

Lawyers around the world: Understanding our commonalities and respecting our differences

Laurel S. Terry, Pennsylvania

I was delighted to be asked to contribute to this publication in honor dedicated to *Dr. Karl Hempel* because *Dr. Hempel* has played a major role in facilitating my research on comparative lawyering. I am a U. S. lawyer and law professor. My research and teaching interests concern an area that is not typically addressed in Austrian universities but is very much an interest of *Dr. Hempel's* – the role and regulation of lawyers. Among other things, I am very interested in comparing the regulation of lawyers in the United States with the regulation of lawyers in other countries. I am also very interested in the rapidly-developing regulation of the cross-border practice of lawyers. (In other words, the regulation by one country of lawyers from another country who handle a matter in that first country.)

Both personally and through his writings, *Dr. Hempel* has substantially contributed to my research. *Dr. Hempel* is intimately familiar both with Austria's regulation of lawyers and with the efforts to regulate the cross-border practice of European Union lawyers. *Dr. Hempel* has been a leader of the bar in Austria, having served, among other things, as the Vice-President of the Vienna Bar Association or Rechtsanwaltskammern. (As one of Austria's nine "Länder" or "provinces", Vienna has its own bar association which has primary responsibility for regulating the lawyers in that province.)

In addition to his leadership roles within Austria, *Dr. Hempel* also has played a major leadership role within Europe. For many years, *Dr. Hempel* represented Austria in the CCBE. The CCBE was established in 1960 in order to study, consult, and provide representation with respect to the problems and opportunities for the legal profession arising from the 1957 Treaty of Rome which created the European Economic Community (EEC or EC). Each Member of the EU and certain designated "Observer States" select three representatives to the CCBE. The CCBE is now officially recognized by the European Community Commission as the representative and liaison body in the European Community for the Bars and Law Societies of the Member States.

Dr. Hempel's leadership role occurred at a critical time. *Dr. Hempel* was Austria's representative to the CCBE while the CCBE Code of Conduct was

being drafted and debated. The CCBE Code of Conduct is intended to govern the conduct of lawyers engaged in cross-border practice in the European Union and designated "Observer States".

Dr. Hempel generously shared his time and his expertise with me in 1992 when I was in Vienna as a Fulbright Research Scholar. Upon my return to the US, I published two papers that addressed these topics: *L. 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 *L. 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) (includes a discussion of Austria's efforts to implement the CCBE Code of Conduct.)

In addition to the information I obtained directly from *Dr. Hempel* in interviews with him, my papers draw heavily upon three articles authored by *Dr. Hempel*. These articles are *K. Hempel, Der CCBE-Standesrechtskodex und das österreichische anwaltliche Standesrecht*, 1991 *Österreichisches Anwaltsblatt* 209; *K. Hempel, Die Niederlassungsfreiheit in den Europäischen Gemeinschaften und die österreichische Anwaltschaft*, 1988 *Österreichisches Anwaltsblatt* 487; and *K. Hempel, Formen der Zusammenarbeit zwischen Rechtsanwältinnen im Neuen Europa*, 1991 *Österreichisches Anwaltsblatt* 221.

It is no exaggeration to say that *Dr. Hempel's* influence has spanned the continents. For example, I have presented papers on the CCBE Code of Conduct, which rely in part on *Dr. Hempel's* own articles, to the Association of American Law Schools ("AALS") and to the American Bar Association ("ABA"). (The AALS is the largest organization of US and Canadian law professors; the ABA consists primarily of US lawyers, but is open to lawyers from all countries and is the largest professional voluntary membership organization in the world.) I also presented a paper at a joint conference of the Netherlands Bar Association and the American Society of International Law and at other conferences. Thus, *Dr. Hempel's* influence extends well beyond Europe.

In addition to my contacts with *Dr. Hempel* in 1992, *Dr. Hempel* was a lecturer in 1995 in the *Comparative Legal Professions* course I taught in Vienna to US law students. Based on these contacts, I know that *Dr. Hempel* can add "excellence in teaching" to his many other accomplishments. (I hope to utilize *Dr. Hempel's* teaching skills again in 1998 when I will teach a course on *European Community Regulation of Lawyers' Cross-Border Practice* at the Institut für Europarecht at the University of Vienna.)

