

# Lawyer's Ethics

Michael G. Karnavas





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This material is a companion to the Ethics E-Course for national attorneys. Its goal is modest: to present a brief, yet contextualized, summary of the ethical obligations of attorneys / advocates (hereinafter “lawyers”).

Article 53 of the national Constitution<sup>1</sup> holds the legal profession to be “an autonomous and independent public service.” To this end, the Attorney’s Law<sup>2</sup> and Code of Professional Ethics of the Attorneys, Attorney’s Professional Associates and Attorney’s Trainees of the MBA (“MBA Code”)<sup>3</sup>, provide the legal and regulatory framework to ensure that the autonomy and independence of the legal profession, and in particular lawyers, are realized within certain defined legal and ethical boundaries. However, considering that the Chamber of Attorneys has signed on to the Council of Bars and Law Societies of Europe Charter of Core Principles of the European Legal Profession (“CCBE Charter”) and CCBE Code of Conduct for European Lawyers (“CCBE Code of Conduct”)<sup>4</sup>, the fact that the new criminal procedure has adopted adversarial modalities from common law systems, and that the practice of the national lawyers is not necessarily confined to their national territory, it behoves exploring and comparing other codes of legal ethics and professional conduct. As such, aside from analyzing the MBA Code in relation to the CCBE, this paper will also examine codes for civil and common law jurisdictions and the International Bar Association (“IBA”).

While this material is by no means an exhaustive treatise on legal and professional ethics, it is hoped that the survey of the fundamental ethics and professional principles – as applied in the various national jurisdictions including the national one – will assist the lawyers in better understanding their ethical and professional obligations in their day-to-day professional affairs.

**Michael G. Karnavas**

<sup>1</sup> Constitution, Official gazette 52/91, 01/92, 31/98, 91/01, 84/03, 107/05, 03/09, 49/11 (hereinafter: “Constitution”).

<sup>2</sup> Attorney’s Law, Official gazette No. 59/02, 60/2006, 29/2007, 106/2008, 135/2011, 113/2012 and 148/2015. Constitutional Court decisions Official gazettes No. 134/2002, 10/2003, 34/2003, 8/2008, 20/2009 and 117/2009 (hereinafter: “Attorney’s Law”).

<sup>3</sup> Code of Professional Ethics of The Attorneys, Attorney’s Professional Associates and Attorney’s Trainees of the Chamber of Attorneys, English translation by OSCE Mission to Skopje, 4 August 2015, (hereinafter: “MBA Code”).

<sup>4</sup> Although the CCBE is not a European Union institution, the CCBE Charter and the CCBE Code of Conduct are not purely advisory. The CCBE Code of Conduct was intended to be adopted by all European States (Art. 1.3 of the CCBE Code of Conduct), and indeed, most countries have already adopted and incorporated the CCBE Code of Conduct into the national legislation. See discussion of national codes below, Introduction.



# Content

<b>Introduction</b>	7
<b>Section 1: Independence</b>	15
Independence from external influences	17
Independence from client and professional detachment	22
Independence from self-interest	27
<b>Section 2: Honesty, Integrity, and Fairness</b>	33
<b>Section 3: Loyalty to the Client's Interests</b>	43
<b>Section 4: Confidentiality</b>	49
<b>Section 5: Conflict of interest</b>	59
<b>Section 6: Diligence</b>	71
<b>Section 7: Lawyer's Fees</b>	77
<b>Section 8: Continuing Legal Education. Competence.</b>	
Training of Trainees	85
<b>Section 9: Advertising</b>	89
<b>Section 10: Discipline</b>	95
<b>Conclusion</b>	101
<b>ANNEX 1 – Table of principles and corresponding provisions</b>	103





## Introduction

Lawyers are essential for the appreciation and application of the rule of law in all societies the world over. Lawyers advocate for the advancement of human rights, protect the rights of their clients, and foster the administration of justice. In order to carry out these critical tasks, lawyers must “at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.”<sup>5</sup> “Legal ethics,” also known as “professional responsibility” is the set of standards of minimally accepted conduct required of a lawyer.<sup>6</sup> These standards comprise of ethical principles and duties that members of the legal profession “owe to one another, their clients, and to the courts.”<sup>7</sup>

In the various legal traditions ethical standards regulating the legal profession are codified in codes of conduct, regulations, guidelines, procedural rules, and legislation. Having analyzed the ethical standards in various legal traditions, one can deduce several core principles as guiding the legal profession worldwide, including independence, honesty, integrity, loyalty, confidentiality, fair treatment, diligence, candor, and competence. While many core principles are shared across legal systems, a lawyer’s interpretation and understanding of them is shaped and nuanced by the legal system in which he or she operates. “[P]rofessional legal ethics is ... subjective and contextual, because the legal profession and the practice of law are necessarily defined in large part by the specific culture of which they are a product.”<sup>8</sup> What is ethical for a lawyer in one jurisdiction may be considered unethical or even illegal in another as the following vignette illustrates:

During a recent visit to the International Criminal Tribunal for the Former Yugoslavia, I met one of the staff lawyers who explained that in discussing preparation of the witnesses for cross-examination during trial several lawyers from different countries expressed opposing views on the questions of ethics involved. An Australian lawyer felt that from his perspective it would be unethical to prepare a witness; a Canadian lawyer said it would be illegal; and an American lawyer’s view was that not to prepare a witness would be malpractice.”<sup>9</sup>

<sup>5</sup> United Nations (“UN”) Basic Principles on the Role of Lawyers (1990), para. 14.

<sup>6</sup> BLACK’S LAW DICTIONARY 904 (7th ed. 1999). Black’s Law Dictionary defines “Legal ethics” as “the standards of minimally acceptable conduct within the legal profession, involving the duties that its members owe one another, their clients, and the courts.”

<sup>7</sup> *Id.*

<sup>8</sup> Philip M. Genty, *The Challenges of Developing Cross-Cultural Legal Ethics Education, Professional Development, and Guidance for the Legal Professions*, 1 J. PROF. L. 37, 41 (2011).

<sup>9</sup> Mary C. Daly, *The Dichotomy between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by US and Foreign Lawyers*, p. 1154, (“Daly”), citing Karen L. K. Miller, *Zip to Nil?: A Comparison of American and English Lawyers Standards of Professional Conduct*, ICA32 ALI-ABA 199, 204 (1995).

Any analysis or understanding of ethical principles cannot be done without taking into account the functions of a lawyer within a given legal system. The new Criminal Procedure Law combines aspects of the inquisitorial and adversarial systems, raising novel ethical questions for lawyers. It is thus worth making some general observations on the differences on the role of the lawyer in the civil law and common law systems.

In the nowadays almost abandoned civil law tradition, the objective of the trial was to seek the material truth. Trials were dominated by judges who had considerable control over the proceedings. Civil law judges were responsible for conducting the investigations, gathering evidence, calling and questioning witnesses, determining the facts, and taking other measures judges believe are useful for the discovery of the material truth. The civil law trial was based on the investigation as recorded in the dossier. The civil law lawyer was responsible for making investigative requests, suggesting questions to be put to witnesses or the accused by the judges, presenting arguments at trial based on the dossier, and overall, protecting the client's rights.

By contrast, in the common law system and in the introduced adversarial systems on the continent as well, trials are party driven. Cases are decided as presented by the parties and the judges act as referees who oversee the conduct of proceedings and the admission of evidence. "The adversarial system trusts the parties to properly and honestly present their side of the argument, and expects that the truth will emerge from a robust presentation of each side's case."<sup>10</sup> This requires lawyers to be much more active: they are responsible for consulting with the client, gathering evidence, examining witnesses, and presenting arguments at trial. Lawyers are both agents of their clients and officers of the court. As a result, many ethical rules revolve around ethical dilemmas as to how a lawyer can fulfil his or her duties to the court while acting in the best interests of the client. One such example is when the client intends to submit false evidence to the court.

A notable distinction between the civil and common law systems is the drafting style of the codes regulating the legal profession. In the civil law system, ethical codes are generally drafted as broad brush principles intended to guide a lawyer in exercising his or her professional discretion. In the common law system, ethical codes are generally drafted as concrete legal rules. Commentary to common law ethical rules and extensive jurisprudence provide detailed advice and situational examples as to how a lawyer should resolve particular ethical dilemmas in practice. However, most codes combine these two drafting styles.

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<sup>10</sup>Felicity Nagorcka, Michael Stanton & Michael Wilson, *Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U. L. REV.448, 465-66 (2005) ("Nagorcka et al., Comparative Legal Ethics").

In analyzing both the civil law and common law ethical codes, it is important to distinguish the character of specific provisions. While some provisions are drafted as concrete legal rules which restrict or regulate a lawyer's conduct, others are merely inspirational and intended to guide the lawyer's professional discretion. For example, some rules under the MBA Code are broad and inspirational such as Rule 13, which provides that a lawyer must "show honored resistance towards any breach of the principles of democracy and dignity of persons." Other rules are more concrete and regulate the lawyer's conduct in particular scenarios, such as the duty under Rule 3 of the MBA Code to withdraw from a case when a conflict of interest arises in the course of representation.

In both civil and common law systems, lawyers consider themselves protectors of their clients' rights. Yet between the two systems, lawyers may hold remarkably different perceptions of their role as advocates, in interpreting the ethical principles they must follow, and of their due diligence obligations towards their clients. The following anecdotes are illustrative.

The first anecdote from John Leubsdorf's *Man in His Original Dignity: Legal Ethics in France* is reflective of the civil law tradition:

In 1894, when Alfred Dreyfus's brother asked Edgar Demange to undertake his brother's defence against espionage charges, Demange made a strange request: he wanted to study the merits of the case before deciding whether to take it. He warned that "if my conscience forbids me from defending your brother ... my refusal will be known and discussed; I will be your brother's first judge." Four years later, the Dreyfus family sought to add to the defence Fernand Labori, who made an even stranger request: not to be paid.<sup>11</sup>

The second anecdote from John Phillips' *Advocacy with Honour* is reflective of the common law tradition:

On a November evening in 1792, Thomas Erskine of Lincoln's Inn was walking home across Hampstead Heath after a day in the courts. Three days earlier, he had accepted a brief to defend the famous pamphleteer and agitator, Thomas Paine, who had been charged with treason following his publication of the second part of *The Rights of Man*. Erskine was brought up short by his friend Lord Loughborough, who said "Erskine, I have a message from the Prince of Wales himself. Your conduct is highly displeasing to the King." Six years earlier, Erskine had been appointed Attorney-General to the Prince, a position which involved a handsome retainer and the prospect

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<sup>11</sup> JOHN LEUBSDORF, *MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE* 14 (2001).

of high judicial appointment. Lord Loughborough continued “You must not take Paine’s brief.” Erskine, who personally disapproved of Paine’s work, did not hesitate. “But I have been retained”, he said, “and I will take it, by God!” He consequently later lost his position as Attorney-General. In his defence of Paine, Erskine addressed the jury on the independence of the English Bar and said *“I will forever, at all hazards, assert the dignity and independence of the English Bar; without which, impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say, that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge and of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment; puts the heavy influence of perhaps mistaken opinion into the scale against the accused in whose favour the benevolent principles of English law makes all presumptions, and which commands the very judge to be his counsel.”*<sup>12</sup>

The differences in the role of a lawyer highlighted by these two anecdotes have important consequences. For example, the French lawyer, as in Leubsdorf’s example, is considered “an independent person who lends his eloquence and credibility to someone in whose cause he believes, and who needs help.”<sup>13</sup> The French lawyer may reject or withdraw from a case he or she does not believe in, provided the lawyer gives timely notice to the client.

By contrast, in common law systems, such a withdrawal may be considered unethical in light of the lawyer’s duty of loyalty and commitment to the client. Common law lawyers “advocate their clients’ interests with the ‘maximum zeal’ permitted by law, and are morally responsible neither for the ends pursued by their client nor the means of pursuing those ends, provided both are lawful.”<sup>14</sup> Phillip’s example shows that common law lawyers primarily see themselves as independent of external pressures (such as the government) in representing the client’s interests, particularly where the client’s cause is controversial or unpopular.

This key difference in the perceived role of a lawyer between the two systems has important implications on other ethical duties such as conflicts of interest, confidentiality, and withdrawal, as will be discussed throughout this material.

<sup>12</sup> JOHN PHILLIPS, *ADVOCACY WITH HONOUR* 1-2, 17 (1985).

<sup>13</sup> JOHN LEUBSDORF, *MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE* 15 (2001).

<sup>14</sup> Nagorcka et al., *Comparative Legal Ethics* 465-466, citing David Luban, *Twenty Theses on Adversarial Ethics* in MICHAEL LAVARCH AND HELEN STACY (EDS), *BEYOND THE ADVERSARIAL SYSTEM* 134, (1999).

Each Section in this material will focus on a lawyer's particular ethical duty under the Attorney's Law and the MBA Code. The selected topics include:

1. Independence;
2. Honesty, Integrity, and Fairness;
3. Loyalty to the Client's Interests;
4. Confidentiality;
5. Conflict of Interest;
6. Diligence;
7. Lawyer's Fees;
8. Continuing Legal Education, Competence, and Training of Trainees;
9. Advertising; and
10. Discipline.

While the plain language of a domestic ethical rule may remain the same under the new Law on Criminal Procedure, interpretation may differ. Additionally, as a result of globalization, more lawyers will be engaged in cross-border practice, necessitating an understanding of multijurisdictional and international legal ethics. A contextual understanding of comparative legal ethics leads to a greater appreciation of ethical principles within the national legal tradition and abroad.

In order to give context to each ethical duty, the domestic codes will be prefaced by an analysis of international principles and codes of conduct such as the CCBE Charter and the International Bar Association Principles on Conduct for the Legal Profession ("IBA Principles"), as well as various domestic codes of conduct of the civil and common law traditions.

The CCBE is an association representative of bar associations and other legal societies of 32 European Member States and 13 Observer States.<sup>15</sup> Its Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers are designed to harmonize ethical principles common to the entire European legal profession in order to avoid the dilemma and confusion of being subject to multiple sets of ethical rules. The CCBE Code of Conduct expresses "a consensus of all the Bars and Law Societies of the European Union and European Economic Area" and urges that national rules of ethics are harmonized and interpreted consistently with the CCBE Code of Conduct.<sup>16</sup> The CCBE Charter and CCBE Code of Conduct apply to Observer Members of the CCBE. To the extent that the CCBE Code of Conduct does not regulate a particular issue, a lawyer engaged in a cross-border practice is "bound to observe the rules of the Bar or Law Society to which he belongs."<sup>17</sup>

<sup>15</sup> About the CCBE, available at <http://www.ccbe.eu/index.php?id=22&L=0>.

<sup>16</sup> CCBE Code of Conduct, Art. 1.3.2.

<sup>17</sup> *Id.*

The IBA is a voluntary association of international legal practitioners, bar associations, and legal societies.<sup>18</sup> The IBA Principles aim at “establishing a generally accepted framework to serve as a basis on which codes of conduct may be established by the appropriate authorities for lawyers in any part of the world.”<sup>19</sup> They “express the common ground which underlies all the national and international rules which govern the conduct of lawyers, principally in relation to their clients.”<sup>20</sup> The IBA Principles are aspirational and non-binding. They are not intended to be used as criteria for professional misconduct or malpractice proceedings,<sup>21</sup> but are nonetheless instructive and provide valuable commentary.

For comparative purposes, France, Germany, the Netherlands, and Belgium were selected as representatives of the major civil law systems. The Netherlands is an interesting example as it was influenced by both the French and German legal systems. Belgium is also an interesting example as lawyers are regulated by regional bar associations. In Wallonia, the legal profession is regulated by the *Ordre des Barreaux Francophones et Germanophones de Belgique* (Order of Francophone and Germanophone Bars, “OBFG”). In Flanders, lawyers are regulated by the *Orde van Vlaamse Balies* (“Flemish Bar”). The two Belgian bar associations have adopted different professional rules codes.

The US and United Kingdom (“UK”) were chosen as representatives of the major common law systems. In the US, each of the 50 states has their own code of conduct for lawyers which are binding on members of a state’s bar. In an effort to harmonize ethical standards, the American Bar Association (“ABA”), a voluntary but influential bar association, promulgated the Model Rules of Professional Conduct. Many of the Model Rules have been incorporated into the ethics rules of most states. The ABA Model Rules will be used throughout this material to explain the lawyer’s various ethical duties in the US.

In the UK, the provision of legal services is split between barristers and solicitors. Barristers specialize in courtroom advocacy whereas solicitors work directly with clients and provide legal advice. In contrast to the US lawyer, who consults directly with the client, barristers primarily act on the instructions of a solicitor. In England and Wales, barristers are regulated by the Bar Standards Board. The Bar Standards Board Handbook (“BSB Handbook”) will be used throughout to discuss the barrister’s ethical duties.

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<sup>18</sup> About the IBA, available at <http://www.ibanet.org/>.

<sup>19</sup> IBA Principles, Preamble.

<sup>20</sup> IBA Commentary, Introduction, para. 3.

<sup>21</sup> IBA Principles, Preamble

However, this material is not an attempt to provide a complete comparative study of legal ethics but is intended to familiarize lawyers with various rationales underlying fundamental ethical principles. This material is complementary reading material to the Ethics E-Course. It is designed to familiarize national lawyers with the fundamental principles of Ethics and prepare them to take the ethics examination. The material cannot provide hard and fast guidance to resolve every ethical dilemma that a lawyer may encounter in practice. Not all answers are readily available, especially when it comes to the more nuanced issues that practice and experience cannot always solve with certainty. Rather, the purpose of this material is to introduce the fundamental ethical principles and duties, and a variety of their interpretations. Hopefully, this material will help lawyers in understanding the fundamental principles applicable in their country, and with these principles in mind, allow them to examine issues and explore proposed actions when confronted with an ethical issue.





## Section 1: Independence

The lawyer's independence is one of the core values of the legal profession; a principle respected in both civil and common law systems. Virtually all international and national codes of conduct provide for various lawyer's duties that ensure the lawyer's independence.<sup>22</sup>

The independence of the legal profession is explicitly provided in various legal instruments. Article 53 of the national Constitution states: "Attorneyship is an autonomous and independent public service, providing legal assistance and carrying out public mandates in accordance with the law."<sup>23</sup> The principle of independence is also found in the Attorney's Law,<sup>24</sup> and MBA Code.<sup>25</sup>

The CCBE Code of Conduct and the IBA Principles explicitly recognize the independence of lawyers as a core principle of the legal profession worldwide.<sup>26</sup>

The CCBE Code of Conduct stresses the lawyer's duties to the client, court, the legal profession in general, and society. The Preamble of the CCBE Code of Conduct provides:

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

- the client;
- the courts and other authorities before whom the lawyer pleads the client's cause or acts on the client's behalf;
- the legal profession in general and each fellow member of it in particular;
- the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.<sup>27</sup>

The CCBE Charter's principle (a) is "the independence of a lawyer, and the freedom of the lawyer to pursue the client's case."<sup>28</sup> According to the CCBE Commentary on the Charter of Core Principles of the European Legal Profession ("CCBE Commentary on the Charter"), a lawyer "must

<sup>22</sup> For example, see IBA Principles, principle 1; CCBE Charter, principle (a); CCBE Code of Conduct, Art. 2.1; French RIN, Art. 1.1; German Rules of Professional Practice, para.1; Dutch Rules of Conduct, Rule 1.2; Flemish Code of Ethics, Art. 1. 1; ABA Model Rules for Professional Conduct, Rule 5.4; UK Code of Conduct, CD4.

