughout Europe, questions arise as to who regulates that lawyer, what regulations the lawyer is subject to, and what to do if the regulations to which a lawyer is subject conflict. As this paper will demonstrate, there is both conflict and convergence in the regulation of lawyers with a multi-jurisdictional practice.

2. SOME BACKGROUND INFORMATION: CONFLICT AND CONVERGENCE IN THE ETHICAL REGULATION OF US LAWYERS

Because many conference participants may not be familiar with the United States' regulation of lawyers, an overview may be helpful (*See generally* ABA/BNA Lawyers' Manual on Professional Conduct, Main Volume 01: 1-46 (1995)). In general, US lawyers are regulated on a state-wide basis rather than on a national basis. Because of constitutional 'separation of powers' concerns, the regulations governing US lawyers usually are issued by an individual state's supreme court, rather than the state legislature. The state supreme court usually considers, and often relies heavily upon the recommendations made by a state bar association. US lawyers often refer to these regulations as involving 'legal ethics' or 'ethical regulation' or 'professional responsibility' or 'the law of lawyering.'

Forty-nine of the fifty US states have adopted ethical regulations which are based on one of the two 'model' regulations issued by the American Bar Association (ABA) which is a voluntary association of lawyers. In 1969, the ABA issued the ABA Model Code of Professional Responsibility (the Model Code). Forty-nine of the fifty US states adopted the Model Code essentially verbatim; thus, until the mid-1970's, when the ABA adopted some controversial amendments, the ethical regulation of lawyers

* Professor of Law, The Dickinson School of Law, Carlisle, Pennsylvania, US.

varied little from state to state. In 1983, however, the ABA adopted the ABA Model Rules of Professional Conduct. Although almost 40 states switched to the Model Rules as the basis for regulating lawyers, some states, including New York, retained their regulations which were based on the older Model Code (California's rules of professional conduct are not based on either the Model Code or the Model Rules).

Thus, since 1983, there has been significant conflict among US states with respect to their regulation of lawyers. Moreover, this conflict occurs not just between those states adopting the Model Code and those adopting the Model Rules; this conflict also occurs *among* states using the Model Rules as the basis for their regulation. It should be noted that unlike the Model Code, most states did not adopt the Model Rules verbatim, but instead adopted them with changes. Furthermore, many of these state variations are *significantly* different from their Model Rule counterpart (see S. Gillers & R. Simon, *Regulation of Lawyers: Statutes and Standards* 1995 (Little Brown & Co.)).

As this history reveals, the regulation of lawyers in the US has gone from convergence to conflict. Arguably, however, there is increasing pressure in the US to now have less conflict and more convergence in the ethical regulation of US lawyers. Many US lawyers are now licensed in multiple states and have a practice that crosses state borders (*see generally* ABA Lawyers Manual, *supra*, at 21: 151-152 and 21: 501-504). As a result, many US lawyers have been confronted with the issue of who regulates their behavior and how to resolve conflicting ethical duties imposed by different states (*see, e.g.,* Fox, 'Cowboy Ethics on the Main Line', 19 *Litigation* 27 (Winter 1993)). This problem became so pressing that two years ago, in order to help alleviate some of the concern caused by conflicts among state regulation of lawyers, the ABA revised Model Rule 8.5 to more clearly define which state's ethics rule should control when lawyers are licensed in multiple jurisdictions and subject to conflicting rules. While the modification of Model Rule 8.5 does not seek to eliminate the underlying conflicts in state ethics rules, it does seek to eliminate the conflicts about *whose* regulations apply in this sense, ABA Model Rule 8.5 is analogous to many rules in the CCBE Code Rom which essentially operate as 'conflicts of law' provisions. Some commentators, however, have gone further and have called for the federalization of lawyers' ethics, in order to reduce conflicts in the regulation of lawyers and facilitate lawyers' practices in the modern business world (Zacharias, 'Federalizing Legal Ethics', 73 *Tex. L. Rev.* 335 (1994)). Additionally, some lawyers argue that at least with respect to certain issues, US Government lawyers should be regulated on a national, rather than a state-wide basis.

Although it remains to be seen whether the method of regulating lawyers in the US will change and whether the conflict in US ethical regulations will be lessened, one thing is clear: the reality of cross-border practice by lawyers *within* the US has led and will continue to lead to a re-examination of the question of who should regulate lawyers and what those regulations should say.