The value of these kinds of exchanges between lawyers from different countries is increasingly important given our global economy. As more and more individuals and businesses engage in commerce around the world, lawyers are either following those clients to new countries or are interacting with lawyers from other countries. Once lawyers engage in cross-border practice, issues arise such as who regulates the lawyers' behavior, what those regulations say, and what to do when the regulations conflict. Moreover, these issues take on significance not just for the lawyers who are

practicing across borders, *but for all those lawyers who must deal with lawyers who are engaged in such cross-border practice.* As a result, in order to better represent clients and to avoid misunderstandings, it is critical for lawyers around the world to understand our commonalities and to respect our differences.

In addition to understanding the cultural and historical differences among lawyers in different countries, both individually and institutionally, lawyers engaged in cross-border practice have had to consider the regulatory framework in which they are practicing. Some US lawyers engaged in cross-border practice, for example, have responded by trying to adapt their Home Country's regulations, designed for a domestic practice, to an international, cross-border practice. In addition to the fact that not all US standards would be appropriate when followed outside the US, the weakness of this approach is that a lawyer may be subject to conflicting regulation in the Home and Host Countries; this approach gives a lawyer little guidance on how to respond when subject to conflicting and mutually inconsistent regulation.

An alternative approach to the issue of cross-border practice is to attempt to harmonize the regulation of lawyers and develop an overarching set of standards that would apply to all lawyers from certain countries. The difficulties in this approach are twofold. Lawyers must learn enough about the history and culture of other lawyers to know when they in fact disagree about appropriate regulation or standards. (Such disagreement is not always transparent.) Second, even lawyers who understand their differences may have difficulty agreeing on a common approach.

Lawyers can, of course, follow a third approach, which is a hybrid. Under this third approach, some overarching principles might be developed, but individual countries might also retain their own regulations, even though the regulations of two countries may conflict. An effort would be made, however, to: 1) decide who regulates lawyers engaged in cross-border practice (Home and Host Country?); 2) identify conduct that would satisfy multiple sets of regulation; 3) establish priorities in regulation for those instances in which there is a conflict between regulation; 4) identify conflicts in regulation that may not be immediately apparent; and 5) establish a means of resolving disputes.

Lawyers' efforts to come to grips with these issues are being undertaken on a worldwide basis, on a regional basis, and on a bilateral or multilateral basis. On a worldwide level, legal services were addressed in an Annex to the General Agreement on Trade in Services, GATS, which in turn is annexed to the World Trade Organization Agreement. Despite the desires of some, the legal services annex did not contain any commitments by countries to further liberalize cross-border practice. Rather, the countries signing the annex committed to refrain from imposing further restrictions on the freedom of 'foreign' lawyers to practice law in that country (i.e. a "stand-still" provision.) Thus, GATS does not contain any agreement as to who regulates lawyers practicing in another country, what those regulations say,

or what to do when the regulations conflict. (One commentator – *John Toulmin*, an English barrister and Past President of the CCBE – has critiqued the limited approach taken by the WTO and suggested that the failure to treat the issue of trade by lawyers as a priority creates a risk that lawyers may be held to a benchmark created for another group of professionals, such as accountants. He further suggested that the CCBE Code of Conduct could be adopted by the WTO to govern worldwide cross-border practice by lawyers.)

Another effort being undertaken on a worldwide basis is represented by the *Guidelines for Foreign Legal Consultants*, which the International Bar Association is in the process of developing. These guidelines propose answers to some of the thorny questions about the regulation of cross-border practice and are intended to provide model legislation which could be adopted by countries to permit “foreign” lawyers to practice in a country using the lawyer’s Home State title and the title of Foreign Legal Consultant.

On a regional basis, Europe has been a leader in trying to facilitate cross-border practice of lawyers. The CCBE Code of Conduct, while not perfect, represents European lawyers’ concerted efforts to come to grips with the problems that arise from cross-border practice.

Europe is not the only region trying to grapple with the new reality of the cross-border practice of law. The North American Free Trade Agreement – NAFTA – certainly contemplates the cross-border practice of lawyers from Canada, Mexico and the United States. No common code of conduct comparable to the CCBE Code of Conduct exists, however, nor has there been any agreement as to which regulations would govern such cross-border practice nor what to do when the regulation conflicts.