<sup>23</sup> Constitution, Art. 53.

<sup>24</sup> Attorney's Law, Art. 2.1.

<sup>25</sup> Independence of a lawyer is ensured through various Rules of the MBA Code: Rules 1, 2, 5, 7, 13, 14, 17, 22.

<sup>26</sup> CCBE Charter, principle (a); IBA Principles, principle 1.

<sup>27</sup> CCBE Code of Conduct, Preamble, Art. 1.1, "The Function of the Lawyer in society".

<sup>28</sup> CCBE Charter, principle (a).

be independent of the state and other powerful interests....” and “must also remain independent of his or her client if the lawyer is to enjoy the trust of third parties and the court.”<sup>29</sup>

Similarly, the Preamble of the IBA Principles emphasizes the lawyer’s duties towards his or her clients: “[l]awyers ... place the interests of their clients above their own, and strive to obtain respect of the Rule of Law.” Principle 1 of the IBA Principles is “Independence”: “[a] lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation....”<sup>30</sup> The IBA Commentary explains that a lawyer must “act for the client in a professional capacity free from direction, control or interference.”<sup>31</sup>

The Attorney’s Law explicitly sets out a lawyer’s independence. Article 7 of the Attorneys Law states: “An individual attorney conducts the legal profession independently.” Rule 13 of the MBA Code provides that a lawyer “must prevent any incorrect attitude from the representatives of [the courts or institutions] towards him or herself and the client.”

According to the CCBE, the IBA, and the MBA, a lawyer is independent when he or she is able to put the client’s interests first and to act without any interference in the lawyer-client relationship, including outside pressure and the lawyer’s own interests. As such, there are three dimensions to the lawyer’s independence:

- Independence from external influences;
- Independence from the client and professional detachment; and
- Independence from the lawyer’s self-interest.

Notwithstanding the universality of the principle of independence of lawyers, it is essential to appreciate that what constitutes “independence” varies remarkably depending on the legal tradition. Any understanding of the principle of independence as it relates to the ethical duties of a lawyer depends on the role of a lawyer and the values attached to the legal profession in a given legal system.

The similarities and differences in the interpretation of the lawyer’s independence are best seen and addressed by contrasting the ways in which the various codes deal with these three dimensions of independence.

<sup>29</sup> CCBE Commentary on the Charter, principle (a).

<sup>30</sup> IBA Principles, principle 1.

<sup>31</sup> IBA Commentary, Explanatory note 1.2.

## INDEPENDENCE FROM EXTERNAL INFLUENCES

### CCBE

Principle (a) of the CCBE Charter is “[i]ndependence of the lawyer, and the freedom of the lawyer to pursue the client’s case.” The CCBE Commentary provides that:

[a] lawyer needs to be free – politically, economically and intellectually – in ... representing the client. This means that the lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed without this independence from the client there can be no guarantee of the quality of the lawyer’s work.<sup>32</sup>

The CCBE Code of Conduct adds more detail to this principle: “[a] lawyer must ... avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court or third parties.”<sup>33</sup> Independence is necessary regardless of whether it is a non-contentious matter or litigation.<sup>34</sup>

If a lawyer gives advice “only to ingratiate him- or herself, to serve his or her personal interests or in response to outside pressure,”<sup>35</sup> such an advice has no value.

### IBA

The IBA Commentary provides that “[i]t is indispensable for the administration of justice and the operation of the Rule of Law that a lawyer acts for the client in a professional capacity free from direction, control or interference.”<sup>36</sup> The IBA Commentary notes that it will be difficult for a lawyer to protect clients if he or she is subject to interference from others, “especially those in power.”<sup>37</sup> The IBA Commentary further explains that individual practicing lawyers, governments, and civil society should “give priority to independence of the legal profession over personal aspirations.”<sup>38</sup>

<sup>32</sup> CCBE Commentary on the Charter, principle (a).

<sup>33</sup> CCBE Code of Conduct, Art. 2.1.1.

<sup>34</sup> CCBE Code of Conduct, Art. 2.1.2.

<sup>35</sup> *Id.*, Art. 2.1.2.

<sup>36</sup> IBA Commentary on IBA International Principles on Conduct for the Legal Profession (“IBA Commentary”), Explanatory note 1.2.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

## Civil Law

In France, Article 1.1 of the French National Internal Regulations on the Profession of an Advocate (“French RIN”) state: “[t]he profession of lawyer is liberal and independent profession in whatever form it is practiced.”<sup>39</sup> Under Article 1.3 of the RIN Lawyers “shall exercise [their] functions with ... independence....” The French RIN do not provide further guidance on the lawyer’s duty of independence.

Christian Charrière-Bournazel, Former Bâtonnier of the Paris Bar Association and President of the National Council of Bars, provides one explanation of the meaning of independence:

While freedom implies the right for everyone to exercise their personal rights in their own interests limited only by the requirements of the law, independence for a lawyer is charged with ethical content. The independence of a lawyer does not mean the liberty to exercise a right, but the willingness to always apply sufficient distance in order to put acts the lawyer considers useful in relation with the law and ethical rules.<sup>40</sup>

According to Christian Charrière-Bournazel, acting with conscience is inseparable from acting with independence.<sup>41</sup> This means that in their independence, lawyers are guided by the fundamental values of law, duty, and honor.<sup>42</sup> Christian Charrière-Bournazel points that although the French lawyer is free to advocate for or against the state, administration or magistrate, or their officials, once a lawyer engages in political life (for example, becomes a Minister) this would be incompatible with his or her practice of the law.<sup>43</sup>

A French lawyer must be independent from external influences. Article 16 of the French RIN prohibits a lawyer from participating in a “network” if it compromises his or her independence. Under Article 16.1 of the French RIN, “network” is defined as “any formal or informal inter-professional arrangement between one or more lawyers and any members of another profession or business, establishing an enduring community of interest with the objective of developing a current or potential clientele and/or promoting the provision of

<sup>39</sup> Decision of 12 July 2007 on the adoption of the National Internal Regulations of the Legal Profession (Décision du 12 juillet 2007 portant adoption du règlement intérieur national (“RIN”) de la profession d’avocat (Art. 21-1 de la loi du 31 décembre 1971 modifiée)(unofficial translation), Art. 1.1.

<sup>40</sup> Round table « Indépendance de l’avocat » : Intervention du Président Charrière-Bournazel au 56<sup>e</sup> Congrès de l’Union Internationale des Avocats, Dresde, 1 November 2012 available at [http://cnb.avocat.fr/Table-ronde-Indépendance-de-l-avocat-Intervention-du-Président-Charriere-Bournazel-au-56e-Congrès-de-l-UIA-Dresde-1er\\_a1398.html](http://cnb.avocat.fr/Table-ronde-Indépendance-de-l-avocat-Intervention-du-Président-Charriere-Bournazel-au-56e-Congrès-de-l-UIA-Dresde-1er_a1398.html) (“Christian Charrière-Bournazel’s speech”).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Christian Charrière-Bournazel’s speech, part A. See also Paris Bar Internal Regulations, Art. 6.16.1 on Incompatible professions, available at [http://dl.avocatparis.org/reglement\\_interieur/RIBP.htm](http://dl.avocatparis.org/reglement_interieur/RIBP.htm) (“RIBP”).

additional services.”<sup>44</sup> For example, the lawyer’s independence will be compromised if the lawyer agrees “to being in a subordinate position or subject to the supervision of their professional activities by other non-lawyer professionals,” or “arrangements which lead to the distribution or sharing of income or to a distribution of remuneration.”<sup>45</sup>

In Germany, the Federal Lawyers’ Act<sup>46</sup> prohibits lawyers from entering into any ties that may pose a threat to their professional independence.<sup>47</sup> The German Rules of Professional Practice instruct lawyers to protect their clients from the state and administration authorities which may violate their rights. The German Rules of Professional Practice provide that a lawyer is an independent adviser and representative in all legal matters and “has to protect his client from a loss of rights.”<sup>48</sup> To this end, the lawyer has “to protect [the client] from wrong decisions taken by the courts and authorities and has to act as his client’s safeguard against unconstitutional impairment of his rights and against the government exceeding its powers.”<sup>49</sup>

In the Netherlands, the Rules of Conduct of the Netherlands Bar Association (“Dutch Rules of Conduct”) ensure the lawyer’s independence from others: “[t]hey should perform [their] task completely independently. This would be incompatible, for example, with granting commission to intermediaries or other third parties for the purpose of securing engagements, or with making arrangements with persons other than their own clients on the manner in which matters will be handled.”<sup>50</sup>

In Belgium<sup>51</sup>, under the Code of Ethics for Lawyers of the Flemish Bar (“Flemish Code of Ethics”), independence is an essential duty of a lawyer.<sup>52</sup> The Flemish Code of Ethics requires “absolute independence, free from all pressure, especially from his [lawyer’s] own interests or outside influence. A lawyer must avoid any impairment of his independence and may not disregard professional ethics to please

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<sup>44</sup> French RIN, Art. 16.1.

<sup>45</sup> *Id.*, Art. 16.9.

<sup>46</sup> The Federal Lawyers’ Act, English translation provided by the CCBE available at <http://www.ccbe.eu/index.php?id=107>.

<sup>47</sup> *Id.*, para.43(a).

<sup>48</sup> The Rules of Professional Practice (2015) (“German Rules of Professional Practice”), English translation provided by the German Chamber of Federal Attorneys (Bundesrechtsanwaltskammer) <http://www.brak.de/fuer-anwaelte/berufsrecht>.

<sup>49</sup> German Rules of Professional Practice, para. 1.

<sup>50</sup> Netherlands Bar Association, The Rules of Conduct of Advocates (1992), (“Dutch Rules of Conduct”), English translation by CCBE available at <http://www.ccbe.eu/index.php?id=107>.

<sup>51</sup> Belgian lawyers are organized in two different bars. For Wallonia, the bar is the *Ordre des barreaux francophones et germanophone de Belgique*, (Order of French-speaking and German-speaking Bars in Belgium, OBFGB); in Flanders it is the *Orde van Vlaamse Balies* (“Flemish Bar”). Every lawyer has to be a member of either of these bars. The two bars have adopted separate professional codes of ethics.

<sup>52</sup> Flemish Bar, Code of Ethics for Lawyers, Art. 1.1. (“Flemish Code of Ethics”), English version available at the Flemish Bar web-site, <http://www.advocaat.be/EnglishPage.aspx?genericid=97>.

the client, the judge or third parties ... in all activities.”<sup>53</sup> Similarly, the French- and German-speaking Federal Bar Code of Ethics (“OBFG Code of Ethics”) provides that lawyers have a duty to represent their clients freely, without being guided by any other concern than the legitimate interests and justice.<sup>54</sup> It is a lawyer’s duty to “defend and advise the client in all independence and liberty.”<sup>55</sup>

### **Common Law**

Common law codes of conduct have similar provisions on the lawyer’s independence. A lawyer cannot diligently pursue the client’s interests if he or she is subject to direction, control, or pressure from a third party.

In the US, the ABA Model Rules provides that “in representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”<sup>56</sup> In order to maintain independence, a US lawyer must “not permit a person who recommends, employs, or pays the lawyer ... to direct or regulate the lawyer’s professional judgment.”<sup>57</sup> Third parties may have interests that differ from those of the client (for example, minimizing the time and money spent on representation or interest in the particular way the representation is evolving). A US lawyer may accept compensation from a third party if the client consents and “there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.”<sup>58</sup>

In the UK, a lawyer’s independence is a “core duty”.<sup>59</sup> The BSB Handbook provides that the interests of justice and the client’s best interests can only be properly served, “if you [the barrister] conduct yourself honestly and maintain your independence from external pressures.”<sup>60</sup> The BSB Handbook provides examples of how a barrister can be seen as compromising his or her independence:

1. offering, promising or giving any commission or referral fee (of whatever size) or a gift (apart from items of modest value) to any client, professional client (such as a solicitor or other barrister), or other intermediary;
2. lending money to any such client, professional client or other intermediary; or

<sup>53</sup> Flemish Code of Ethics, Arts.1.1.-1.2.

<sup>54</sup> Order of French- and German-speaking Bars, French- and German-speaking Federal Bar Code of Ethics, 12 November 2012, Art. 1.1 (“OBFG Code of Ethics”) (available in French only at [http://www.barreaudebruxelles.info/images/publications/recueil\\_codeon\\_rdb.pdf](http://www.barreaudebruxelles.info/images/publications/recueil_codeon_rdb.pdf)(last accessed on XX).

<sup>55</sup> *Id.*, Art. 1.2.

<sup>56</sup> ABA Model Rule 1.2.

<sup>57</sup> ABA Model Rule 5.4(c).

<sup>58</sup> ABA Model Rules, Rule 1.8(f).

<sup>59</sup> BSB Handbook, CD4.

<sup>60</sup> BSB Handbook, gC14.

3. accepting any money (whether as a loan or otherwise) from any client, professional client or other intermediary, unless it is a payment for the professional services or reimbursement of expenses or of disbursements made on behalf of the client.<sup>61</sup>

### ***National Legislation***

Like in the other countries discussed above, lawyers here must also be free from interference, control, and pressure from others. Under Article 2.3 of the Attorney's Law, in order to resist interference from others, lawyers must be guided "exclusively ... by the interests of the parties they are protecting, to their best ability and with legal means." For example, state authorities should not interfere in the lawyer-client's relationship by withholding necessary information or documents, unless it is a state secret. According to Article 3-a(1) of the Attorney's Law, state authorities and local authorities, as well as legal and natural persons with public powers are obliged to provide the data and the documents necessary for the lawyer's activity in a specific case, unless that is contrary to the duty to maintain professional secrecy.

Rule 13 of the MBA Code states that a lawyer is obliged to show respect towards the court and institutions he or she appears before. This obligation does not mean that any representative of these bodies can interfere with, direct, or control the lawyer-client relationship. To the contrary, Rule 13 provides that a lawyer "must prevent any incorrect attitude from the representatives of those bodies towards him or herself and the client." Lawyers must do so by legal means and instruments. Under Rule 13, as a "protector of the implementation of the laws and the client's rights and interests," the lawyer "is obliged to show honored resistance towards any breach of the principles of democracy and dignity of the persons."

Under Rule 14, "friendly or family relations between the lawyer and the judge, person employed with the institution, elected or appointed official, member of a political party must not come to the fore for the duration of the lawyer's representation." Rule 14 further provides that it would be "especially undignified" for a lawyer to use these relations for the benefit of the client or disadvantage of the opposing party.

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<sup>61</sup> BSB Handbook, gC18.

## INDEPENDENCE FROM CLIENT AND PROFESSIONAL DETACHMENT

### CCBE

Principle (a) of the CCBE Commentary on the Charter provides: “the lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts.”<sup>62</sup> The CCBE Commentary on the Charter further explains: “without this independence ... there is no guarantee of the quality of the lawyer’s work.”<sup>63</sup>

Article 2.1.1 of the CCBE Code of Conduct states: “the lawyer’s absolute independence ... is as necessary to trust in the process of justice as the impartiality of the judge.”<sup>64</sup> According to the CCBE Code of Conduct, a lawyer must avoid any impairment of his or her independence and “be careful not to compromise his or her professional standards in order to please the client, the court or third parties.”<sup>65</sup>

### IBA

The IBA Commentary does not specifically provide for independence from the client. It implies that a lawyer must not compromise his or her independence in order to please the client. For instance, the client is entitled to know the likelihood of success of his or her case and “to expect independent, unbiased and candid advice, irrespective of whether or not the advice is to the client’s liking.”<sup>66</sup>

### Civil Law

In France, a lawyer is generally free to decide whether or not to take on a case. The Paris Bar Internal Regulations (“RIBP”) provide that “[the lawyer] has the right to stop his mission, he will need to inform his client in a timely manner.”<sup>67</sup> However, if a lawyer decides to stop representing a client, this should not put the client’s defense in jeopardy and the lawyer must do his utmost to allow the client to acquire further representation.<sup>68</sup>

In criminal matters, if a lawyer is appointed to represent a client,<sup>69</sup> he or she is not free to refuse the representation or withdraw from the case unless there are justifying reasons to do so. The President of the

<sup>62</sup> CCBE Commentary on the Charter, principle (a).

<sup>63</sup> *Id.*

<sup>64</sup> CCBE Code of Conduct, Art. 2.1.1.

<sup>65</sup> *Id.*

<sup>66</sup> IBA Commentary, Explanatory note 1.2.

<sup>67</sup> RIBP, Art. P. 34.

<sup>68</sup> RIBP, Art. P. 34.1. See also Christian Charrière-Bournazel’s speech, part B.

<sup>69</sup> Article 317 of the French Code of Criminal Procedure provides that the presence of the defence is obligatory.



*Cour d'assises* or the *Bâtonnier*, who appoints the lawyer decides whether such reasons are sufficient.<sup>70</sup>

In a case before the *Cour d'assises* of the Pas-de-Calais, two lawyers representing a client decided to step out of the hearing and to withdraw from the case (their client also intended not to participate in the hearing).<sup>71</sup> One of the lawyers was hired by the client. The other was appointed by the President of the *Cour d'assises*.<sup>72</sup> The *Cour de cassation* considered that the appointed lawyer could not refuse to represent his client and could not leave the courtroom, especially since the President refused to approve the reasons he put forward for withdrawal.<sup>73</sup> The *Cour de cassation* did not oppose the other lawyer's withdrawal.<sup>74</sup> One can infer from this decision that, generally, French lawyers are independent from the client and can withdraw from the case. However, if a lawyer was appointed to the case by the President of the *Cour d'assises* or by the *Bâtonnier*, the lawyer is not free to refuse to represent a client or withdraw from the case.

In France, once a French lawyer accepts a case, the lawyer has a duty to advise the client as to what he or she believes is the best strategy for the representation. Generally, French lawyers cannot go against the client's instructions in the sense that they cannot implement a strategy different than the one ordered by the client. If after advising the client, the client does not wish to follow the lawyer's advice, the lawyer has the right to withdraw from the case if the client's instructions would go against the lawyer's conscience or what he or she believes is best for the client. The Bar Association of *Val d'Oise* explains that a lawyer maintains his or her intellectual independence from the client by "liberty of his or her argumentation before the tribunals, which may differ from what the client proposes, and it is for him [lawyer], to ensure the best defense possible."<sup>75</sup>

In another aspect of a French lawyer's independence, when a lawyer has only one client, and that client is of high economic importance to the lawyer's firm, the lawyer's independence may be compromised.<sup>76</sup> Christian Charrière-Bournazel points out that although there is no explicit rule to prohibit the lawyer to act for one client only, it is evident that the independence of the lawyer in such a case will be limited.<sup>77</sup>

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<sup>70</sup> Article 9 of the 31 December 1971 Law: The lawyer regularly appointed by the *bâtonnier* or by the President of the *Cour d'assises* cannot refuse his ministry without approval of his excuses or impediment by the *bâtonnier* or by the President. See also Cass. civ., 15 November 1989, n. 88-11413.

<sup>71</sup> Cass. crim., 24 June 2015, no. 14-84221.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Avocats du Val d'Oise, Déontologie, available at <http://www.avocat-95.fr/index.php?page=article&article=9&PHPSESSID=b527c2df7928987a4288613572b00d67>.