3. MULTI-JURISDICTIONAL REGULATION OF LAWYERS IN AN INTERNATIONAL CONTEXT

At the same time that US lawyers are grappling with the question of multi-jurisdictional regulation of lawyers domestically, analogous issues have arisen in many different international contexts. As Mr. Toulmin has indicated, both the issues of *who* regulates lawyers who want to exercise their profession throughout Europe, and the *nature* of that regulation, has come up in the CCBE Common Code of Conduct (7

Geo. J. Legal Ethics 1, 63-75 (1993)), the CCBE's draft Establishment Directive (18 *Lawyers in Europe* 10-13 (November/December 1992)) and in the EU Commission's Proposed Establishment Directive (COM (94) 572 final Brussels, 94/0299 (COD) 12 Dec. 1994). As Mr. Griffin has shown, these issues also arise in the context of US lawyers who want to practice in Brussels pursuant to the Agreement between the ABA and the Brussels Bars. Similar issues also have surfaced in the context of GATS, the General Agreement on Trade in Services and NAFTA, the North American Free Trade Agreement. Moreover, the IBA or International Bar Association recently has been struggling with these issues in the context of its Guidelines for Legal Consultants. The American Bar Association's Model Rule on Foreign Legal Consultants also addresses these issues ('ABA/BNA Lawyer's Manual on Professional Conduct', 9 *Current Reports* 237, 25 August 1993). Thus, lawyers are going to have to decide in many different contexts: who regulates their behavior, what those regulations say, and what to do when a lawyer is subject to conflicting regulations.

So, how do lawyers who want to exercise their profession in multiple jurisdictions respond? One response is to try to adapt one's own standards, designed for a domestic practice, to an international practice (See, e.g., Goebel, 63 *Tulane L. Rev.* 443 (1989)). An alternative response is to call for an overarching set of standards so that a lawyer would be subject to similar standards wherever the lawyer is engaged in legal work. The CCBE Common Code of Conduct is an example of the effort to design an overarching code. Although the CCBE Code originally was intended to apply just to European lawyers practicing in Europe, its reach is much broader now. As a result of the Agreement between the ABA and the Bar Associations of Brussels, the CCBE Code now applies to US lawyers as well as European lawyers. In addition, one of the authors of the CCBE Code suggested in the context of GATT discussions that the CCBE Code should be used not just as a regional code, but as the basis for a true overarching, international code of ethics (See Toulmin, 15 *Fordham Int'l L.J.* 673, 1674-75 (1991-92)). Thus, regardless of whether one thinks it is a good idea to have a unitary code of conduct for all lawyers, I think it behooves all lawyers to become familiar with the CCBE Common Code of Conduct so that they will be better able to enter into the dialogue concerning who should regulate lawyers engaged in international practice, and the nature of that regulation (Cf. Abel, 'Transnational Law Practice', 44 *Case Western L. Rev.* 737-763 (1994)).

4. CONFLICT AND CONVERGENCE BETWEEN THE CCBE COMMON CODE OF CONDUCT AND THE ABA MODEL RULES OF CONDUCT

A comparison of the *CCBE Code of Conduct* and the ABA Model Rules of Professional Conduct is fairly typical, I suspect, of what one will find when one compares a specific country's ethics code with an overarching set of standards, such as the CCBE Code. On the one hand, there is a surprising amount of convergence among the provision of the Model Rules and the CCBE Code. On the other hand, there certainly are points of conflict between the Model Rules and the CCBE Code, some of which may be avoidable and some of which may not be avoidable. Furthermore, there may be conflicts which are not apparent when reading the two codes because of the general language that is used, but which will surface when lawyers from different cultures apply each of the code provisions.

In the short space allotted in these proceedings, I can only comment briefly on the similarities and differences between the Model Rules and the CCBE Code. In

addition, a more complete discussion of the similarities and differences between the Model Rules and the CCBE Code is contained in two articles which I have published on this topic: Terry, 'An Introduction to the European Community's Legal Ethics Code, Part I: An Analysis of the CCBE Code of Conduct', 7 *Georgetown Journal of Legal Ethics* 1 (1993) and Terry, 'An Introduction to the European Community's Legal Ethics Code Part II: Applying the CCBE Code of Conduct', 7 *Georgetown Journal of Legal Ethics* 345 (1993).

In a nutshell, there are numerous similarities between the Model Rules and the CCBE Code. For example, both codes include the core duties of loyalty, confidentiality and independence. Moreover, there are several very specific provisions that are similar, in addition to the very general core obligations.