In addition to these regional efforts, numerous bilateral and multilateral efforts are underway to facilitate the cross-border practice of lawyers. One such effort is the agreement between the American Bar Association and the French and Dutch Language Bars of Brussels. This agreement, like the CCBE Code of Conduct, attempts to specify the regulations that apply to US lawyers practicing in Brussels and to establish a mechanism for responding to conflicts among the regulations to which such US lawyers are subject. The ABA-Brussels Bar Agreement is notable, among other reasons, because it uses the CCBE Code of Conduct as the primary code with which lawyers practicing permanently in Brussels must comply. Other efforts to obtain bilateral agreements about cross-border practice include the discussions between Japan and the United States on trade issues, which discussions have touched on the cross-border practice of lawyers, and the multilateral discussions among the ABA, CCBE and Japanese Bar Association.

The CCBE Code of Conduct, which represents one of the leading efforts to respond to cross-border practice issues, contains provisions that mirror each of the three approaches that have been taken to cross-border practice. For example, some CCBE Code provisions have substantive content; they are comparable to an overarching code and attempt to set forth minimal regulations with which all EU (and Observer State) lawyers must comply.

Thus, CCBE Code of Conduct Rule 3.8 requires a lawyer to segregate client funds from other funds, requires client funds to be held in an identifiable account in a bank or comparable institution, requires that records be maintained, and requires that the lawyer not use these funds for purposes or clients other than those for which they were intended.

Second, the CCBE Code of Conduct contains provisions that operate primarily as conflict of laws provisions; they specify whose regulations apply should there be a conflict, rather than establishing substantive standards. CCBE Code of Conduct Rule 2.6 is an example of such an approach. This rule specifies that a lawyer may not advertise or seek personal publicity where it is not permitted, even if the regulations in the lawyer's Home State would permit such advertising.

A final type of provision in the CCBE Code of Conduct is represented by Rule 5.3. Rule 5.3 does not adopt a substantive rule, does not specify whose rule takes precedence, but rather seeks to educate lawyers so as to avoid any misunderstanding or conflict. Thus, Rule 5.3 requires a lawyer who is sending a communication to a lawyer in another Member State to clearly express the intention to have the correspondence between lawyers remain confidential (and not be shown to the recipient lawyer's client). The recipient lawyer has a corresponding duty to return the correspondence to the sender without revealing it to anyone if the recipient is unable to ensure its status as confidential.

Thus, as the CCBE Code of Conduct demonstrates, in responding to cross-border practice, it may be helpful to draw upon all three approaches to the issue. Lawyers who study the history, culture and regulation of other lawyers will undoubtedly be better suited to respond to the regulatory questions that arise in response to cross-border practice.

In the last thirteen years, US lawyers have begun encountering similar cross-border practice difficulties, *even with respect to their domestic law practices*. US lawyers are regulated by individual states, rather than the federal government. Until 1983, most state regulation of lawyers was based on the ABA's Model Code of Professional Responsibility and was substantially similar. Beginning in 1983, however, state regulation of lawyers began to diverge significantly. It is now true that many lawyers are licensed to and do practice in more than one state. It is also true that a lawyer may be subject to conflicting regulations. (For example, New Jersey requires a lawyer to reveal confidential information to prevent a client from committing a criminal, illegal or fraudulent act likely to result in substantial injury to the financial interest or property of another. New York prohibits disclosure of such information.) Thus, it has become increasingly important for US lawyers to develop a system to respond to the regulatory problems raised by such cross-border practice.

The responses in the US have not been dissimilar to the responses throughout the world. One response has been to call for an overarching set of regulations to apply to all US lawyers. Another response has been to try to adapt one's Home State's regulations to practice in another state. A third

response has been to identify how conflicts between regulations should be handled. The ABA, for example, recently promulgated a new version of Model Rule of Professional Conduct 8.5 to aid in resolving such conflicts. This rule provides:

Rule 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

ABA Model Rule of Professional Conduct 8.5, like the CCBE Code of Conduct, has not been without its critics. The disagreement demonstrates once again how difficult it can be to resolve cross-border practice issues, even within a single country in which lawyers have a substantially similar history and culture. This disagreement also shows how one legal profession – that of the US – may benefit by seeing the development throughout the world in response to cross-border practice issues.

In sum, I am very happy to be able to pay tribute to *Dr. Karl Hempel* who has been a world leader in facilitating understanding of other lawyers and other legal cultures. Thanks to his efforts in the CCBE, as well as his other cross-cultural legal exchanges, lawyers are much further along in their identification of shared principles, in their understanding of conflicts between legal cultures, and in developing a method to respond to such conflicts. In short, *Dr. Hempel* has helped lawyers around the world understand our commonalities and respect our differences. These efforts redound to the benefit of clients and society at large and we are in his debt.