<sup>76</sup> Christian Charrière-Bournazel's speech, part B.

<sup>77</sup> *Id.*

The various ethical rules concerning conflicts of interest and withdrawal discussed above emphasize the French lawyer's independence from third parties and the client. As academics have explained, the lawyer's independence from the client is:

one of the cornerstones of French legal ethics (along with independence from the court and other *avocats*)... An *avocat* has no responsibility to accept a case; indeed, it is his or her duty to 'judge' his or her client before accepting the brief. Once the brief has been accepted, an *avocat* has no responsibility to continue to act for a client and may withdraw his or her services on proper notice.<sup>78</sup>

While this concept may be alien to the common law lawyer, the French lawyer's interpretation of independence is a result of the role of the lawyer within the French system.

The French lawyer is not an agent of the client, but an "independent person who lends his eloquence and credibility to someone in whose cause he believes, and who needs his help. He sometimes vouches for clients by declaring his belief in their cause, which is precisely what a lawyer in the United States is not supposed to do."<sup>79</sup>

In Germany, lawyers may refuse to accept a case if approached by a private client. The Federal Lawyers' Act specifies that lawyers who are approached for professional services and who do not wish to accept the case must immediately inform the client and provide compensation for any damage resulting from any negligent delay in making such a statement.<sup>80</sup> However, lawyers appointed by the court as defence counsel in criminal matters have a duty to provide legal advice.<sup>81</sup> Lawyers may only refuse to provide legal services if there are justifying grounds to do so.<sup>82</sup> Such justifying grounds may include: the lawyer's illness or excessive workload, the client's non-cooperation, serious loss of mutual trust between the lawyer and the client due to the client's conduct, or the client's income and/or assets do not justify the granting of legal aid.<sup>83</sup>

In the Netherlands, lawyers assume full responsibility for handling cases.<sup>84</sup> This means that lawyers may not evade this responsibility by invoking the instruction received from their clients.<sup>85</sup> The Dutch Rules of Conduct provide that lawyers cannot perform any acts against the

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<sup>78</sup> Nagorcka et al., *Comparative Legal Ethics* at 466 (italics in original).

<sup>79</sup> JOHN LEUBSDORF, *MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE* 15 (2001).

<sup>80</sup> Federal Lawyers' Act, para. 43c.

<sup>81</sup> *Id.*, paras. 49, 49a.

<sup>82</sup> *Id.*, para. 49a.

<sup>83</sup> German Rules of Professional Practice, para. 16a.

<sup>84</sup> Dutch Rules of Conduct, Rule 9.

<sup>85</sup> *Id.*

apparent wishes of the client.<sup>86</sup> Often, however, a lawyer and client will disagree about a course of action. The Dutch Rules of Conduct provide that “[i]f a difference of opinion exists between an advocate and his client concerning the way in which the case should be handled, and this dispute cannot be resolved by mutual consultation, the advocate shall withdraw.”<sup>87</sup> However, if a lawyer decides to withdraw, he or she must do so “in a careful manner and see to it that the client experiences as few drawbacks as possible.”<sup>88</sup>

In Belgium, according to the Flemish Code of Ethics, a lawyer “acts only when he has received an instruction to do so from his client.”<sup>89</sup> A lawyer may receive instructions from another lawyer that represents the client or a competent authority, and if their competence and authority are not clear, the lawyer “must make reasonable efforts to establish the identity, competence, and powers of the person from whom or organization from which he receives the instruction.”<sup>90</sup> The Flemish Code of Ethics provides that a lawyer must not withdraw from a case “in a manner or under circumstances in which the client would be unable to obtain legal assistance in due time, in order to prevent the client from suffering damage.”<sup>91</sup> Similarly, the OBFGE Code of Ethics provides that a lawyer must defend and advise his or her client in “full independence and liberty.”<sup>92</sup> It further specifies that a lawyer must ensure that the performance of his duties is “not endangered by the clients, courts or third parties.”<sup>93</sup> Unlike the codes discussed above, the OBFGE Code of Ethics provides that trainees are obliged to perform their assignments diligently, “without prejudice to their right to refuse a case that does not seem just to them.”<sup>94</sup>

### Common Law

In the US, a lawyer is generally not independent from the client and must abide by the client’s decisions.<sup>95</sup> The client is responsible for deciding the objectives of the representation and the lawyer must consult with the client regarding the means by which those objectives are to be pursued.<sup>96</sup> In criminal matters, the lawyer must specifically abide by the client’s decisions as to whether to enter a plea or accept a plea bargain, whether to waive a jury trial, and whether the client will testify.<sup>97</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*, Rule 9.2.

<sup>88</sup> *Id.*, Rule 9.3.

<sup>89</sup> Flemish Code of Ethics, Art. X. 3. 1. 1.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*, Art. X. 3. 1. 4.

<sup>92</sup> OBFGE Code of Ethics, Art.1.2(a) (unofficial translation by author.)

<sup>93</sup> *Id.*, Art. 1.3 (unofficial translation by author.)

<sup>94</sup> *Id.*, Art. 3.13 (unofficial translation by author.)

<sup>95</sup> ABA Model Rules, Rule 1.2(a).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

The lawyer's independence means that representing a client, including representation by appointment, does not constitute approval or endorsement of the client's political, social or moral views and activities.<sup>98</sup> The lawyer cannot deny the legal representation simply because the client's cause is unpopular or controversial.<sup>99</sup>

In the UK, under the BSB Handbook, a barrister cannot refuse to put forward his or her client's case simply because the barrister does not believe that the facts are as the client states them to be, as long as any positive case he or she puts forward accords with the barrister's instructions and does not mislead the court.<sup>100</sup> The BSB Handbook provides that the barrister's role "when acting as an advocate or conducting litigation is to present your client's case, and it is not for you to decide whether your client's case is to be believed."<sup>101</sup>

### **National Legislation**

The MBA Code provides for lawyer's independence from the client and professional detachment. However, unlike in France, this independence is not absolute and depends on various factors. According to Rule 5, the lawyer's independence means that the lawyer does not identify him or herself with the client, but keeps "the respectful level of the function – represent or defend the client." Under Rule 7, the lawyer maintains independence and professional detachment by "honest[ly] present[ing] to the client his/her overview on the possible outcome of the proceedings," regardless of whether such an overview is to the client's liking.

Independence from the client does not mean that the lawyer can refuse to provide legal assistance without justifying reasons. Under Rule 1 of the MBA Code, a lawyer is obliged to take on a case unless there are justifying reasons to decline the representation. Rule 1 of the MBA Code provides for examples of justifying reasons. In civil matters, the lawyer may refuse to provide legal assistance under limited reasons, such as work overload, or in case the client is incapable of paying the expenses. In criminal matters, however, the client's inability to pay does not justify a refusal to provide legal assistance. In such a case, a lawyer must take on the representation unless or he she has objective or personal reasons, such as the lawyer's illness, or if the client has failed to pay for a given defense in the same case.

Rule 2 of the MBA Code provides that if the lawyer decides to withdraw from the case, he or she must do so in a careful manner, ensuring that the withdrawal will not be harmful for the client's defense.

<sup>98</sup> *Id.* See also ABA Model Rules, Commentary [5] to Rule 1.2.

<sup>99</sup> ABA Model Rules, Commentary [5] to Rule 1.2.

<sup>100</sup> BSB Handbook, gC6.

<sup>101</sup> *Id.*, (italics in original.)

Under Rule 2, the lawyer has the right to withdraw from a case only if he or she becomes aware of reasons necessitating withdrawal after accepting the case. According to Rule 22, if the client asks the lawyer to represent him or her against the material truth, the lawyer may, but is not obliged, to refuse to represent the client further. Even then, the lawyer “shall not undertake any measure that could cause harm to the client.” The MBA Code does not specify which measures would qualify as harmful. An example of a harmful measure would be to inform the judge of the client’s intent to lie and withdraw from the case. In such a scenario, the lawyer would not only harm the client, but also violate the duty of professional secrecy under Rule 20.

## **INDEPENDENCE FROM SELF-INTEREST**

Factors such as private and personal interests may interfere with the lawyer’s objectivity and independence. Often a lawyer’s financial interest may conflict with the lawyer’s duties towards his or her client. Conflicting self-interest is just one type of the conflict of interest that may interfere with the lawyer’s professional responsibilities. Generally, a conflict of interest is a situation when a lawyer’s ability to represent the client is materially limited by his or her own interests or the interests of third parties. There may be various types of conflicts of interest, including conflicts between the lawyer and the client, between the lawyer’s concurrent clients, between a current and a former client, and conflicts due to the lawyer’s duties to third parties. Various types of the conflict of interest will be discussed in detail in Section 5. This section will briefly address one type: the conflict of interest between a lawyer and a client.

### **CCBE**

The CCBE Commentary on the Charter provides that the lawyer must not take on a client if there is a conflict of interest between the client and the lawyer.<sup>102</sup> If the conflict arises in the course of representation, the lawyer must cease to act.<sup>103</sup> The CCBE Code of Conduct obliges a lawyer to “put those [client’s] interests before the lawyer’s own or those of fellow members of the legal profession.”<sup>104</sup>

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<sup>102</sup> CCBE Commentary on the Charter, principle (c).

<sup>103</sup> *Id*

<sup>104</sup> CCBE Code of Conduct, Art. 2.7.

## IBA

The IBA describes circumstances in which a lawyer's interests interfere with the client's best interests and the lawyer's professional judgment, including:

1. the involvement of the lawyer in a business transaction with the client absent proper disclosure and client consent;
2. where the lawyer becomes involved in a business, occupation or activity whilst acting for a client and such an interest takes or is likely to take precedence over the client's interest;
3. unless otherwise authorized by law, knowingly acquiring an ownership, possessory or security interest adverse to the client; and
4. holding or acquiring a financial interest in the subject matter of a case which the lawyer is conducting, whether or not before a court or administrative body, except, where authorized by law, for contingent fee agreements and liens to secure fees.<sup>105</sup>

## Civil Law

The French RIN recognize that the representation of a client may be limited if there is a risk of a conflict of interest.<sup>106</sup> Article 4.1 of the RIN provides that the lawyer "shall, unless the parties agree, cease to act for all the clients concerned when a conflict of interest arises, when confidentiality risks being breached or when the lawyer's independence risks being compromised." When there is a serious risk of a conflict of interest in the future lawyers are obliged to first obtain the agreement of all affected parties before agreeing to act for more than one party.<sup>107</sup> Article 4.2 provides that a conflict of interest exists if the lawyer is unable to provide full and accurate information without compromising the interests of one or more parties, or if the lawyer is forced to present a case different from the one which would have been chosen if the interests of one party were to be represented. Unlike the common law rules on conflicts of interest, the French RIN do not provide concrete situations in which a conflict may limit a lawyer's independence or explain whether conflicts can be waived. Maya Goldstein Bolocan explains that while actual conflicts are not waivable, potential conflicts may be waived.<sup>108</sup> Phillip Genty explains that in practice "the determination of whether a conflict of interest exists is entirely the attorney's, and client consent to waive a conflict is neither solicited nor honored."<sup>109</sup>

<sup>105</sup> IBA Commentary, Explanatory note 1.2.

<sup>106</sup> French RIN, Art. 4.1.

<sup>107</sup> French RIN, Art. 4.2.

<sup>108</sup> Maya Goldstein Bolocan, *Professional Legal Ethics: A Comparative Perspective*, ABA CEELI Program 44 (2002).

<sup>109</sup> Philip M. Genty, *The Challenges of Developing Cross-Cultural Legal Ethics Education, Professional Development, and Guidance for the Legal Professions*, 1 J. PROF. L. 37, 42 (2011).

In Germany, under the Federal Lawyers' Act, a lawyer must not take on a case if he or she has previously acted in the same matter as a judge, an arbitrator, a public prosecutor, a member of the public service, or a notary.<sup>110</sup> The German Rules of Professional Practice do not define conflicts of interest, but prohibit for the lawyer to act if the conflict of interest exists.<sup>111</sup> The Federal Lawyers' Act lists a number of situations when conflicts of interest exist; however, conflicts between the client and the lawyer are not included.<sup>112</sup>

In the Netherlands, the Dutch Rules of Conduct state: "the interest of the client rather than any self-interest of advocates shall determine the manner in which advocates are required to handle cases."<sup>113</sup>

In Belgium, the Flemish Code of Ethics provides that the lawyer "may not act if this gives rise to a conflict of interests or the substantial threat of such a conflict between him and a client."<sup>114</sup> Similarly, under the OBF Code of Ethics, preventing conflicts of interests is one of the main duties of a lawyer.<sup>115</sup> The OBF Code of Ethics ensures independence by forbidding the lawyer from carrying on another paid activity (except in rare instances such as in education or politics) or intervening in situations where there could be a conflict of interests.<sup>116</sup>

### **Common Law**

In the US, independence requires a lawyer to act without any improper self-interest in the client's case. If there is a significant risk that the representation will be limited by a personal interest of the lawyer, such representation is prohibited.<sup>117</sup> The ABA Model Rules provide several prohibitions on conduct which is likely to adversely impact the lawyer-client relationship due to the lawyer's self-interest. For instance, a lawyer is prohibited from entering into "a business transaction with the client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client...."<sup>118</sup> These prohibitions exist because the lawyer's legal training coupled with the relationship of trust and confidence between the lawyer and client create a situation where the lawyer could take advantage of the client.<sup>119</sup>

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<sup>110</sup> Federal Lawyers' Act, para. 45.1.

<sup>111</sup> German Rules of Professional Practice, para. 3.

<sup>112</sup> Federal Lawyers' Act, paras. 45-46.

<sup>113</sup> Dutch Rules of Conduct, Rule 5.

<sup>114</sup> Flemish Code of Ethics, Art. I. 2. 3. 1.

<sup>115</sup> OBF Code of Ethics, Art.1.2(c).

<sup>116</sup> *Id.*, Arts. 2.1-2.6.

<sup>117</sup> ABA Model Rules, Rule 1.7(a)(2).

<sup>118</sup> ABA Model Rules, Rule 1.8(a).

<sup>119</sup> ABA Model Rules, Comment [1] to Rule 1.8.

For example, if a lawyer drafts a contract to which he and his client are parties, the lawyer can abuse the client's unawareness of legal technicalities and draft the terms in a way most favorable to the lawyer himself. Another example of improper interest is a situation, in which a lawyer invests in a company, and later represents a plaintiff in a lawsuit against that very company. The litigation against the company may jeopardize the lawyer's business interests, and at the same time, the lawyer must be zealous in representing his client's interests.

In the UK, barristers are prohibited from acting if there is a conflict of interest between the barrister's own interests and the interests of the prospective client.<sup>120</sup> The BSB Handbook provides:

Examples of when you may not be able to maintain your independence include appearing as an advocate in a matter in which you are likely to be called as a witness (unless the matter on which you are likely to be called as a witness is peripheral or minor in the context of the litigation as a whole and is unlikely to lead to your involvement in the matter being challenged at a later date). However, if you are planning to withdraw from a case because it appears that you are likely to be a witness on a material question of fact, you should only withdraw if you can do so without jeopardising the client's interests.<sup>121</sup>

### **National Legislation**

The MBA Code also protects the lawyer's independence from a conflict of interest between the lawyer and client. It is implied in the provisions of the MBA Code that a lawyer should avoid any conflicting self-interest that may interfere with his or her independent professional judgment. Under Rule 26, in order to guarantee the lawyer's freedom and independence, lawyers are obliged "to restrain from the own personal, especially material interests, which might [throw] doubts on his/her moral."

According to Article 17(4) of the Attorney's Law, when a lawyer represents two parties in legal matters, contracts or other matters, the lawyer "is required to protect consciously the interests of both parties, regardless of which party has requested and/or is paying for the assistance." Similarly, under Rule 4 of the MBA Code, "the lawyer is obliged to protect interests of both parties consciously ... [and] if a dispute arises between the parties based on the agreement compiled by the lawyer the lawyer shall not represent neither of the parties." This means that when someone other than the client pays the lawyer's fee, this must not affect the lawyer's duties towards his or her client.

<sup>120</sup> BSB Handbook, rC21.

<sup>121</sup> *Id.*, gC73 (italics in original)



## Conclusion

Although lawyer's independence is a cornerstone principle in all legal systems, the same principle has different meanings depending on the legal tradition and practice. There are substantial differences in the contours of the lawyer's independence between the European civil law countries that one must be aware of, especially if practicing abroad.

Generally, the principle of independence in all jurisdictions shares several common duties, such as:

- acting zealously in the interests of his or her client; but such zeal must be tempered by the prohibition to obstruct the fair administration of justice;
- withdrawing from the case only when there are justifying reasons to do so; and
- acting without improper self-interest in the client's matter.

All jurisdictions recognize the need for the legal profession to be independent from the outside pressure. Some national professional rules, like the Dutch Rules of Conduct, specify that lawyers must avoid interference from third parties and intermediaries in the lawyer-client relationship. The ABA Model Rules explicitly state that the parties paying the lawyers' fees must not direct or control the lawyer's representation of the client's interests. This is similar to Rule 4 of the MBA Code which requires lawyers to represent the best interests of the clients regardless of the source of the payment.

While the other national codes discussed above implicitly protect the lawyer from interference from the government, Article 3 of the Attorney's Law explicitly ensures that lawyers are protected from interference of the state authorities, which is in line with the CCBE Code of Conduct and the IBA Principles provisions.<sup>122</sup> Moreover, according to Article 3-a of the Attorney's Law, the state authorities must provide lawyers the necessary information.

National lawyers are independent from their clients to a certain extent. Unlike in France, where a lawyer's independence is practically absolute, under Rule 1 of the MBA Code, a lawyer is his or her client's "representative and defender", and may not refuse representation without justifying reasons. Rule 1 of the MBA Code provides for some of those reasons, similar to the list contained in the German Rules of Professional Practice.

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<sup>122</sup>CCBE Code of Conduct, Art. 2.1.1; IBA Commentary, Explanatory note 1.2.

Some national codes, like those of France, the Netherlands, and Belgium specifically provide that if a lawyer decides to withdraw from the case, he or she must do so in a careful manner, ensuring that the client will suffer no prejudice. The MBA Code contains similar requirements. Under Rule 22, lawyers withdrawing from the case shall not take “any measure that could harm the client.”

Unlike most of the national codes, the MBA Code has no specific section dealing with the conflict of interests. However, the need to avoid such a conflict is implied in Rules 4 and 23, obliging lawyers to avoid any personal or material self-interest in the client’s matter and consciously represent the interests of both parties in a bilateral legal transaction.

## Section 2: Honesty, Integrity, and Fairness

The principle of honesty, integrity, and fairness is common to the professional ethical principles of all countries. National codes phrase this principle in the terms of the lawyer's duties of honesty, candor to the court, personal dignity, respect, and courtesy to the colleagues. The MBA Code requires lawyers to be honest with the client, respect the fair administration of justice, to act with courtesy towards the opposing parties. One ethical dilemma faced by lawyers is how best to remain loyal to the client, press every advantage in his or her favor, and maintain confidentiality while also fulfilling one's duty of honesty to the court.