Despite these similarities, however, there are also some differences between the Model Rules and the CCBE Code. Some of these differences, of course, would not subject a lawyer to conflicting obligations (i.e., a lawyer could choose to comply with the more stringent standard.) An example of such a difference is the fact that CCBE Rule 5.4 does not allow a lawyer to charge a contingent fee, whereas Model Rule 1.5 generally permits contingency fees. Similarly, CCBE Rule 3.9 requires a lawyer to maintain malpractice insurance whereas the Model Rules have no such requirement.

There are other provisions, however, where there arguably are differences between the Model Rules and the CCBE Code, but a US lawyer could interpret the CCBE Code provision so that the conflict is avoidable. For example, CCBE Rules 2.7 and 3.2 prohibit conflicts of interest and have no consent exception. Many US lawyers are accustomed to interpreting the 'trigger' language of Model Rule 1.7 rather broadly, so that it takes relatively little to create a conflict which then requires disclosure to the client and client consent before proceeding with the representation. A US lawyer subject to the CCBE Code may be tempted to find that a particular situation would not raise a 'conflict' under CCBE Rules 2.7 and 3.2, even though the lawyer might find that the identical situation created enough of a conflict under Model Rule 1.7 to trigger its disclosure and consent requirements.

There is a third set of provisions in the CCBE Code, however, which at least theoretically could place lawyers in a situation in which they would be forced to violate the ethical regulations of one of the jurisdictions to which they were subject. CCBE Rule 2.3.2, for example, requires a lawyer to maintain absolute confidentiality, whereas Model Rules 1.6, 3.3, and 4.1, when read together, sometimes require a lawyer to disclose client confidences. Furthermore, several states, such as New Jersey, have gone much further than the Model Rule in terms of requiring disclosure of client confidences (New Jersey's version of Rule of Professional Conduct 1.6 *requires* a lawyer to reveal confidential information 'to prevent a client from committing a criminal, illegal or fraudulent act . . . likely to result in death or substantial bodily harm of substantial injury to the financial interest or property of another').

As this brief discussion illustrates, there are areas of both convergence and of seeming conflict between the CCBE Code of Conduct and the ABA Model Rules of Professional Conduct. Furthermore, some of the areas that lawyers from one culture perceive as conflicts may not in fact *be* conflicts, whereas there may be conflicts that lurk beneath seemingly general and acceptable language. In short, I think lawyers practicing in multiple jurisdictions who are subject to multiple regulation cannot necessarily evaluate ahead of time the degree to which their ethical regulations are in convergence and in conflict. For better or worse, only time and experience will show us where our regulations and our interpretations of them converge and where they

conflict. In the meantime, all we can do is continue to talk with one another to sensitize ourselves to these issues and to try and educate each other about our differences; in short, to strive for 'transparency' on these issues.

With that in mind, I would ask for your assistance. I am obviously interested in this topic of the multi-jurisdictional regulation of lawyers, and the conflicts and convergence between different ethics codes. On the one hand, however, I am limited in my research by the fact that I am not practicing international law and am not in a position to personally experience the convergence and conflict in the various regulations. On the other hand, I agree with the recent ABA *McCrate Report* insofar as it suggested that there can be a valuable synergism when the academic community and the practicing bar collaborate. Many lawyers have told me they would like to think about these issues further, but do not have time to pursue them. I can justify the time, but need the raw data. Accordingly, I would ask that you tell me where you think I am wrong; that if you find yourself wishing you had more guidance on an issue involving multi-jurisdiction practice, you would let me know; and finally that you keep me apprised of new developments in this area.

5. CONCLUSION

It is my belief that we are witnessing a major change in the way lawyers are regulated. Not surprisingly, as business has gone global, so have lawyers. And as lawyers venture from the original jurisdiction in which they were licensed, questions arise as to who should regulate those lawyers and how. I believe that both the efforts to have convergence on these issues, as well as the conflicts which will arise, will inevitably lead to a re-evaluation and possible redefinition of many individual jurisdictions' regulation of lawyers.

Some commentators have suggested that because such a small percentage of lawyers are engaged in cross-border practice, the impact of such practice is relatively minimal. I disagree with this premise. I think that just as the practices of large US law firms have changed the practice of law to some degree for *all* US lawyers, including those in small firms, the international cross-border practice phenomenon will have a profound effect both domestically and internationally on the way lawyers practice law and on the manner in which lawyers are governed. Whether we end up with an overarching code or not, I believe that the pressure of trying to sort out the convergence and conflicts in the different sets of codes which regulate lawyers ultimately will affect the way all lawyers in this room practice law.