### CCBE

The CCBE Charter contains several principles that deal with the various aspects of the lawyer's honesty, personal integrity and fairness. Principle (d) of the CCBE Charter is "dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer."<sup>123</sup> The CCBE Commentary explains that maintaining this principle is necessary if the lawyer is to be trusted by clients, third parties, the courts and the state.<sup>124</sup> This means that the lawyer "must not engage in disgraceful conduct, whether in legal practice or in other business activities or even in private life, of a sort likely to dishonor the profession."<sup>125</sup> The CCBE Code of Conduct provides that "relationships of trust can only exist if a lawyer's personal honour, honesty and integrity are beyond doubt."<sup>126</sup> The CCBE Explanatory Memorandum does not provide any commentary to this rule.

Under the principle (i) of the CCBE Charter, the lawyer must respect the rule of law and the fair administration of justice. The CCBE Commentary on the Charter explains that part of the lawyer's role is being a participant in the fair administration of justice.<sup>127</sup> According to the CCBE Commentary on the Charter, "the same idea is sometimes expressed by describing the lawyer as an 'officer of the court' or as a 'minister of justice'."<sup>128</sup> This principle provides that a lawyer "must never knowingly give false or misleading information to the court, nor should he ever lie to third parties in the course of his or her professional activities."<sup>129</sup>

<sup>123</sup> CCBE Commentary on the Charter, principle (d).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> CCBE Code of Conduct, Art. 2.2.

<sup>127</sup> *Id.*, principle (d).

<sup>128</sup> *Id.*, principle (i).

<sup>129</sup> *Id.*

The CCBE Commentary on the Charter provides general guidance for situations when these prohibitions run counter to the interests of the client: the lawyer is entitled to look to the bar association for assistance. It notes, however, “in the last analysis, the lawyer can only successfully represent his or her client if the lawyer can be relied on by the courts and by third parties as a trusted intermediary and as a participant in the fair administration of justice.”<sup>130</sup> Presumably, this means that in instances when the client asks the lawyer to compromise his or her duties to the court and the fair administration of justice in order to put forward a dishonest case, the lawyer’s duty to the court prevails.<sup>131</sup>

Article 4.2 of the CCBE Code of Conduct provides that lawyers must have “due regard for the fair conduct of proceedings.”<sup>132</sup> The CCBE Explanatory Memorandum explains that the lawyer must not “make contact with the judge without first informing the lawyer acting for the opposing party or submit exhibits, notes or documents to the judge without communicating them in good time to the lawyer on the other side unless such steps are permitted under the relevant rules of procedure.”<sup>133</sup>

According to principle (h) of the CCBE Charter, respect towards professional colleagues represents “more than an assertion of the need for courtesy.”<sup>134</sup> The CCBE Commentary on the Charter interprets this principle as relating to the lawyer’s role “as intermediary, who can be trusted to speak the truth, to comply with the professional rules and to keep his or her promises.”<sup>135</sup> This means that lawyers must resolve contentious matters in a civilized way, deal with each other in good faith, and not deceive.<sup>136</sup>

## **IBA**

The IBA principle 2 provides that “a lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer’s client, the court, colleagues and all those with whom the lawyer comes into professional contact.”<sup>137</sup> This means that the lawyer must not “make a false statement of fact or law in the course of representing a client or fail to correct a false statement of material fact or law previously made by the lawyer.”<sup>138</sup>

<sup>130</sup> *Id.*

<sup>131</sup> CCBE Commentary to principle (e) – loyalty to the client: “...the lawyer must make it clear to the client that the lawyer cannot compromise his or her duties to the court and to the administration of justice in order to put forward a dishonest case on behalf of the client.”

<sup>132</sup> CCBE Code of Conduct, Article 4.2.

<sup>133</sup> CCBE Explanatory Memorandum, cmt. on Article 4.2.

<sup>134</sup> CCBE Charter, principle (h).

<sup>135</sup> CCBE Commentary on the Charter, principle (h).

<sup>136</sup> *Id.*

<sup>137</sup> IBA Principles, Principle 2.1.

<sup>138</sup> IBA Commentary, Explanatory note 2.2.

The IBA Commentary also notes that lawyers must be professional with clients, other parties, the court, the court's personnel and the public. This includes "civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation...."<sup>139</sup> The IBA Commentary notes that lawyers should not treat the court, other lawyers, or the public in a hostile manner. The IBA Principles provide that there are different standards of what is expected from lawyers depending on their responsibilities, and that the expression of these responsibilities varies jurisdiction by jurisdiction.<sup>140</sup>

## Civil Law

All civil law codes provides for the principle of honor, honesty, integrity, and respect for the proper administration of justice through multiple provisions and various lawyer's duties.

In France, lawyers must "respect the principles of honor, fairness, impartiality, collegiality, tact, moderation and courtesy."<sup>141</sup> Under the Paris Bar Internal Regulations ("RIBP"), to harass or to have a discriminatory attitude towards someone would be a violation of the basic principles.<sup>142</sup>

The French RIN characterize the lawyer as "an officer of the court and an essential participant in the practice of law."<sup>143</sup> Article 1*bis* of the French RIN provides one example as to how to resolve a conflict between the lawyer's duty to the court and to the client. Article 1*bis* explains that if there is reason to suspect that his or her advice will be used to commit or further an offense, the lawyer must seek to dissuade the client, and if that fails, he or she must withdraw from the case.

In Germany, the Federal Lawyers' Act provides that a lawyer "must not behave with lack of objectivity in professional practice."<sup>144</sup> This includes conduct that "involves the conscious dissemination of untruths or making denigrating statements when other parties involved or the course of the proceedings have given no cause for such statements."<sup>145</sup>

Under the German Rules of Professional Practice, a lawyer must be honest to his or her client, for instance, by informing the client about any events and measures taken regarding the case,<sup>146</sup> about the availability of legal aid,<sup>147</sup> or by promptly answering the client's inquiries.<sup>148</sup>

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> French RIN, Art. 1.3.

<sup>142</sup> Internal Regulations of the Paris Bar ("RIBP"), Art.P.1.6, available at [http://dl.avocatparis.org/reglement\\_interieur/RIBP.htm#\\_Toc435782388](http://dl.avocatparis.org/reglement_interieur/RIBP.htm#_Toc435782388).

<sup>143</sup> *Id.*, Art. 6.1.

<sup>144</sup> Federal Lawyers' Act, para.43a(3).

<sup>145</sup> *Id.*

<sup>146</sup> German Rules of Professional Practice, para. 11.1.

<sup>147</sup> *Id.*, para. 16.1.

<sup>148</sup> *Id.*, para. 11.2.

In contacts with the opposing party, the Federal Lawyers' Act prohibits the German lawyers to contact or negotiate with another party directly without prior consent of the party's lawyer.<sup>149</sup> Also, if a lawyer "wishes to draw a colleague's attention to the fact that he is violating a professional duty, this must be done confidentially...."<sup>150</sup>

In the Netherlands, the Dutch Rules of Conduct provide that the lawyer's role in the administration of justice puts them in a privileged position.<sup>151</sup> Lawyers must properly use this privileged position "not only - and not even primarily - because this position and these privileges can be put in jeopardy if used improperly, but because they represent a commitment to society."<sup>152</sup> In relations with client, lawyers "shall always aim to base their mutual relationships on courtesy and trust."<sup>153</sup>

In the Netherlands, the duty of honesty to the court is reflected in the lawyer's "duty to refrain from furnishing factual information which they know or should have known to be incorrect."<sup>154</sup> Lawyers must avoid expressing themselves in "unnecessarily offensive terms ... and must take into account the justified interests of the other party and any third party."<sup>155</sup> Lawyers must avoid "contact[ing] a party on a matter in respect of which they know this party to be receiving the assistance of an advocate, other than by the agency of the advocate in question, unless the latter gives them permission to contact that party directly. The same [applies] when the party ... contacts them directly."<sup>156</sup>

In Belgium, the Flemish Code of Ethics provides for the obligation of collegiality.<sup>157</sup> This means that lawyers must uphold the rights of defense, respect the adversarial nature of proceedings, and not mislead.<sup>158</sup> The obligation of collegiality "promote[s] the relationship of trust among lawyers in the interests of the client."<sup>159</sup> Similarly, under the OBFGE Code of Ethics, a lawyer is obliged to be loyal to the client and to respect the court and third parties, the principle of collegiality and to refrain from any behavior that may adversely affect the honor of the legal profession.<sup>160</sup>

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<sup>149</sup> *Id.*, para. 12.1.

<sup>150</sup> *Id.*, para. 25

<sup>151</sup> Dutch Rules of Conduct, Rule 1.2.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*, Rule 17.

<sup>154</sup> *Id.*, Rule 30.

<sup>155</sup> *Id.*, Rule 31 and 1.2.

<sup>156</sup> *Id.*, Rule 31 and 1.2.

<sup>157</sup> *Id.*, Rule 18.

<sup>158</sup> *Id.*, Art.III.2.1.1.

<sup>159</sup> *Id.*

<sup>160</sup> OBFGE Code of Ethics, Art. 1.2(e), (g)-(j).

## Common law

In the US, the ABA Model Rules provide for honesty, personal integrity, and fairness through various lawyers' duties. For instance, ABA Model Rule 2.1 provides that the lawyer must give candid advice. This means that the lawyer should provide a straightforward advice "expressing lawyer's honest assessment."<sup>161</sup> The Commentary to Rule 2.1 explains that "a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits."<sup>162</sup> The lawyer should not be deterred from advising honestly by the prospect that the advice will not be to the client's liking.<sup>163</sup>

Under ABA Model Rule 3.3, a lawyer must not knowingly make a false statement of fact or law to the court, fail to correct a false statement previously made by the lawyer, or offer evidence that the lawyer knows to be false.<sup>164</sup> The Commentary to this Rule explains that "although the lawyer in an adversary proceedings is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."<sup>165</sup> If the lawyer knows that the lawyer's client or a witness called by the lawyer has offered false material evidence, the lawyer must take remedial measures, including disclosure to the court.<sup>166</sup> The lawyer, however, cannot refuse the testimony of the defendant in a criminal matter.<sup>167</sup>

A remedial measure, according to the Commentary, is "to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor ... and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence."<sup>168</sup> If this fails, the lawyer must take further remedial measures, such as withdraw from the representation.<sup>169</sup> In requesting the permission to withdraw, a lawyer may only reveal information reasonably necessary to comply with the duty of candor to the court.<sup>170</sup> If withdrawal is denied or will not remedy the situation, the lawyer "must make such disclosure ... as is reasonably necessary to remedy the situation," even if it breaks the duty of confidentiality.<sup>171</sup>

<sup>161</sup> ABA Model Rules, cmt.[1] to Rule 2.1.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*, Rule 3.3(a)(1)-(3).

<sup>165</sup> *Id.*, cmt.[2].

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*, cmt.[10].

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*, cmt.[15].

<sup>171</sup> *Id.*

ABA Model Rule 3.4 requires a lawyer to be fair to opposing party.<sup>172</sup> This means that the lawyer must not, for example, unlawfully obstruct another party's access to evidence,<sup>173</sup> destroy or conceal any documents with evidentiary value,<sup>174</sup> make frivolous requests,<sup>175</sup> or assert personal knowledge of facts.<sup>176</sup> ABA Model Rule 3.5 prohibits unlawfully influencing a judge, juror, or other official, communicating with these persons out of court and proceedings, or engaging in a conduct that disrupts the court.<sup>177</sup>

In the UK, according to the BSB Handbook, acting with honesty and integrity is a core duty.<sup>178</sup> The duty to act with honesty and integrity includes several requirements. Under these requirements, a barrister must not knowingly or recklessly mislead or attempt to mislead anyone, encourage witnesses to testify misleadingly or untruthfully, or rehearse, practice with or coach witnesses.<sup>179</sup> The BSB Handbook notes that in certain circumstances, the duty overrides the duty to act in the best interests of the client.<sup>180</sup> For instance, a barrister is required "to draw to the attention of the court any decision or provision which may be adverse to the interests of your client. It is particularly important where you are appearing against a litigant who is not legally represented."<sup>181</sup>

In regards to the administration of justice, the barrister's duty to the court "overrides any other core duty, if and to the extent the two are inconsistent."<sup>182</sup> If the client instructs a barrister to act unethically, the barrister's duties to the court would override the duties toward the client, subject to the duty of confidentiality. The BSB Handbook provides that if there is a risk that the court would be misled unless the barrister discloses the client's confidential information, the barrister must seek the client's permission.<sup>183</sup> If the client refuses to allow the disclosure, the barrister must cease to act and return his or her instructions. However, the barrister may not reveal the confidential information to the court.<sup>184</sup>

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<sup>172</sup> *Id.*, Rule 3.4

<sup>173</sup> *Id.*, Rule 3.4(a).

<sup>174</sup> *Id.*, Rule 3.4(b).

<sup>175</sup> *Id.*, Rule 3.4(d).

<sup>176</sup> *Id.*, Rule 3.4(e).

<sup>177</sup> *Id.*, Rule 3.5.

<sup>178</sup> BSB Handbook, CD3.

<sup>179</sup> BSB Handbook, rC9.

<sup>180</sup> BSB Handbook, gC1.

<sup>181</sup> *Id.*, gC5 and C3.3.

<sup>182</sup> *Id.*, gC1.

<sup>183</sup> *Id.*, gC11.

<sup>184</sup> *Id.*



In *Rondel v. Worsley*, Lord Reid explained the balance between a barrister's duty to the client and to the court:

Every counsel has a duty to his client fearlessly, to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce.<sup>185</sup>

The BSB Handbook provides that offensive or discreditable conduct towards third parties, dishonesty, unlawful victimization or harassment, or abuse of professional position, attempts to mislead the opposing party, will be also treated as a breach of the duty of honesty and integrity.<sup>186</sup>

### **National Legislation**

The MBA Code reflects the principles of honesty, integrity and fairness through various lawyer's duties. Rule 7 of the MBA Code provides for the lawyer's duty to "honestly present to the client his/her overview on the possible outcome of the proceeding [and] ... to inform the client about the current status of the case."

A lawyer has a duty to respect the fair administration of justice. Under Rule 15, the lawyer must not "misuse the factual and legal circumstances in his/her presentation." Under Rule 22, the lawyer must neither falsify evidence nor advise a witness to testify falsely.

Rule 22 allows the lawyer to withdraw if the client insists on the representation against the material truth.

Rule 14 of the MBA Code provides some guidance on how to act in situations when a lawyer has "friendly or family relations between the lawyer and the judge, person employed with the institution, elected or appointed official, member of a political party." Rule 14 prohibits a lawyer from trying to use these relations to the client's advantage, or to the disadvantage of the opposing party, or any third party. According to Rule 11, when the lawyer is in friendly relations with the opposing

<sup>185</sup> *Rondel v. Worsley* [1969] 1A.C.191,227.

<sup>186</sup> *Id.*,gC25andgC96.

party, he or she must inform the client before the litigation starts as to avoid any doubt the client may have in the lawyer's loyalty. Under Rule 23, a lawyer who learned information while representing or being a member of a legal entity, must not use this information in any way against this legal entity.

Under Rule 13, the lawyer must show respect towards the court and "protect the dignity of the courts and institutions he/she is performing before." The MBA Code specifically indicates that this duty in no way diminishes the lawyer's zeal and loyalty in representing the client's interests. According to Rule 15, the lawyer acts under the client's authorization before the courts and institutions "purposely to protect client's rights and legal interests." Rule 13 states that he or she must "prevent any incorrect attitude" from the court's representatives towards his or her client. Respect for the court does not mean that the lawyer should be servile to the court and not provide aggressive protection to the client. To the contrary, under Rule 11, the lawyer must "perform energetically and without fear," within the law and the MBA Code.

The MBA Code addresses a possible conflict between the lawyer's duty to respect the fair administration of justice and the duty to act in the client's interests. Rule 22 instructs that if the client asks a lawyer to represent him or her against the material truth, a lawyer can, but is not obliged, to refuse to further represent the client. Under Rule 22, when a lawyer decides to withdraw from representation the lawyer "shall not undertake any measure that could cause harm to the client." According to Rule 21, if the withdrawal is not permitted or will not remedy the situation a lawyer can request the MBA's assistance and approval of disclosure.

The MBA Code ensures that a lawyer's relationship to the opposing party and colleagues must be one of honesty, integrity and fairness. Under Rule 11, a lawyer must "not see an enemy in the opposing party but an average opponent who might believe to be right just like the client the lawyer is representing." Under Rule 18, it is unacceptable to take over a client from another lawyer based on connections, references, or to "steal" another lawyer's client by offering a lower price for services. According to Rule 11, lawyers must respect the lawyer-client relationship and must not have "any contact with the opponent client without knowledge of his/her [own] client and the legal representative of the opponent party."

The MBA Code specifies that in criminal cases with several co-defendants, so-called "cut-throat" defenses are generally prohibited. Under Rule 18, the lawyer "must not direct and set his/her defence towards incriminating others co-defendants, unless if it is in the interest of his/her client."

A lawyer must not take advantage of an unrepresented person. Under Rule 11, the lawyer's duties of honesty, integrity, and fairness prohibit using the opponent's lack of knowledge in order to thrive unfair success for the client, "especially if the other party does not have a lawyer."

## **Conclusion**

The principle of the lawyer's honesty, integrity, and fairness is incorporated in various national codes. There is no "catch-all" provision, dealing with all the aspects of this principle. It is reflected in a number of lawyer's duties towards the client, the court, the opposing party and colleagues. The same principle may be phrased in slightly different terms, such as collegiality, civility, courtesy, prudence, dignity, etc.

Some of the civil law codes lack provisions dealing with the situations when there is tension between the duty to be honest to the court and the duty to maintain loyalty to the client. Presumably, in civil law systems, where the judge conducts the questioning of the accused and witnesses, lawyers rarely face the dilemmas that common law lawyers may face when clients intend to testify falsely.

In civil law, codes emphasize the lawyer's role in the fair administration of justice. As the CCBE Charter suggests, the lawyer's duties to the court override duties to the client when the immediate interests of the client run counter to the lawyer's prohibitions on giving false or misleading information to the court.

This is also true for common law jurisdictions. While common law lawyers have no duty to provide the court with all the material facts of the case, or vouch for the evidence submitted, they are prohibited from knowingly misleading the court, providing false evidence, or tampering with the evidence in any other way. However, the modalities of these duties differ among civil and common law systems. The core duties of honesty, integrity and fairness are basically the same in all jurisdictions and require maintaining honesty and trust in relations with the client, respect the fair administration of justice by never giving false or misleading information to the court, and treat the colleagues, including the opposing lawyers with respect and courtesy.

Similarly, Rules 15 and 22 of the MBA Code reflect the CCBE principle of the fair administration of justice, common to the national rules of all jurisdictions, prohibiting lawyers from introducing false evidence or misleading the court by misusing the factual and legal circumstances in the matter.

The MBA Code requires honesty in relations with the client. Rule 7 contains provisions, similar to those in the German Rules of Professional Practice, requiring honest representation in the outcome of the matter, as well as updating and informing the client of the progress in the case. Similar to France, the Netherlands, and Belgium, Rule 7 of the MBA

Code specifies that when the lawyer withdraws, he or she must make sure that it does not involve measures that are harmful to the client.

The MBA Code contains multiple provisions incorporating the principle of respect towards the colleagues, as required by the CCBE. Unlike other civil law codes, Rule 18 of the MBA Code specifies that lawyers should not set the defense towards incriminating other co-defendants. Similar to the Netherlands, Rule 11 of the MBA Code does not allow the lawyer to contact the opponent's client without informing the opposing party. Unlike most of the civil law codes, Rule 11 of the MBA Code specifies that lawyers should not abuse the lack of knowledge of the unrepresented party in order to thrive unfair success for his or her own client.

## Section 3: Loyalty to the Client's Interests

Loyalty and ability to act in the best interests of the client are essential elements of the lawyer-client relationship. The lawyer's duty of loyalty to the client is reflected in other ethical duties, such as the duties to avoid conflicts of interest,<sup>187</sup> maintain confidentiality,<sup>188</sup> and maintain independence from external influences.<sup>189</sup> Once a lawyer takes on the case, the principle of loyalty prohibits withdrawing from the case when things go unpleasant and there is little chance of winning the case. Loyalty requires lawyers to fulfill their duties with commitment and dedication, to be relied upon, and to stand still, even if it means that the lawyer must steel him or herself to the challenge of representing the worst among us. The principle of loyalty is reflected in both civil and common law jurisdictions through various lawyer's duties. Similarly, under Rule 2 the MBA Code, lawyers "must stay loyal to the client and try to establish a relation of trust."

### CCBE

Principle (e) of the CCBE Charter is "loyalty to the client."<sup>190</sup> The Commentary on the Charter states that "[l]oyalty to the client is of the essence of the lawyer's role."<sup>191</sup> This is crucial for the trust in the lawyer-client relationship.<sup>192</sup> To remain loyal to the client, the lawyer must be independent, avoid conflicts of interest, and keep the client's confidences. The CCBE notes that some of the most delicate problems of professional conduct arise from the interaction between the principle of loyalty to the client and principles which set out the lawyer's wider duties, such as dignity and honor, respect towards professional colleagues, and in particular, respect for the rule of law and the fair administration of justice. The CCBE Commentary explains that in dealing with such issues, the lawyer must make it clear to the client that the lawyer cannot compromise his or her duties to the court and to the administration of justice in order to put forward a dishonest case on behalf of the client.

The CCBE Code of Conduct provides for the lawyer's duty to act in the best interests of the client. Article 2.7 states that "subject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of the client and must put those interests before the lawyer's own interests or those of fellow members of the legal profession."<sup>193</sup>

<sup>187</sup> See Section 5, Conflict of interest, discussing various types of conflicts and its resolution.

<sup>188</sup> See Section 4.

<sup>189</sup> See Section 1.

<sup>190</sup> CCBE Charter, principle (e).

<sup>191</sup> CCBE Commentary on the Charter, cmt. principle (e).

<sup>192</sup> *Id.*

<sup>193</sup> CCBE Code of Conduct, Art. 2.7.

This provision emphasizes the general principle that the lawyer must always place the client's interests before the lawyer's own interests and other interests that may conflict with the client's interests.

## **IBA**

The IBA Principles provide that it is a general principle for a lawyer to treat the client's interests as paramount "subject to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards."<sup>194</sup> The IBA explains that lawyers in all their dealings with the courts should act with competence and honesty.<sup>195</sup> They should be acting competently, diligently, promptly and avoid any conflict to their duty to the court.

The IBA Commentary to the principle 5 explains that the lawyer should deal with their clients free of the influence of any interest which may conflict with a client's best interests, and act with commitment and dedication in pursuing the client's interests.

Loyalty to the client's interests means that a lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures may be required to vindicate a client's cause or endeavor. Lawyers must also maintain confidentiality.<sup>196</sup>

In order to protect their clients' interests and advise them competently, a lawyer should also provide all relevant information to their clients. He or she must not "engage in, or assist their client with, conduct that is intended to mislead or adversely affect the interest of justice, or wilfully breach the law."<sup>197</sup> The IBA Commentary notes that lawyers' duty to safeguard clients' interests starts from their retainer and remains until their effective release from the case or the final disposition of the whole subject matter of the litigation.

## **Civil law**

The national codes of ethics do not always contain explicit provisions regarding the client's best interests and may not explain the meaning of "loyalty". Loyalty and client's interests are implied, for example, in provisions concerning the conflict of interest, confidentiality and independence.

In France, Article 1.3 of the French RIN states: "The lawyer will ... respect the principle[] of... loyalty..." Under Article 2.1 of the RIN, a lawyer is a "necessary confidant of the client." According to the French RIN, loyalty is one of the values that constitute the fundamental principles of the profession.

<sup>194</sup> IBA Principles, Principle 5.1.

<sup>195</sup> IBA Commentary, Explanatory note 5.2.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

In Germany, the German Rules of Professional Practice instruct that a lawyer must protect his or her client from a loss of rights. To this end, he or she must “accompany the client with a view to shaping the law, avoiding conflicts and settling disputes.”<sup>198</sup> The German Rules of Professional Practice provide that a lawyer must protect the client from wrong decisions taken by the courts and authorities and has to act as his client’s safeguard against unconstitutional impairment of his rights and against the government exceeding its powers.<sup>199</sup>

In the Netherlands, under the Dutch Rules of Conduct “looking after the interests of the clients” is the essence of the lawyer’s function.<sup>200</sup> The Dutch Rules of Conduct require lawyers to handle cases in a sound and careful manner.<sup>201</sup> They should not, for example, resort to improper means, such as announcing or taking steps that are not in keeping with the goal they have in mind.<sup>202</sup> Lawyers must avoid conflicting interests and must exercise due care in handling the matters entrusted to them.<sup>203</sup>

In Belgium, according to the Flemish Code of Ethics, a lawyer must protect his or her client’s interests by upholding the rights of defense. He or she must respect the adversarial nature of proceedings and not mislead anyone. The lawyer has an obligation of loyalty in order to promote the fair and proper administration of justice.<sup>204</sup> Loyalty requires maintaining the confidentiality of the discussions and contacts between the lawyer and the client.<sup>205</sup> The Flemish Code of Ethics provides that “a lawyer must defend the interests of his client in good faith and without fear, regardless of his own interests, and regardless of any consequences for himself or any other person.”<sup>206</sup> Similarly, under the OBFEG Code of Ethics, loyalty toward the client obliges lawyers to respect the professional secret and the lawyer’s independence in relations with clients and public.<sup>207</sup>

### **Common law**

In the US, Rule 1.7(a) prohibits the lawyer from undertaking representation if a conflict of interest exists. This is part of the US lawyer’s duty of loyalty. Under Rule 1.7(a), lawyers may not take a position directly adverse to a present client of the lawyer. Comment 1 to Rule 1.7 of the ABA Model Rules explains that “[l]oyalty and independent

<sup>198</sup> German Rules of Professional Practice, para. 1.

<sup>199</sup> *Id.*

<sup>200</sup> Dutch Rules of Conduct, Rules 1.1, 1.2.

<sup>201</sup> *Id.*, Rule 1.2.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*, Rule 4.

<sup>204</sup> Flemish Code of Ethics, Art. III. 2.1.1.

<sup>205</sup> *Id.*, Art. III. 2.3.1.

<sup>206</sup> Art. X. 4.3.

<sup>207</sup> OBFEG Code of Ethics, Art. 5.3.

judgment are essential elements in the lawyer’s relationship to a client.” Rule 1.9 reflects the duty of loyalty lawyers owe to former clients. Rule 1.9 prohibits the lawyer taking a position directly adverse to a former client in the same or a substantially related matter.<sup>208</sup> This principle is also reflected in the US jurisprudence. For instance, in *Strickland v. Washington*, the US Supreme Court described the duty of loyalty as “perhaps the most basic of counsel’s duties.”<sup>209</sup>

In the UK, according to the BSB Handbook, it is a core duty to act in the best interests of each client.<sup>210</sup> Barristers are obliged to “promote fearlessly and by all proper and lawful means the client’s best interests.” They must do so “without regard to [their] own interests or to any consequences to [the barrister] (which may include, for the avoidance of doubt, being required to take reasonable steps to mitigate the effects of any breach of the [BSB Handbook]).”<sup>211</sup> Barristers must “protect the client’s interests without regard to the consequences to any other person (whether to your professional client, employer or any other person).”<sup>212</sup>

The BSB Handbook provides that the barristers are obliged to promote and to protect their client’s interests so far as that is consistent with the law and with their overriding duty to the court.<sup>213</sup> The BSB Handbook further explains that the barrister’s duty to the court does not prevent from putting forward the client’s case simply because the barrister does not believe that the facts are as the client states them to be “as long as any positive case you put forward accords with your instructions and you do not mislead the court.”<sup>214</sup> The barrister’s role “when acting as an advocate or conducting litigation is to present [the] client’s case, and it is not for [the barrister] to decide whether [the] client’s case is to be believed.”<sup>215</sup>

## National Legislation

The MBA Code explicitly provides for the lawyer’s duty of loyalty to the client. Under Rule 2, a lawyer “must stay loyal to the client and try to establish a relation of trust.” Rule 2 prohibits cancelling representation without any justifying reasons.

Under Rule 5, a lawyer must act with commitment and consciously represent his or her client’s interests “using entire available means, permitted by Law or other regulations.”

<sup>208</sup> ABA Model Rules, Rule 1.9.

<sup>209</sup> *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

<sup>210</sup> BSB Handbook, CD2.

<sup>211</sup> *Id.*, rC15.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*, gC6.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*



Under Rule 6, a lawyer must “not accept offer for representation from the opposing party neither shall undertake other activities related to the case but contrary to the interests of the client while the case is ongoing.”

Under Rule 4, when a lawyer drafts a bilateral legal document, such as a contract, the duty of loyalty requires the lawyer to protect the interests of both parties, regardless of who pays the reward, and in a case of a dispute, the lawyer must not represent any of the parties.

According to Rule 11, if the lawyer is in a friendly relationship with the opposing party, the duty of loyalty to the client requires the lawyer to inform the client about this kind of relationship before the litigation starts.

Rule 23 reflects the duty of loyalty to the former clients. Rules 22 and 23 provide that the lawyer must keep confidential the information learned during the representation of former clients and may not use such information against this client.

### **Conclusion**

The principle of loyalty is common to all jurisdictions. Loyalty creates the trust that enables effective representation. All other aspects of the lawyer-client relationship, such as avoiding the conflict of interests, maintaining confidentiality and independence derive from and reinforce the lawyer’s primary duty of loyalty. Once the principle loyalty is breached, it affects every decision in the representation and every aspect of the lawyer-client relationship.

The MBA Code codifies the duty of loyalty and contains lawyer’s duties common to both civil and common law systems. Under the MBA Code, the duty of loyalty means that lawyers must avoid conflict of interest, maintain professional secrecy, remain independent, and act with commitment and diligence. Lawyers must treat their clients’ interests as paramount, staying within the framework of law and the MBA Code. Rule 2 obliges lawyers to take on the case and provides for some justifying reasons, similar to those under the German Rules of Professional Practice. As in the US and UK, and consistent with the Dutch Rules of Conduct and the provisions of the Flemish Code of Ethics, under Rule 5 national lawyers must represent their clients with zeal and commitment using all available means, limited by law and MBA Code only. Similar to the other codes discussed above, Rules 4, 6, 11 of the MBA Code regulating conflicts of interest ensure that lawyers stays loyal to their clients. Similar to the provisions under the Flemish Code, Rules 22 and 23 of the MBA Code, protecting professional secrets learned during the representation of former clients, complement lawyers’ duty of loyalty and prohibiting them from using confidential information against former clients.



## Section 4: Confidentiality

The principle of confidentiality of lawyer-client communications encourages the frank and full communication between lawyers and their clients. It ensures the trust that characterizes the lawyer-client relationship and assists the lawyer in providing effective legal assistance by being provided with all relevant information. Ethical principles in both civil and common law systems consider the duty of confidentiality as a core duty of the lawyer. Generally, the lawyer's duty of confidentiality in European countries applying civil law systems is referred to as "professional secret/secretcy". Both civil and common law systems recognize the evidentiary lawyer-client privilege that protects the confidential information from disclosure and use in proceedings as evidence. The MBA Code contains a separate section regulating professional secrets.

### CCBE

The CCBE Charter phrases the confidentiality principle as "the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy."<sup>216</sup> The CCBE Commentary to the Charter explains that the principle of confidentiality has a dual nature: on the one hand it is the lawyer's duty to observe confidentiality; on the other hand "it is a fundamental human right of the client."<sup>217</sup> The CCBE Commentary explains that the lawyer-client privilege prohibits communications from being used against the client. The Commentary further notes that in some jurisdictions the right to confidentiality belongs to the client alone. In others, professional secrecy "may also require that the lawyer keeps secret from his or her own client communications from the other party's lawyer imparted on the basis of confidence."<sup>218</sup> The Commentary also notes that the lawyer's duty of confidentiality remains even after the termination of the lawyer-client relationship.

The CCBE Code of Conduct provides that the essence of the lawyer's function is that the lawyer should be told information which the client would not tell to others, and that the lawyer should receive other information on the basis of confidence.<sup>219</sup> Without confidentiality there cannot be trust.<sup>220</sup> According to the CCBE Code, "[c]onfidentiality is a primary and fundamental right and duty of the lawyer."<sup>221</sup>

<sup>216</sup> CCBE Charter, principle (b).

<sup>217</sup> CCBE Commentary on the Charter, principle (b).

<sup>218</sup> *Id.*

<sup>219</sup> CCBE Code of Conduct, Art. 2.3.1.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

The CCBE Code of Conduct provides that because confidentiality serves the interests of the administration of justice, it is entitled to special protection by the state.<sup>222</sup> The CCBE Code of Conduct further adds that the lawyer’s duty to respect the confidentiality is unlimited in time.<sup>223</sup> This means that the duty of confidentiality remains binding on the lawyer even if he or she ceases to act for the client.<sup>224</sup> The lawyer must not only respect the duty of confidentiality him or herself.<sup>225</sup> This duty extends to the lawyer’s associates, staff and anyone engaged by the lawyer in the course of providing professional services.<sup>226</sup>

## **IBA**

Principle 4 of the IBA Principles provides that a lawyer must “maintain and be afforded protection of confidentiality regarding the affairs of present or former clients,” unless the law provides otherwise.<sup>227</sup> The IBA Commentary provides that the principle of confidentiality is an indispensable feature of the rule of law.<sup>228</sup> It is equally essential to public trust and confidence in the administration of justice and the independence of the legal profession.<sup>229</sup>

According to the IBA Commentary, the principle confidentiality has two main features. First, it is “the contractual, ethical and frequently statutory duty on the part of the lawyer to keep client secrets confidential.” According to the IBA Commentary, “the statutory duty sometimes takes the form of an evidentiary lawyer-client privilege.”<sup>230</sup> The IBA Commentary further explains that the evidentiary privilege differs from the lawyer’s ethical duty of confidentiality. The lawyer’s ethical duty of confidentiality extends beyond the termination of the lawyer-client relationship.<sup>231</sup> According to the IBA Commentary, most jurisdictions “respect and protect such confidentiality duties, for example, by exempting the lawyer from testifying before courts and/or by affording lawyer-client communications special protection.”<sup>232</sup> Second, according to the IBA, there are situations in which the confidentiality of lawyer-client communications “no longer applies in full or in part.”<sup>233</sup>

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.* Art. 2.3.3.

<sup>224</sup> CCBE Explanatory Memorandum to the Code, cmt. on Art. 2.3.

<sup>225</sup> *Id.*

<sup>226</sup> CCBE Code of Conduct, Art. 2.3.4.

<sup>227</sup> IBA Principles, Principle 4.

<sup>228</sup> IBA Commentary, Explanatory note 4.2.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

The IBA Commentary states that lawyers “cannot claim the protection of confidentiality when assisting and abetting the unlawful conduct of their clients.”<sup>234</sup>

The IBA explains that some jurisdictions allow a lawyer to reveal information relating to the representation to the extent the lawyer reasonably believes is necessary to prevent substantial bodily harm or death, or to prevent the client from committing a crime in which the client has used the lawyer’s services. The IBA Commentary notes that “recent legislation imposing special duties upon lawyers to assist in the prevention of criminal phenomena such as terrorism, money laundering or organised crime has led to further erosion of the protection of the lawyer’s duty of confidentiality. Many bars are opposed in principle to the scope of this legislation.”<sup>235</sup>

According to the IBA Commentary, “[a]ny encroachment on the lawyer’s duty should be limited to information that is absolutely indispensable to enable lawyers to comply with their legal obligations or to prevent lawyers from being unknowingly abused by criminals to assist their improper goals.”<sup>236</sup> If a suspect of a past crime seeks advice from a lawyer, the duty of confidentiality should be fully protected.<sup>237</sup> However, a lawyer cannot act as an accomplice to a crime and invoke confidentiality as a shield.<sup>238</sup>

The IBA Commentary points out that the scope of protection of confidentiality differs from jurisdiction to jurisdiction.<sup>239</sup> In some jurisdictions clients may waive the lawyer’s obligation of confidentiality. In others, clients may not. In some jurisdictions, the lawyer can break the obligation for the purposes of self-defence in a lawsuit against him. In all jurisdictions, confidentiality is unlimited in time. This obligation also applies to assistants, interns, and all employed by the lawyer or law firm.

The IBA notes that lawyers should ensure that confidentiality is maintained in respect of electronic communications, and data stored on computers: “[s]tandards are evolving in this sphere as technology itself evolves, and lawyers are under a duty to keep themselves informed of the required professional standards so as to maintain their professional obligations.”<sup>240</sup>

Jurisdictions differ in the extent in which clients may waive the right to confidentiality. According to the IBA Commentary, the rules “limiting the ability to waive argue that clients frequently cannot properly

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

assess the disadvantages of issuing such a waiver.”<sup>241</sup> The IBA explains that restrictions on waivers are “of paramount importance to protect against a court or governmental authority putting inappropriate pressure on a client to waive his or her right to confidentiality.”<sup>242</sup>

Finally, lawyers should not benefit from secrets learned from the client in confidence.<sup>243</sup>

### Civil law

In France, the principle of confidentiality is referred to as “professional secrecy”.<sup>244</sup> Breach of a lawyer’s duty of professional secrecy is a criminal offence, except for the cases where the law imposes or authorizes the disclosure of the secret.<sup>245</sup> Under the French RIN, the lawyer is a necessary confidant of the client.<sup>246</sup> The duty of professional secrecy is “general, absolute and unlimited in time.”<sup>247</sup> The lawyer must not reveal professional secret in any manner, with limited exceptions when it is strictly necessary for the lawyer’s defense before a court or when the disclosure is authorized by law.<sup>248</sup>

Professional secrecy in France covers all matters “in the domain of the advice or litigation.”<sup>249</sup> The French RIN provide that this includes consultations between the lawyer and client; correspondence exchanged between the lawyer and client or between the lawyer and his or her colleagues; file notes and generally any documents in the case file, the names of the clients, and monetary settlements; and information requested by auditors or any third party.<sup>250</sup> Similarly, the lawyer must ensure that his or her staff or anyone engaged in his or her legal business respects professional secrecy.<sup>251</sup>

The French RIN provide that lawyers must also respect the confidentiality of criminal investigations.<sup>252</sup> To this end, they must “refrain from communicating, except to their clients for the purpose of their defense, information taken from the *dossier* and from rendering public any documents, exhibits or letters which relate to an ongoing investigation.”<sup>253</sup>

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> French Criminal Code, Arts.226-13 and 226-14.