DISCUSSION

ISSUES

In his presentation John Toulmin has spoken about the two draft Directives of the European Union and of the activities of the CCBE, of which he is a former president. The CCBE represents the Bar Associations and Law Societies in Europe. Joseph Griffin has globally explained the contents of the recent 'Agreement' between the American Bar Association – the ABA – and the two Brussels Bar Associations (the French language and the Dutch language Order of the Brussels Bar). Laurel Terry,

finally, remarked on the standard of conduct for a lawyer practising somewhere other than in his home State – who has a multi-jurisdictional practice.

Before the floor is given to the audience Mr. Griffin clarifies an aspect of his presentation concerning the scope of the Agreement between the ABA and the two Brussels Bars. The Brussels rules of conduct as modified by the CCBE rules apply to American lawyers who are registered under the system and not to the firm as such. The rules thus only apply to the Brussels office and the people working in it. No other foreign based American law office falls under the scope of the Agreement.

LIMITED AMOUNT OF LITERATURE ON THE TOPIC AND THE ROLE OF THE WTO

ROGER GOEBEL* is the first to intervene and would like to call attention to a book on the topic published this year, 1995, as there is only a very limited amount of literature available. The book is called: *Rights, Liabilities and Ethics in International Legal Practice*, (Daly and Goebels (eds), Transnational Juris Publications). The book reproduces the conference proceedings of a program at which some 50 European and American professors and lawyers discussed these issues. He further called attention to a major case pending before the European Court of Justice – *Gebhard v. the Milan Bar Council* – in which the Advocate General Jeger has issued his opinion and judgment may come in the fall. The case concerns a German lawyer attempting to practice in Milan and claiming rights under the Lawyers Services Directive or a right of establishment. The Advocate General's opinion contains dicta on the host State's right to require foreign lawyers to follow local professional rules, pay into the retirement fund and have local insurance. Mr. Goebel hopes that the Court itself will stick to the questions put before it, but fears that the Court will follow the Advocate General in these dicta.

He wonders what is happening to legal services in the WTO, which is already working on accountants services.

JOSEPH GRIFFIN points out that part of the GATT consists of a General Agreement on Trade in Services. That Agreement includes a legal services annex in which some 40 or 50 States did commit themselves to refrain from imposing any further restrictions on the freedom to practice law on their territory by 'foreign' lawyers. These commitments are called 'stand-still agreements'. They have, however, not made any commitment to liberalization. Attempts by the governments to try to have the American, Japanese and European professions reach some sort of consensus that might have been reflected in the GATS failed. The issue of legal services has been put on the US version of the working-agenda of the WTO, but it is definitely not a priority ('the joke being that it has 14th or 15th position on the agenda, depending on where the problem of reindeer-stampedes will be listed'). At this moment and in the future more is to be expected from European efforts like the CCBE and from bilateral agreements between, for instance, the ABA and European Bar Associations.

JOHN TOULMIN agrees, but warns for the risk this involves. As it may not be just the perceived lack of importance which has put the issue of the legal services a long way down on the list but also the perceived recalcitrance and inability of the legal profession to reach an agreement on anything. If the legal profession do not stand up for themselves it might well be that the accounting profession – which as mentioned

* Fordham Law School, New York, US.

by Mr. Goebel the WTO is working on – will make the bench mark, and the legal profession will be forced to follow. There is a certain amount of sparring going on between the professions of different jurisdictions, also within the CCBE. No international agreement is easily won, but lawyers must realize that it is very important for them to start agreeing on certain matters or they will be ruled by the General Services Directive of the European Union.

Concerning Mr. Goebel's fear about the case pending before the Court of Justice, Mr. Toulmin mentions that in a previous case before the Court of Justice – the *Goolum*-case – the Court restricted its decision to answering the questions put before it, even though the opinion of the French Advocate General Damon had contained several dicta of the sort mentioned by Mr. Goebel. According to Mr. Toulmin the Court of Justice is not in the habit of providing *obiter dicta*. If, however, in the pending case the Court does follow the Advocate General, the decision would be halfway consistent with Article 6.3 of the Commission's Directive and with the draft Directive on the right of establishment, on which the legal profession has agreed.

WAIVER OF CONFLICTS BY THE CLIENT

KATHLEEN PAISLEY* requests comments of the panel on their view as to whether a conflict can be waived under the CCBE rules and to compare this to the position of the American Bar Association. According to Ms. Terry the CCBE rules do not contain a waiver provision and so under those rules a conflict cannot be waived. If there is a conflict the lawyer is out.