<sup>245</sup> *Id.*

<sup>246</sup> French RIN, Art. 2.1.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*, Art. 2.3.

<sup>250</sup> *Id.*, Art. 2.2.

<sup>251</sup> *Id.*, Art. 2.3.

<sup>252</sup> *Id.*, Art. 2.bis.

<sup>253</sup> *Id.*

The French RIN specify that if lawyers intend to give their clients copies of the materials produced after the first appearance or first examination, they must notify the examining magistrate of the list of copies of documents or exhibits they wish to submit.<sup>254</sup> The French RIN provide that the violation of the obligation of confidentiality constitutes both a criminal offence and a breach of the rules of professional conduct.<sup>255</sup>

In Germany, like in France, violation of “professional secret” is a criminal offence.<sup>256</sup> A German lawyer must observe professional secrecy under the Federal Lawyers’ Act.<sup>257</sup> This includes everything that has become known to the lawyer in professional practice.<sup>258</sup> The German Rules of Professional Practice further specify that the lawyer “has the right and the duty to observe confidentiality.”<sup>259</sup> It applies to all information that the lawyer learns in the course of his professional activity. The duty remains after the lawyer ceases to act for the client.<sup>260</sup> According to the German Rules of Professional Practice, the duty of confidentiality does not apply “if the enforcement of or defence against claims arising from a case, or if the defence of the [lawyer’s] own interests, require the disclosure of information.”<sup>261</sup>

The German Rules of Professional Practice specify that the lawyer must “explicitly require their staff and anyone participating in his professional activity to observe the duty of confidentiality.”<sup>262</sup>

In the Netherlands, the Dutch Rules of Conduct require lawyers to exercise “the greatest possible care in observing secrecy and in making use of their lawyer-client privilege.”<sup>263</sup> Lawyer must not “divulge the details of cases they are handling, the identity of their clients or the nature and extent of their interests.”<sup>264</sup> The Dutch Rules of Conduct, unlike the French and German codes, include the disclosure of confidential information upon client’s consent under strict limitations. The Dutch Rules of Conduct specify that if the lawyer is “of the opinion that the proper performance of the task entrusted to him requires his knowledge to be made public in any way,” the lawyer can reveal confidential information on condition that the client does not object and if it is compatible with sound professional practice.<sup>265</sup>

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<sup>254</sup> *Id.*, Art. 2.4, referring to the French Code of Criminal Procedure, Art.114, paras.4 and 7.

<sup>255</sup> *Id.*, Art. 2.5.

<sup>256</sup> German Criminal Code, Section 203.

<sup>257</sup> Federal Lawyers’ Act, para.43a(2).

<sup>258</sup> *Id.*

<sup>259</sup> German Rules of Professional Practice, para. 2(1).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*, Art. 2(3).

<sup>262</sup> *Id.*, Art. 2(4).

<sup>263</sup> Dutch Rules of Conduct, Rule 1.2.

<sup>264</sup> *Id.*, Rule 6.1.

<sup>265</sup> *Id.*, Rule 6.2.

Similar to ethical rules in France and Germany, in the Netherlands the duty of confidentiality applies to the lawyer's staff<sup>266</sup> and is not limited in time.<sup>267</sup>

In Belgium, the Flemish Code of Ethics provides a list of conditions under which a lawyer "may provide confidential information to the courts, arbitration tribunals, and third parties."<sup>268</sup> A lawyer may release confidential information if:

- a. the release of that information is relevant;
- b. the release of that information is in the client's interests;
- c. the client agrees to the release of that information; and
- d. the release of that information is not prohibited by law.<sup>269</sup>

If a lawyer uses confidential information that is necessary for his or her own defense, this will not be considered as a breach of professional privilege.<sup>270</sup> The duty to uphold the professional privilege applies indefinitely,<sup>271</sup> and a lawyer must ensure that his or her personnel, agents, and other people working with the lawyer in professional capacity uphold the professional privilege.<sup>272</sup>

Unlike the Flemish Code of Ethics, the OBF Code of Ethics does not list specific conditions under which the professional secret may be lifted. Under the OBF Code of Ethics, professional secret prohibits a lawyer at any stage of the proceedings to reveal confidences received from his or her client.<sup>273</sup> The OBF Code of Ethics provides that "the correspondence between lawyers is confidential. Even when the lawyers agree, the correspondence cannot be produced without the authorization of bâtonnier. This provision covers both judicial and extra-judicial production."<sup>274</sup> In mediation, professional secret can be lifted only upon the agreement of the parties and the mediator in cause of a dispute arising from the mediation agreement.<sup>275</sup> The OBF Code of Ethics specifies that a lawyer representing a minor "in respect of professional secret, shall only communicate with the third parties, including parents or representatives of psychological or educational sector, to the extent necessary to perform his or her mission."<sup>276</sup>

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<sup>266</sup> *Id.*, Rule 6.3.

<sup>267</sup> *Id.*, Rule 6.4.

<sup>268</sup> Flemish Code of Ethics, Art. I. 3. 1. 2.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*, Art. I. 3. 1. 5.

<sup>271</sup> *Id.*, Art. I. 3. 1. 1.

<sup>272</sup> *Id.*, Art. I. 3. 1. 4.

<sup>273</sup> OBF Code of Ethics, Art. 5.16.

<sup>274</sup> *Id.*, Art. 6.1 (unofficial translation by author.)

<sup>275</sup> *Id.*, Art. 2.18.

<sup>276</sup> *Id.*, Art. 2.23 (unofficial translation by author.)



## Common Law

In the US, ABA Model Rule 1.6 provides that a lawyer must not reveal confidential information, unless the client gives informed consent, or disclosure is authorized in order to carry out the representation.<sup>277</sup>

In the US, there is a distinction between the ethical duty of confidentiality and the lawyer-client privilege. The lawyer-client privilege has a narrower scope than the ethical duty of confidentiality. The lawyer-client privilege is an evidentiary rule, prohibiting the compulsion of confidential attorney-client communications by the government or tribunal. By contrast, the ethical duty of confidentiality protects all information relating to the representation of client from voluntary disclosure and use against the client.<sup>278</sup> The duty of confidentiality covers communications protected by the lawyer-client privilege, plus any other information relating to the representation. Unlike the attorney-client privilege, which protects only confidential communications between the lawyer and client, the ethical duty of confidentiality protects information regardless of the source.

Generally, the lawyer-client privilege does not apply in situations when:

- a. it is used to engage or assist in a crime or fraud, commonly referred to as the “crime-fraud exception”;<sup>279</sup>
- b. the confidential communications are relevant to the dispute arising out of the breach of the lawyer-client relationship.<sup>280</sup>

The exceptions to the ethical duty of confidentiality are:

- a. The client gives an informed consent to reveal the confidential information;
- b. The lawyer needs to protect him or herself against a claim of malpractice, disciplinary violation, or the like;
- c. The lawyer seeks legal ethics advice;
- d. The disclosure is required by the law or court;
- e. The lawyer reasonably believes that the disclosure is necessary to prevent certain death or substantial bodily harm;
- f. The lawyer may disclose limited information (such as names, brief summary of issues relating to the matter) in order to detect and resolve conflicts of interest.<sup>281</sup>

Closely related to the lawyer-client privilege is the work product doctrine. In the preparation of a case, attorneys must often draft legal documents, internal reports, and other memoranda, which may contain confidential client communications. These documents, though

<sup>277</sup> ABA Model Rules, Rule 1.6(a).

<sup>278</sup> ABA Model Rules, Rule 1.6, cmt. 1.

<sup>279</sup> The lawyer-client privilege developed as an evidentiary rule in the US jurisprudence. See e.g. *Clark v. U.S.*, 289 U.S. 1, 6 (1933), *U.S. v. Zolin*, 491 U.S. 554, 563 (1989).

<sup>280</sup> ABA Model Rules, Rule 1.6(b)(5).

<sup>281</sup> ABA Model Rules, Rule 1.6(b).

not necessarily attorney-client communications, are protected under the work product doctrine and are not subject to disclosure.<sup>282</sup>

In the UK, a barrister must keep the affairs of each client confidential.<sup>283</sup> The BSB Handbook provides that the duty of confidentiality is central to the administration of justice. It explains that “clients who put their confidence in their legal advisers must be able to do so in the knowledge that the information they give, or which is given on their behalf, will stay confidential.”<sup>284</sup> The BSB Handbook further notes that “[i]n normal circumstances, this information will be privileged and not disclosed to a court.”<sup>285</sup> The BSB Handbook also addresses the relation between the duty of confidentiality and the barrister’s duty to the court. It explains that the duty to the court “does not permit or require [the barrister] to disclose confidential information” obtained in the course of the instructions and without the client’s authorization.<sup>286</sup> The BSB Handbook instructs that if there is a risk that the court will be misled unless the barrister discloses confidential information, he or she should ask the client for permission to disclose it to the court.<sup>287</sup> If the client refuses to allow the disclosure, the barrister must cease to act, and return his or her instructions.<sup>288</sup> In these circumstances, the barrister must not reveal the information to the court.<sup>289</sup>

The BSB Handbook acknowledges that duty of confidentiality is subject to an exception if disclosure is required or permitted by law, for example, the barristers may be obliged to disclose certain matters by the Proceeds of Crime Act 2002.<sup>290</sup>

Like in the US, the crime-fraud exception developed in the UK jurisprudence. In case of *Queen v. Cox and Railton*, one of the earliest cases to address the crime-fraud exception to the lawyer client privilege, judges reasoned:

In order that the rule [of privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view of his communications with his [lawyer] one of these elements must necessarily be absent. The client must either conspire with his [lawyer] or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the [lawyer’s] business to further any criminal object. If the

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<sup>282</sup> The work product doctrine developed in *Hickman v. Taylor*, 329 U.S. 495 (1947).

<sup>283</sup> BSB Handbook, CD6.

<sup>284</sup> *Id.*, gC42.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*, gC8.

<sup>287</sup> *Id.*, gC11.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*, gC43.

client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist.<sup>291</sup>

### **National Legislation**

The MBA Code has a separate section dedicated to the issue of professional secrets. Under Rule 20, professional secret covers all information the client gives to the lawyer regarding the requested legal advice, representation or defense and all the confidential data the lawyer learns in another way. Rule 20 provides that the breach of professional secret by the lawyer may subject him to the criminal or disciplinary responsibility. According to Rule 31, the duty to keep professional secrets extends to the lawyer's trainees.

Rule 21 provides for exceptions allowing the disclosure of confidential information. A professional secret can be discovered only when the client consciously consents, and if it is in favor or essential of the defense, as well as if the lawyer's request for disclosure is approved by the MBA. Under Rule 21, if the lawyer makes a request for approval from the MBA, the MBA is obliged to evaluate all existing circumstances.

In the practice, professional secrecy covers information where disclosure may be harmful to the client. According to Rule 20, the duty to maintain professional secret confidential exists "both during the representation and defense, and later, as long as its public announcement may cause harm to the client." Rule 23 of the MBA Code prohibits the use of confidential information that the lawyer learned while representing a legal entity or being a member of it to the detriment of that legal entity.

Article 3(a)(3) of the Attorney's Law prohibits the use of confidential information by the courts. This includes "communication between attorneys and the communication between an attorney and a client, regardless of the manner in which it is realized." This information "may not be subject to scrutiny, copying, examination and impounding and may not be used as evidence in the procedures before the courts or other state authorities." Similar to the work product doctrine in the US, under Article 3(a)(2), lawyer's "books and cases, files, electronic data and other means of communication are inviolable and may not be subject to scrutiny, copying, examination and impounding, save in cases as envisaged under a law."

The Attorney's Law does not explicitly provide for a crime-fraud exception. However, Article 21 of the Attorney's Law states that the offices of the lawyer or a law firm can be searched on the matter expressly written in the search warrant, issued by the competent judge in a criminal proceeding, while authorized official persons shall have no access to other written materials, acts, files and archives.

<sup>291</sup> *Queen v. Cox and Railton*, 14 Q.B.D. 153, 168 (1884).

## Conclusion

In all jurisdictions, professional secrecy/confidentiality of the lawyer-client communications is an important component of the lawyer's work. The client must feel secure that his or her highly sensitive information will not fall into the wrong hands. Lawyers should be aware of the parameters and exceptions to their duties regarding professional secrecy/confidentiality, as well as the lawyer-client privilege in order to most effectively advise his or her clients.

Rule 20 of the MBA Code protects all information a lawyer learns from a client or through other means. As in France, Germany and the Netherlands, the MBA Code informs of the criminal responsibility as a possible consequence of violating professional secrets. Unlike the other civil law codes discussed above, the MBA Code is explicit about the rule that the duty to keep professional secrets extends to the lawyer's trainees under Rule 31.

Rule 21 of the MBA Code provides for waiver of professional secrets. If the client consents to waive the secrecy, he must do so "consciously" – similar to the "informed consent" in the US and UK. Also, similar to the US "work product doctrine", Article 3(a)(2) of the Attorney's Law protects secrecy of books, cases, files, electronic data, and other means of communication between the lawyer and client.

In all jurisdictions, and under Rule 20 of the MBA Code, professional secrecy/ confidentiality of lawyer-client communications is unlimited in time and remains after the termination of the lawyer-client relationship.

## Section 5: Conflict of interest

By the very nature of the practice of law lawyers frequently find themselves in situations where the client's interests conflict with the lawyer's responsibilities to another client, to a former client, to third parties, or even against the lawyer's own personal interests. This is what is known as a conflict of interest. The definition and rules regulating conflicts of interest vary from jurisdiction to jurisdiction. All international and national codes incorporate the duty to avoid conflicts of interest and provide that if the representation involves a conflict of interest, the lawyer refuse representation. The Attorney's Law and the MBA Code contain provisions offering guidance on how to avoid conflicts of interest. Generally, a conflict of interest exists when a lawyer's ability to represent the client is materially limited by his or her own interests or the interests of third parties. There may be various types of conflict of interest, such as the conflicts between the lawyer and the client,<sup>292</sup> among the lawyer's concurrent clients, among a current and former clients, and conflicts due to the lawyer's duties to the third parties.

### CCBE

The CCBE Charter provides for the principle of "avoidance of conflict of interest, whether between different clients or between the client and the lawyer."<sup>293</sup> The CCBE Commentary does not define a conflict of interest. According to the CCBE Commentary, a lawyer must not act for two clients in the same case if there is a conflict, or a risk of conflict between the interests of those two clients.<sup>294</sup> A lawyer must also refrain from acting for a new client if the lawyer obtained confidential information from another current or former client.<sup>295</sup> Equally, a lawyer must avoid a conflict of interest between the client and the lawyer.<sup>296</sup> If a conflict of interest arises in the course of acting for a client, the lawyer must cease to act. The CCBE Commentary points out that the conflict of interest is closely linked to the principles of confidentiality, independence and loyalty.<sup>297</sup>

The CCBE Code of Conduct lists several types of conflict of interest that lawyer must avoid:

- a. 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;<sup>298</sup>

<sup>292</sup> See Section 1, Independence, sub-section Independence from self-interest.

<sup>293</sup> CCBE Charter, principle (c).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> CCBE Code of Conduct, Art. 3.2.1.

- b. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.<sup>299</sup>
- c. A lawyer must also refrain from acting for a new client if there is a risk of breach of a 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.<sup>300</sup>

Where lawyers practice in an association, these prohibitions equally apply to all members of the association.<sup>301</sup>

The CCBE Explanatory Memorandum provides that a lawyer may still act for two or more clients in the same matter if their interests are not in fact in conflict and that there is no significant risk of such conflict.<sup>302</sup> If a conflict arises during representation, or there is a risk of a breach of confidence or other circumstances impairing the lawyer's independence, the lawyer must cease to act for all the clients in the matter.<sup>303</sup>

The CCBE provides that under certain circumstances it may be appropriate for a lawyer to act as a mediator between the conflicting clients. In such circumstances, the lawyer must: a. explain his or her position as mediator, b. obtain an agreement from the parties, and c. attempt to resolve the differences between the parties.<sup>304</sup> A lawyer must use his or her own judgment on whether to cease to act or to try to mediate.<sup>305</sup> And when a lawyer seeks to mediate between the conflicting clients and mediation fails, the CCBE instructs the lawyer to cease to act for those clients.<sup>306</sup>

## **IBA**

The IBA Principle 3 provide that a lawyer “shall not assume a position in which a client’s interests conflict with those of the lawyer, another lawyer in the same firm, or another client,” unless it is permitted by law or by client’s authorization.<sup>307</sup> The IBA explains that there are several types of conflicts, such as when the representation of one client will be directly adverse to another client, or there is a risk that the representation of one or more clients will be materially limited by: (i)

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<sup>299</sup> *Id.*, Art. 3.2.2.

<sup>300</sup> *Id.*, Art. 3.2.3.

<sup>301</sup> *Id.*, Art. 3.2.4.

<sup>302</sup> CCBE Explanatory Memorandum, Commentary on Art. 3.2.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> IBA Principles, principle 3.

the lawyer's responsibilities to another client; (ii) a former client; (iii) a third person; or (iv) the lawyer's personal interest.<sup>308</sup>

According to the IBA Commentary, in some jurisdictions a lawyer may represent the client if:

- a. the lawyer will be able to provide competent and diligent representation to each affected client;
- b. the representation is not prohibited by law;
- c. the representation does not involve the assertion of a claim by one client against lawyer's another client; and
- d. each client gives informed consent in writing.<sup>309</sup>

Information that the lawyer learned from a formerly represented client must not be used to the disadvantage of the former client except when permitted by applicable law or ethics rules.<sup>310</sup>

In other jurisdictions, where there is a potential conflict of interest the lawyer may still undertake the representation if he or she discloses the possibility of the conflict to all affected parties and obtains their consent.<sup>311</sup> However, disclosure must not violate the lawyer's duty of confidentiality.<sup>312</sup>

The IBA points out that in some jurisdictions, if a conflict becomes apparent only after the lawyer started to work, the conflicted lawyer must withdraw from the case in its entirety and in respect of all clients concerned.<sup>313</sup> Some other jurisdictions require withdrawal from representing one client only, but not all clients.<sup>314</sup>

The IBA Commentary distinguishes between a legal/professional conflict and a commercial conflict of interest. According to the IBA, a commercial conflict of interest does not prevent a lawyer from representing a client "even if that client is a competitor or its interests conflict with the commercial interests of another present or former client, not involved or related in that particular case assigned to the lawyer."<sup>315</sup>

The IBA Commentary provides that a lawyer may defend the interests of a client against another client "in any circumstance where the latter, whether in negotiating an agreement, or in another legal action or arbitration, has chosen to place its interests for those cases with another lawyer."<sup>316</sup> The IBA explains, however, that in such cases,

<sup>308</sup> IBA Commentary, Explanatory note 3.2.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

the first lawyer will have to comply with all other applicable rules of professional conduct, and in particular, with rules of confidentiality, professional secrecy, and independence.<sup>317</sup>

The IBA further explains that “[l]awyers must not allow their own interests to conflict with or displace those of their client.”<sup>318</sup> This includes that a lawyer must not unduly influence the client for his or her own benefit. Similarly, when a lawyer becomes aware of the conflict between the client’s and lawyer’s own interests, the lawyer must not accept instructions or continue to act for that client.<sup>319</sup>

## Civil Law

In France, the French RIN limit the free choice of lawyer by consideration of conflicts of interest.<sup>320</sup> The French RIN differentiate between an actual and potential conflict of interest. An actual conflict of interest exist:

- a. in relation to legal advice, when lawyers, having an obligation to provide full and accurate information to their clients, are unable to do so without compromising the interests of one or more parties;
- b. in relation to representation in legal proceedings, when representation of several parties would cause lawyers to present a different case, particularly in its development, argument and objective, from the one which would be presented if the lawyer were to represent only one party;
- c. when an development or a change in the case results in one of the difficulties described above.<sup>321</sup>

A potential conflict of interest exists when “a foreseeable change or development” in the case gives the lawyer a reason to foresee that one of the difficulties described with regard to the actual conflict of interest may materialize.<sup>322</sup>

The French RIN describe the circumstances when conflicts of interest do not exist, or can be waived. No conflict will exist if the lawyer informs the clients of the conflict of interest between them and receives an agreement, reconciling that conflict.<sup>323</sup> However, if the lawyer fails to reconcile the conflicting clients, he or she may not advise or act on behalf of one of them.<sup>324</sup> Similarly, no conflict will exist if the clients agree that the lawyer will advise them on a joint strategy, or if lawyers, who are members of the same firm or group act separately on behalf of

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> French RIN, Art. 4.1.

<sup>321</sup> *Id.*, Art. 4.2.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*



different clients, who are aware of the lawyers' common membership.<sup>325</sup> There are certain limitations on the freedom of lawyers to act. For instance, if there is a risk of a breach of professional secret or a risk of the lawyer's independence being compromised, lawyers must cease to act for all the concerned clients, unless the parties agree.<sup>326</sup> Similarly, lawyers may not accept instructions from any new client if it will breach his or her obligation of confidentiality towards a former client.<sup>327</sup> The French RIN further specify that lawyers may act for the clients in other matters without having to secure their agreement when those matters are not linked to the conflict of interest and the lawyers' involvement in them does not prejudice lawyers' independence and their duty of professional secrecy.<sup>328</sup>

In Germany, representing two parties in the same matter is a criminal offence, punishable by a term of imprisonment of three months to five years.<sup>329</sup> The Federal Lawyers' Act prohibits a lawyer to represent conflicting interests.<sup>330</sup> The German Rules of Professional Practice specify that the lawyer "must refrain from acting for a new party if he has advised or represented another party in the same matter, if there is a conflict of interest or if he has been seized with the matter in any other professional way...."<sup>331</sup> This prohibition applies if the lawyer leaves one joint practice to work in another one.<sup>332</sup> If the lawyer realizes that there is a conflict of interest in the course of representation, he or she must "inform his clients immediately and cease to act for all other clients involved in the same matter."<sup>333</sup>

A conflict of interest may be waived if the clients "have expressly agreed, following comprehensive information, to be represented by the [lawyer] and where this is not against the interests of the proper administration of justice."<sup>334</sup> The German Rules of Professional Practice provide that in all circumstances when faced with the conflicts of interest, the lawyer must keep the duty of confidentiality.<sup>335</sup>

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<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> German Criminal Code, para. 356: "(1) An attorney or other person rendering legal assistance who in relation to matters confided to him in this capacity in the same legal matter serves both parties with counsel and assistance in breach of his duty shall be liable to imprisonment from three months to five years. (2) If the offender acts in collusion with the opposing party to the detriment of his client the penalty shall be imprisonment from one year to five years."

<sup>330</sup> Federal Lawyers' Act, para. 43(a)(4).

<sup>331</sup> German Rules of Professional Practice, para. 3.

<sup>332</sup> *Id.*, para. 3(3).

<sup>333</sup> *Id.*, para. 3(4).

<sup>334</sup> *Id.*, para. 3(2).

<sup>335</sup> *Id.*, para.3(5).

In the Netherlands, the lawyer may not represent the interests of more than one party “if such interests are in conflict or if there was a real chance of such conflict.”<sup>336</sup> If a lawyer represents the interests of more than one party, he or she is generally obliged to withdraw from the case as soon as a conflict arises that is incapable of immediate resolution.<sup>337</sup> The Dutch Rules of Conduct explain that there may be special circumstances that justify the general rule not being applied.

The Dutch Rules of Conduct state:

from the point of view of efficiency, information, costs savings, etc., this [representing interests of more than two party] is not in general undesirable, nevertheless it is quite conceivable that a conflict could arise between the interests of both clients. Thus, for example, there could be a disagreement even before the start of proceedings as to cover, although it is in the interests of both the insured party and insurer not to openly disclose this until a decision has been reached on the claim. In some circumstances it is also conceivable that an advocate continues to act for a longstanding client (insured party or insurer) as against the other party (insured party or insurer) when problems gradually arise on matters such as insurance cover or a settlement.<sup>338</sup>

If an advocate acts for one of the two parties, from the start there should be no doubt as to whose interests the lawyer represent if a conflict of interest arises.<sup>339</sup> The lawyer must not use the confidential information received from either of the parties against the other.<sup>340</sup> When a lawyer represents the interests of multiple parties and decides to withdraw from representing one of those parties, the lawyer must not act against the client he or she withdrew from.<sup>341</sup> The Dutch Rules of Conduct explain that this rule applies also if the lawyer withdraws for a reason other than a conflict of interest.<sup>342</sup>

The Dutch Rules of Conduct provide that the lawyer may not act against a former client or the client of a colleague within the same firm.<sup>343</sup> However, in these situations the conflict of interest may be waived if:

- a. the matter entrusted to the lawyer relates to a different issue in regard to the lawyer or law firm’s representation of a current or former client;

<sup>336</sup> Dutch Rules of Conduct, Rule 7. 1.

<sup>337</sup> *Id.*, Rule 7. 2.

<sup>338</sup> *Id.*, Commentary on Rule 7. 2.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*, Rule 7. 3.

<sup>342</sup> *Id.*, Commentary on Rule 7. 3.

<sup>343</sup> *Id.* Rule 7. 4.

- b. the interests entrusted to the lawyer are also unconnected with such issue and it is unlikely that such a connection will arise;
- c. the lawyer or his colleague within the same law firm does not possess confidential information of any nature originating from his former or existing client, nor business-related information or other information relating to the person or business of the former or existing client, which could be significant in the case against the former or existing client; and
- d. no reasonable objections have been put forward by the former or existing client or the party requesting the lawyer to represent their interests.<sup>344</sup>

If these conditions have not been satisfied, a lawyer can resolve the conflict by obtaining the informed consent of all affected parties.<sup>345</sup>

The Dutch Rules of Conduct note that a lawyer is not prohibited from acting against a client to recover payment for his unpaid bill.<sup>346</sup> It further notes that the rationale for the conflict of interest provisions is that “a client must have the fullest confidence that information about the case, himself or his business that he provides to the advocate or a colleague within the firm will not be used against him at any time in the future.”<sup>347</sup> Under the Dutch Rules of Conduct, a lawyer facing a conflict of interest may wish to seek the advice of the Dean.<sup>348</sup> The decision as to whether to remain on the case or to withdraw due to a conflict of interest is principally the responsibility of the lawyer himself, rather than depending on the wishes of the client.<sup>349</sup>

The Dutch Rules of Conduct prohibit “the creation within one and the same firm of an artificial administrative separation of representation of interests and the relevant files – known as “Chinese walls” – as a way of avoiding conflicts of interest.”<sup>350</sup>

In Belgium, like in the Netherlands, the Flemish Code of Ethics has similar provisions generally prohibiting acting for several clients with conflicting interests.<sup>351</sup> However, unlike the Dutch Rules of Conduct, the Flemish Code of Ethics allows a lawyer to act for several clients with conflicting interests if those clients also have common interest and approach the lawyer to defend that common interest.<sup>352</sup> Dual or multiple representation of clients is possible if the clients agree in writing and the lawyer is able to protect all the clients’ interests

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* Rule 7. 5.

<sup>346</sup> *Id.* Commentary to Rule 7. 7.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> Flemish Code of Ethics, Art. I. 2. 3. 2.

<sup>352</sup> *Id.*, Art. I. 2. 3. 2, para. 2.

without breaching his or her professional privilege and independence.<sup>353</sup> The Flemish Code of Ethics provides that the lawyer must refrain from acting in every respect if his or her involvement would imply a breach of his or her duty of confidentiality or independence.<sup>354</sup>

Under the OBF Code of Ethics, a lawyer has a duty to prevent conflicts of interests.<sup>355</sup> The Ethics Regulations of Brussels<sup>356</sup> specify that a lawyer “shall not defend the interests of a close relative, or those of a colleague of which it is a partner, collaborator or tutor or with whom he jointly practices the profession.”<sup>357</sup> It is also prohibited to represent a party if a lawyer has already represented an adverse party in the same case.”<sup>358</sup> The same prohibition extends to cases a lawyer was earlier involved in or has knowledge of affairs that may be beneficial to the new client, unless there are exceptional circumstances approved by the bâtonnier.<sup>359</sup>

### Common law

In the US, the ABA Model Rules contain elaborate provisions dealing with different types of the conflict of interest. According to the ABA Model Rules, conflicts of interest are divided into four categories: (i) conflicts between current clients; (ii) conflicts between a current client and a former client; (iii) conflicts due to the lawyer’s obligation to a third person; and (iv) conflicts between the lawyer and the client.

Under ABA Model Rule 1.7, a conflict of interest exists when the representation of one client will be directly adverse to another client, or when there is a significant risk that the representation will be materially limited by the lawyer’s own interests or lawyer’s responsibilities to another client, a former client, or a third party.<sup>360</sup> Conflicts of interest among current clients may arise in situations such as representing two or more parties in civil litigation, representing co-defendants in criminal cases, or parties to the same business transaction.<sup>361</sup>

In these situations, the lawyer may accept representation despite the existence of a conflict if: (I) the lawyer reasonably believes to be able to provide competent and diligent representation to each client; (II) the representation is not against the law; (III) the representation does not

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<sup>353</sup> *Id.*

<sup>354</sup> *Id.*, Arts. I. 2. 3. 3. - I. 2. 3. 4.

<sup>355</sup> OBF Code of Ethics, Art. 1.2.

<sup>356</sup> Similar to the Paris Bar Internal Regulations that incorporate the French RIN, the Ethics Regulations of Brussels incorporate the OBF Code of Ethics and add specific provisions to it. See Ethics Regulations of Brussels (Le Règlement déontologique bruxellois), available in French only at <http://www.barreaudebruxelles.info>.

<sup>357</sup> Ethics Regulations of Brussels, Art. 5.100.a.

<sup>358</sup> *Id.*, Art. 5.100.c (unofficial translation by author.)

<sup>359</sup> *Id.*

<sup>360</sup> ABA Model Rules, Rule 1.7.

<sup>361</sup> ABA Model Rules, Rule 1.7(a).

involve the assertion of a claim by one client against the other one; and (IV) each affected client gives informed consent in writing.<sup>362</sup>

With regard to a former client, the lawyer must not represent a client whose interests are materially adverse to those of a former client in a matter that is “the same or substantially related” to a matter in which the lawyer represented the former client, “unless the former client gives informed consent, confirmed in writing.”<sup>363</sup> The same rule applies to the clients of the lawyer’s former firm. A lawyer whose firm formerly represented a client in a matter and who acquired confidential information or information pertaining to the representation, may not represent another person, if that person’s interests are materially adverse to those of the former client.<sup>364</sup> Under the ABA Model Rules, lawyers have a duty to preserve confidential information after the representation ends.<sup>365</sup> A lawyer must not use confidential information to the former client’s disadvantage, unless the lawyer receives an informed consent in writing.<sup>366</sup>

In order to avoid a conflict involving the interests of third persons, the lawyer must not accept compensation from a third person for representing a client, unless: (I) the client gives an informed consent, (II) the third person does not interfere with the lawyer-client relationship, and (III) the arrangement does not compromise the lawyer’s duty of confidentiality.<sup>367</sup>

Regarding the lawyer’s own interests, the ABA Model Rules describe three common scenarios when a lawyer’s self-interest conflicts with the clients interests:

- a. the lawyer enters into a business or financial transaction with the client;<sup>368</sup>
- b. the lawyer’s personal interests may affect the representation of the client, such as a relationship with the opposing party or when the related persons (spouses, siblings, etc.) represent the adverse parties.<sup>369</sup>
- c. the lawyer drafts an instrument, for example, a will, in which a client who is not related to the lawyer gives a gift to the lawyer or his or her close relative.<sup>370</sup>

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<sup>362</sup> *Id.*, Rule 1.7(b).

<sup>363</sup> *Id.*, Rule 1.7(a).

<sup>364</sup> *Id.*, Rule 1.9(c).

<sup>365</sup> *Id.*, Rule 1.6.

<sup>366</sup> *Id.*, Rule 1.9(c)(1).

<sup>367</sup> *Id.*, Rule 1.8(f).

<sup>368</sup> ABA Model Rules, Rule 1.8(a)

<sup>369</sup> ABA Model Rules, Rule 1.7, cmt. 11.

<sup>370</sup> ABA Model Rules, Rule 1.8(c).

In some situations, the conflict of interest can be waived by the client's informed consent. Informed consent is "an agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."<sup>371</sup> This requires the client to not only be aware of all relevant circumstances, but also how the conflict adversely affects his or her interests, and available alternatives.<sup>372</sup>

In the UK, the BSB Handbook states that the barristers must not accept instructions from a client in a particular matter if:

- a. there is a conflict of interest between the barrister's own personal interests and the interests of the prospective client in respect of the particular matter; or
- b. there is a conflict of interest between the prospective client and one or more of the barrister's former or existing clients in respect of the particular matter unless all of the clients who have an interest in the particular matter give their informed consent to the barrister acting in such circumstances.<sup>373</sup>

Similar to the ABA Model Rules, the BSB Handbook specifies that barristers have a continuing duty of confidentiality. A barrister may not accept representation if there is a real risk that the duty to keep confidentiality regarding the information obtained from another former or existing client, or any other person, will prevent the barrister to act in the best interests of the prospective client.<sup>374</sup> Also similar to the ABA Model Rules, a barrister may accept representation if the person to whom the barrister owes a duty of confidentiality gives informed consent to the disclosure of that confidential information.<sup>375</sup>

In order to receive informed consent, a barrister must fully disclose to the relevant clients and prospective clients the extent and nature of the conflict and must be able to act independently and in the best interests of each client.<sup>376</sup>

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<sup>371</sup> *Id.*, Rule 1.0(e).

<sup>372</sup> *Id.*, Rule 1.7, cmt. 18.

<sup>373</sup> BSB Handbook, Code of Conduct, rC21.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*, gC68

## National Legislation

The MBA Code does not use the term “conflict of interest” and there is no separate section of the Code defining or regulating conflicts of interest. However, several provisions of the Attorney’s Law and the MBA Code offer basic guidance as to how to avoid conflicts of interest.

The Attorney’s Law contains provisions regulating concurrent and successive representation. Article 17 of the Attorney’s Law states that the lawyer cannot provide legal assistance on a particular matter when the lawyer or the lawyer’s colleague from the same law firm has provided legal assistance to the opposite party in a dispute in the same matter, or when the lawyer has worked on that case in another professional capacity (for example, as a judge, prosecutor or as a public administration official). According to Article 17(4), when a lawyer prepares a bipartite contract or other legal matter, in case of a dispute, the lawyer must not represent either of the parties.<sup>377</sup> Similarly, Rule 4 of the MBA Code requires a lawyer to protect the interests of both parties, regardless of who pays the reward, and in a case of a dispute, the lawyer must not represent any of the parties.

The MBA Code restates these prohibitions. Under Rule 3, the lawyer is not allowed to “undertake public function or to represent co-plaintiffs and co-defendants if mutual interests are conflicting.” Rule 3 further provides that if the conflict arises in the course of representation, the lawyer “is obliged to revoke the representation or the defence to one of the parties.”

Rule 6 provides that the lawyer must not accept an “offer for representation from the opposing party” and prohibits undertaking “any other activities related to the case but contrary to the interests of the client while the case is ongoing.” Under Rule 7, the lawyer must “study consciously every undertaken case and act accordingly.” Presumably, this means that, unlike under some civil law codes discussed in this Section, the MBA Code requires lawyers to be proactive and diligent in avoiding conflicts of interest. The lawyer may not limit himself or herself with the information provided by the client, but must take reasonable measures to examine the case and the possibility of the conflict of interest.

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<sup>377</sup> *Id.*, Art. 17(4).

## Conclusion

The definition of a conflict of interest differs from jurisdiction to jurisdiction. Generally, conflicts of interest exist when a lawyer's representation of a client is limited by his or her obligations to a third party, or by the lawyer's self-interest. The main differences in resolving conflicts of interest in civil and common law jurisdictions are whether the client can waive the conflict, and whether information barriers (such as "Chinese walls" described in the Dutch Rules of Conduct) are permitted.

A lawyer must take into account the differences that exist in the national rules, especially in cross-border practice. Although the CCBE provides for certain principles to determine which rules apply in cross-border practice, there is always a risk of conflicting rules between jurisdictions when it comes to the more nuanced issues – the sort of problems that even practice and experience cannot readily solve with certainty. That is why it is so crucial for a lawyer to be aware of the applicable rules and to examine whether he or she complies with such rules in every jurisdiction in which he or she provides legal services.

Although there is no separate section in the MBA Code dealing with the conflicts of interest as in the codes discussed above, several provisions of the Attorney's Law and the MBA Code provide minimum guidance as to how to resolve conflicts of interest. Article 17 of the Attorney's Law and Rule 4 of the MBA Code prohibit lawyers from representing directly adverse interests and specify that if the conflict arises out of an agreement compiled by the lawyer for multiple parties, the lawyer must not represent either of the parties.

Rule 3 ensures that lawyers do not undertake representation for co-plaintiffs or co-defendants if their interests are conflicting, and if such conflict arises during representation, a lawyer must withdraw from representing one of the clients. However, the question arises whether a lawyer can practically do so without violating his or her duty to keep professional secret. If the conflict of interest arises in the middle of representation and the lawyer decides to withdraw from representing one of the co-defendants only, the information he or she learned from a now-former client is beneficial for the remaining client. Thus, to continue to act for one of the clients will violate a lawyer's obligation to keep professional secret and refrain from using it for his or her case's benefit.

Unlike other codes discussed in this Section, Rule 7 of the MBA Code obliges a lawyer to take reasonable measures to examine the case and the possibility of the conflict of interest, and act accordingly.



## Section 6: Diligence

The lawyer's duty of diligence is universally recognized. In criminal matters, due diligence is incorporated into the fair trial rights guaranteed to suspects and accused. The duty of diligence is not always explicitly stated, but is implied in various rules requiring promptness, competence, zeal, commitment, dedication, and workload management. A lawyer's ability to satisfy the duty of diligence is paramount to ensuring that the client receives a fair trial and effective legal assistance.