JOHN TOULMIN points out that the rules in the England, Scotland and Wales Common Law jurisdictions can be compared to those of the ABA in the United States and so do contain a waiver provision. Civil Law countries differ and it is true that no waiver provision has been included in the CCBE. Reading the explanatory memorandum, however, one can detect that in certain circumstances a waiver is allowed.

LAUREL TERRY, looking at the CCBE explanatory memorandum from an American perspective, does not see that waivers are explicitly authorized. She interprets the CCBE Explanatory Memorandum as saying that there are certain situations where there is a conflict and the lawyer cannot go forward, but there are other situations in which a conflict is not perceived. Correlating that with the ABA model rule 1.7 – the waiver of conflict rule – there are situations where that rule is not triggered at all and the lawyer can go forward. The tricky part, at least for an American lawyer, is that he or she may be in a situation which the CCBE rule would not regard as a conflict, so that he or she can go forward. However, using the ABA model rule the lawyer might very well want to comply with the conflict provision by satisfying the conflict exception. In other words, there is a lower conflict threshold in the ABA rule. The potential problem being that the lawyer will have to comply with the ABA rule and get the client's consent and go through what is called the 'plus-factor analysis' under provision 1.7. At the same time assuming that in doing so he or she has not violated the CCBE rule, because their conflict threshold is higher.

JOHN TOULMIN does not really see a problem here. If in fact there is no conflict under rule 3.2 of the CCBE, then there is nothing under that code to be waived. If

* Boechoute, Belgium.

the threshold of the CCBE is higher than under the ABA rules and there is something to be waived in order to comply with the ABA, that waiver can be obtained under those rules. Hence no problem.

LAUREL TERRY sees that it is more a problem for comfort level. A lawyer will have to say that it is a conflict under one system but not under another. This is something that can be done, but would make the American lawyer somewhat uncomfortable as they will have to use the same word in different meanings.

JOHN TOULMIN submits that it is a question of definition of conflict. The CCBE rule is in the form that it is because it has to take account of the United Kingdom, where a waiver of conflict is possible in certain circumstances. So the explanatory memorandum of the CCBE code has to reflect that.

ROGER GOEBEL points out that there is a (unfinished) Draft Restatement of explanatory rules of law governing lawyers drawn up by the American Law Institute. It heightens the level at which conflicts are formed and increases the level of procedural safeguards when waivers are to be obtained. In practice one sees that European lawyers do not see a conflict where American lawyers do. In some European States there is no rule that says you can waive, but it is the practice. That, however, is unsatisfactory to the American lawyers because they do not know when they can and cannot waive. It is much more than an academic problem. It is much more apt in the future to produce an actual case of problem. Most probably in the United States, when people try to fulfil rules governing conflicts according to another system's approach.

LAUREL TERRY points out that the Restatement has in some ways made the conflict much stricter, but has in other ways loosened it up by introducing screening. So the Restatement has given with one hand and taken away with the other. An important point is the enforcement of these rules. Even though these rules stipulate that they are designed for discipline only – as a condition for obtaining a license – and are not to be used in a civil law suit, what has happened is that they are increasingly used in malpractice cases. Today they set the standard of conduct for lawyers for malpractice.

DIVIDED PROFESSIONS

YVONNE FEATHERSTONE* is the last to intervene. Her question concerns the matter of divided professions. How do the codes and the draft Directives deal with the divided professions especially in the host State – the State to which the lawyer goes? A practical example being the Dutch distinction between a notary and an advocate as relates to an English solicitor wishing to prepare a will in Holland for English clients.

JOHN TOULMIN remarks first of all that the matter of divided professions is very important as only Denmark does not have divided professions. The division in the continental European States is between advocates and notaries, whereas in the United Kingdom the division is made between barristers and solicitors. The European codes do deal with the division between barristers and solicitors. Notaries, however are not included in any of the European codes. Part of the reason for the exclusion is that the

* International Criminal Tribunal for the Former Yugoslavia, The Hague, The Netherlands.

<notary has so far been regarded under Article 55 of the Rome Treaty as being a profession that exercises public authority.

CONCLUSION

JOSEPH GRIFFIN closes the discussion and the day with a warning. Lawyers in general are going to be declared to be just another class of service providers if they are not going to agree on how to resolve these issues. They will be thrown on one big heap with the surveyors, accountants and architects. Lawyers must think more seriously about these issues in order to affect their own future, because if they do not, the politicians will.

*Reporter: Lilian Steffens**

* Faculty of Law, University of Leiden, The Netherlands.