### CCBE

The CCBE Charter does not use the term "diligence", but this duty can be gleaned from the CCBE Commentary on the Charter to the core principles. The CCBE Charter stresses that lawyers must not take on cases which they are not competent to handle.<sup>378</sup> Similarly, the CCBE Code of Conduct prohibits lawyers from handling a matter he or she is not competent to handle, unless he or she cooperates with a competent lawyer.<sup>379</sup>

The CCBE Code of Conduct provides that a lawyer must advise and represent the client "promptly, conscientiously and diligently."<sup>380</sup> The lawyer must undertake personal responsibility for the discharge of the client's instructions and keep the client informed as to the progress of the matter.<sup>381</sup> Under the CCBE Code of Conduct, lawyers should not exercise the right to withdraw from a case in a way that "the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client."<sup>382</sup> The CCBE Explanatory Memorandum to the Code provides that once having accepted the client's instructions, the lawyer is obliged not to withdraw without ensuring that the client's interests are safeguarded.<sup>383</sup>

### IBA

The IBA principles provide that lawyers have an obligation to be professional with clients, other parties and their counsel, the courts, court personnel, and the public.<sup>384</sup> This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation. All of these characteristics are essential for the fair administration of justice.<sup>385</sup> The IBA Commentary provides that

<sup>378</sup> CCBE Commentary on the Charter, principle (g).

<sup>379</sup> CCBE Code of Conduct, Art. 3.1.2.

<sup>380</sup> *Id.*, Art. 3.1.1.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*, Art. 3.1.4.

<sup>383</sup> CCBE Explanatory Memorandum, cmt. on Article 3.1.

<sup>384</sup> IBA Principles, Explanatory note 2.2.

<sup>385</sup> *Id.*

lawyers should serve their clients competently, diligently, promptly, and without any conflict to their duty to the court. Lawyers should protect client's best interests with commitment and dedication and pursue a matter despite opposition, obstruction, or personal inconvenience to the lawyer, taking whatever lawful and ethical measures that may be necessary.<sup>386</sup> The IBA also explains that due diligence requires the lawyer to avoid giving or requesting an undertaking that cannot be fulfilled. The lawyer is required to have full control over the ability to fulfil any undertaking given.<sup>387</sup>

### Civil law

In France, Article 1.3 of the French RIN state that lawyers owe their clients a duty of “dedication, diligence and care.”<sup>388</sup> Under the French RIN, the duty of care requires the lawyer to properly assess the facts of the case or matter in order to provide intelligent, meaningful, and sound legal advice.<sup>389</sup>

The lawyer is required to establish the nature and extent of the legal transaction for which assistance is requested. When the lawyer has a reason to suspect that a legal transaction is intended to assist in the commission of an offense, the lawyer must immediately seek to dissuade his client. If this fails, the lawyer must withdraw from the case.<sup>390</sup> The French RIN also provide for the duty to respect the principle of due process.<sup>391</sup> In order to ensure “fair and equitable proceedings, with full respect of rights of defence,” the principle of due process requires that “[m]utual and full communication of relevant facts, evidence and legal arguments should be exchanged in good time and in writing.”<sup>392</sup> In criminal proceedings, if the accused lodges an objection, the RIN require that the accused's lawyers “communicate the grounds and evidence without delay to enable the counter-argument in good time by the opposing party.”<sup>393</sup>

In Germany, the German Rules of Professional Practice do not contain the terms “diligence” or “competence”, but oblige lawyers to act with promptness, for instance, in answering a client's inquiries, or informing a client about the progress of the matter undertaken by the lawyer.<sup>394</sup>

In the Netherlands, lawyers must exercise the greatest possible care in observing secrecy and in making use of their lawyer-client privilege.

<sup>386</sup> *Id.*, Explanatory note 5.2.

<sup>387</sup> *Id.*, Explanatory note 6.2.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*, Art. 1.5.

<sup>390</sup> *Id.*, Art. 1.5.

<sup>391</sup> *Id.*, Art. 5.1.

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*, Art. 5.3.

<sup>394</sup> German Rules of Professional Practice, para. 11.

The Dutch Rules of Conduct state that the primary duty of lawyers is to handle cases in a sound and careful manner, which includes “the duty to gain and keep up the necessary know-how and, when they are faced with a case for which they lack the required knowledge and/or skills to secure the necessary assistance or refer the client to a colleague who does meet the requirements.”<sup>395</sup>

In Belgium, the Flemish Code of Ethics requires lawyers to exercise the profession in an expert manner, in compliance with professional privilege, the essential duties of independence and partiality, and by avoiding conflicts of interest.<sup>396</sup> A lawyer must uphold the principles of dignity, righteousness, and discretion that form the basis of the profession.<sup>397</sup> Similarly, the OBFGE Code of Ethics provides that a lawyer has a duty to perform his functions “with diligence and competence.”<sup>398</sup> According to the OBFGE Code of Ethics, “dignity, honesty and tact form the basis of the profession and guarantee the adequate performance.”<sup>399</sup>

### Common law

In the US, ABA Rule 1.3 requires a lawyer to “act with reasonable diligence and promptness in representing a client.”<sup>400</sup> The Commentary to this rule explains that a lawyer must pursue a matter on behalf of a client “despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”<sup>401</sup> According to the Commentary, a lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. This does not mean, however, that the lawyer is bound to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. According to the Commentary, the lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.<sup>402</sup>

The Commentary further explains that a lawyer must control his or her workload so that each matter can be handled competently.<sup>403</sup> A client’s interests often can be adversely affected by the passage of time or the change of conditions. For example, when a lawyer overlooks a statute

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<sup>395</sup> Dutch Rules of Conduct, Rule 1.2.

<sup>396</sup> Flemish Code of Ethics, Art. I. 1.1.

<sup>397</sup> *Id.*

<sup>398</sup> OBFGE Code of Ethics, Art.1.2(f) (unofficial translation by author.)

<sup>399</sup> *Id.*, Art. 1.2(d) (unofficial translation by author.)

<sup>400</sup> ABA Model Rules, Rule 1.3.

<sup>401</sup> *Id.*, cmt. 1.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*, cmt. 2.

of limitations, the client’s legal position may be destroyed. According to the Commentary, even when the client’s interests are not affected in substance, an unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness. This does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer’s client. The lawyer must carry this duty through to conclusion of all matters undertaken for a client.

In the UK, similar rules apply to barristers. One of the core duties under the BSB Handbook is “to provide a competent standard of work and service to each client.”<sup>404</sup> This means that barristers are obliged not only to provide a competent standard of work but also a competent standard of service to clients.<sup>405</sup> The BSB Handbook provides some examples as to what a competent standard of work and of service also includes:

1. treating each client with courtesy and consideration; and
2. seeking to advise your client, in terms they can understand; and
3. taking all reasonable steps to avoid incurring unnecessary expense; and
4. reading your instructions promptly. This may be important if there is a time limit or limitation period. If you fail to read your instructions promptly, it is possible that you will not be aware of the time limit until it is too late.<sup>406</sup>

Diligence requires barristers to defend their client’s “fearlessly and by all proper and lawful means.”<sup>407</sup> They must do so “without regard to [their] own interests...”<sup>408</sup>

### **National Legislation**

The MBA Code, like the codes in other civil law countries discussed above, does not have a specific provision on diligence. However, the duty of diligence is implied in some provisions of the Attorney’s Law and the MBA Code. Articles 11 and 17 of the Attorney’s Law require from lawyers “conscientious” performance. Rule 5 of the MBA Code develops this requirement, providing that the lawyer must “consciously represent and defend the client, using the entire available means, permitted by Law.” Under Rule 11, lawyers must act in the interests of their clients “energetically and without fear.”

Under Rule 15, in order to be diligent, lawyers must “avoid demagoguery ... in their presentations.” They are obliged to “perform right regardless if the client or the public are present or not.” Ethically, lawyers are expected

<sup>404</sup> BSB Handbook, CD7.

<sup>405</sup> *Id.*, gC38 (italics in original).

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*, rC12.

<sup>408</sup> *Id.*

to robustly advocate for the client's cause with elegant and cogent arguments, while maintaining a sense of decorum and civilities towards the court and opposing parties. Rule 16 requires the lawyer's motions and speeches to be presented in "a nice, impressive and plausible form, more interesting and easy to be accepted."

Under Rule 9, the lawyer must not accept representation if he or she is overloaded with work to that level that not every case can be led thoroughly and consciously. Rule 9 of the MBA Code further specifies that in such circumstances, the lawyer who is too occupied must "offer to the client other trustful colleagues who has time and possibility to accept the client." The MBA Code also requires lawyers to exercise diligence in avoiding conflicts of interest. Under Rule 7, lawyer are "obliged to study consciously every undertaken case and to act accordingly" in order to protect client's interests and avoid any conflicts of interest. Rule 7 further obliges the lawyer to inform the client about the current status of the case from the factual and legal points of view. Under Rule 10, lawyers are obliged to provide "all original documents and papers in any phase of the procedure" to their clients, when requested.

### **Conclusion**

The lawyer's duty of diligence is easier described than defined. Few national codes use the term "diligence," comparable to the ABA Model Rules. However, this does not mean that the duty of diligence is not recognized in civil law systems. All of the codes contain provisions requiring competence in handling the client's case, dedication in defending the client's interests, commitment preventing lawyers to withdraw and abandon the case without serious justifying reasons, etc. Similarly, the MBA Code implies the lawyer's duty of diligence in its provisions regulating the lawyer-client relationship, the avoidance of the conflicts of interest, and the lawyer's undertaking and obligation to take on a case. Rule 9 of the MBA Code incorporates the requirements contained in the CCBE Code and the IBA principles regarding the work overload. Unlike the CCBE Code and IBA Principles, the MBA Code specifies that in case of the work overload, a lawyer must offer to the client other trustful colleagues who have time and facilities to take on the client's case.

Similar to the duty of care in France, Rule 7 of the MBA Code requires the lawyer to assess the facts of the case or matter diligently and properly, in order to provide a sound legal advice and avoid conflicts of interest. As in Germany, the duty of diligence is also reflected in the lawyer's duty to promptly inform the client of the progress in his or her matter and answer to the client's requests for the relevant documents under Rules 7 and 10. Finally, similar to the US and UK, Rule 11 of the MBA Code requires lawyers to protect their clients fearlessly and by all proper means.



## Section 7: Lawyer's Fees

Lawyer's fees may affect the lawyer-client relationship. The cost / fees in representing a client is a crucial element in the availability of legal services. Virtually all jurisdictions adopt laws and regulations to reflect the principle of fair lawyer's fees. Different jurisdictions apply different rules regulating specifics details, such as the minimum amount to be charged, fee sharing with lawyers and non-lawyers, referral fees, etc. Both civil and common law jurisdictions require that in order to be fair, the lawyer's fees must be reasonable.

### CCBE

The CCBE Charter contains a principle of "fair treatment of clients in relation to fees."<sup>409</sup> The CCBE Commentary on the Charter explains that the "fee charged by a lawyer must be fully disclosed to the client, must be fair and reasonable, and must comply with the law and professional rules to which the lawyer is subject."<sup>410</sup> The Commentary on the Charter explains that since "the matter of the lawyer's fees seems to present an inherent danger of [conflict of interest between lawyer and client] ... the principle dictates the necessity of professional regulation to see that the client is not overcharged."<sup>411</sup>

The CCBE Code of Conduct restates the principle that a fee charged must be fully disclosed to the client, and be fair and reasonable.<sup>412</sup> The CCBE Code of Conduct specifies that if a lawyer requires a payment on account of his or her fees, such payment should not exceed a reasonable estimate of the fees involved.<sup>413</sup> A lawyer may withdraw from the case or refuse to handle it if the client fails to pay.<sup>414</sup> However, the lawyer's withdrawal must be done in a way so that the client is able to find another lawyer within a reasonable time and suffers no prejudice.<sup>415</sup>

The CCBE Code of Conduct prohibits making a *pactum de quota litis*.<sup>416</sup> A *pactum de quota litis* (or contingency fee) is defined as "an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter."<sup>417</sup>

<sup>409</sup> CCBE Charter, principle (f).

<sup>410</sup> CCBE Commentary on the Charter, principle (f).

<sup>411</sup> *Id.*

<sup>412</sup> CCBE Code of Conduct, Art. 3.4.

<sup>413</sup> *Id.*, Art. 3.5.

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*, referring to Art. 3.1.4.

<sup>416</sup> *Id.*, Art. 3.3.1.

<sup>417</sup> *Id.*

This does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer.<sup>418</sup>

The CCBE Code of Conduct also prohibits fee sharing with non-lawyers. Article 3.6.1 provides that “[a] lawyer may not share his or her fees with a person who is not a lawyer except where an association between the lawyer and the other person is permitted by the laws and the professional rules to which the lawyer is subject.”<sup>419</sup> The CCBE Code of Conduct specifies that this does not preclude a lawyer from paying a fee, commission, or other compensation to a deceased lawyer’s heirs or to a retired lawyer in respect of taking over the deceased or retired lawyer’s practice.<sup>420</sup>

The CCBE Code of Conduct requires lawyers to inform their clients of the availability of legal aid where applicable.<sup>421</sup> Generally, lawyers should strive to achieve the most cost-effective resolution of the client’s dispute, including advising on whether to attempt to negotiate a settlement or engage in alternative dispute resolution.<sup>422</sup>

The CCBE Code of Conduct prohibits referral fees.<sup>423</sup> This provision reflects the principle that a lawyer may not demand or accept from another lawyer or any other person a fee, commission, or any other compensation for referring or recommending the lawyer to a client.<sup>424</sup> Similarly, a lawyer may not pay anyone a fee as a consideration for referring a client to him- or herself.<sup>425</sup>

## **IBA**

Principle 10 of the IBA Principles provides that lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee.<sup>426</sup> This means that a lawyer must not generate unnecessary work to increase his or her fees.<sup>427</sup> The IBA Commentary explains that the basis for the claim of a lawyer to fees for services performed may be contractual or statutory.<sup>428</sup> Lawyers must make a clear and transparent arrangement on fees. The fee arrangement must always be reasonable.<sup>429</sup>

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<sup>418</sup> *Id.*, Art. 3.3.3.

<sup>419</sup> *Id.*, Art. 3.6.1.

<sup>420</sup> *Id.*, Art. 3.6.2.

<sup>421</sup> *Id.*, Art. 3.7.2.

<sup>422</sup> *Id.*, Art. 3.7.1.

<sup>423</sup> *Id.*, Art. 5.4.

<sup>424</sup> *Id.*, Art. 5.4.1.

<sup>425</sup> *Id.*, Art. 5.4.2.

<sup>426</sup> IBA Principles, principle 10.

<sup>427</sup> *Id.*

<sup>428</sup> IBA Commentary, Explanatory note 10.2.

<sup>429</sup> *Id.*



According to the IBA, “[r]easonableness is normally determined with a view to the nature of the assignment, its difficulty, the amount involved, the scope of work to be undertaken and other suitable criteria.”<sup>430</sup> The IBA Principles also require the lawyer to strive to achieve the most cost-effective resolution of the client’s dispute. Where permitted, a lawyer may require the payment of reasonable deposits to cover the likely fees and expenses as a condition to commencing or continuing his or her work.<sup>431</sup>

Regarding the cross-border practice, the IBA Commentary notes that the lawyer should investigate whether arrangements on fees, payments of deposits, and limitations of liability are permitted under all applicable rules and, if relevant, the rules which govern the responsibility for fees of other lawyers who may become involved. For instance, the IBA Commentary points that *pactum de quota litis* (a contingency fee) is permitted in certain jurisdictions but prohibited as a matter of public policy in other jurisdictions.<sup>432</sup>

### Civil law

In France, lawyers are “entitled to the settlement of fees and emoluments due to them as remuneration for the work performed, services rendered and results obtained....”<sup>433</sup> Fees must be paid by the clients for the work performed, even if the clients withdraw their instructions prior to the conclusion of the matter.<sup>434</sup> The requested fee may not exceed “a reasonable estimate of the fees and disbursements likely to be incurred in the matter.”<sup>435</sup> Under the French RIN, if the client fails to pay the requested fee, lawyers may refuse to handle the matter and withdraw from the case, provided that the withdrawal will not prejudice the client’s interests.<sup>436</sup>

The French RIN provide that lawyers must inform their client by sending a detailed account in which fees are calculated.<sup>437</sup> Lawyers are obliged to maintain an accurate and separate account of the fees in respect of each matter they are dealing with.<sup>438</sup> The French RIN specify that in calculating the fees, lawyers must consider:

- The time spent on the matter;
- The research involved;
- The nature and complexity of the matter;

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<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*, Explanatory note 10.2.

<sup>433</sup> French RIN, Art. 11.1.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*, Art. 11.4.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*, Art. 11.2.

<sup>438</sup> *Id.*

- The importance of the interests involved;
- The incidence of expenses and overheads of the law firm;
- The standing, titles, seniority, experience and specialization of the lawyers involved;
- The advantages and results achieved for the client's benefit;
- The particular circumstances of the client.

Among the permitted methods of payment, the French RIN include additional success fees, dependent on the results achieved, a fixed inclusive fee, and fees in instalments.<sup>439</sup>

The French RIN prohibit *pactum de quota litis* (a contingency fee), referral fees,<sup>440</sup> as well as sharing fees with non-lawyers.<sup>441</sup> Fees can be shared in partnerships and corporate bodies “formed for the purpose of the joint exercise of more than one regulated liberal profession.”<sup>442</sup> Similarly, the prohibition on fee sharing does not apply to situations where lawyers pay compensation to the heirs of their deceased colleagues.<sup>443</sup>

In Germany, the Federal Lawyers' Act prohibits lawyers to agree on lower fees and disbursements than those provided for in the Federal Scale of Lawyers' Fees.<sup>444</sup> In individual cases, a lawyer may give consideration to a client's particular personal circumstances, such as the client's impecuniousness, by lowering the fees or by waiving fees or disbursements after bringing the case to a conclusion.<sup>445</sup> The German Rules of Professional Practice specify that the prohibition on charging or agreeing upon fees that are less than the legally prescribed fees also applies to relations with third parties who pay the fees instead of or together with the client.<sup>446</sup> The Federal Lawyers' Act prohibits *pactum de quota litis* (a contingency fee).<sup>447</sup>

Regarding fee sharing, it is not permissible to pay and accept part of the fees or other benefits for acting as an agent in obtaining instructions from clients with other lawyers or third parties.<sup>448</sup> This does not preclude the German lawyer to pay a reasonable fee for the work of another lawyer.<sup>449</sup> Fees must take into account the responsibility and potential liability borne by the lawyers involved and also of any other circumstances. A fee-sharing agreement must not be made a precondition for accepting

<sup>439</sup> *Id.*, Art. 11.3.

<sup>440</sup> *Id.*, Art. 11.4.

<sup>441</sup> *Id.*, Art. 11.5.

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> Federal Lawyers' Act, para.49(b).

<sup>445</sup> *Id.*

<sup>446</sup> German Rules of Professional Practice, para. 21.

<sup>447</sup> Federal Lawyers' Act, para. 49(b)(2).

<sup>448</sup> *Id.*, para. 49(b)(3).

<sup>449</sup> *Id.*

instructions.<sup>450</sup> The German Rules of Professional Practice specify that adequate remuneration usually means fees split into equal amounts regardless of whether they are reimbursable or not.<sup>451</sup>

A German lawyer who has a dispute over a fee with the client must observe professional secrecy.<sup>452</sup> It is not permissible to assign claims to fees or to delegate the collection of fees to a third party.<sup>453</sup> The German Rules of Professional Practice provide that “upon termination of a retainer, at the latest, the lawyer shall promptly draw up a statement for the client or the party liable to pay the fees listing fees paid in advance.”<sup>454</sup>

In the Netherlands, lawyers must always charge a reasonable fee<sup>455</sup> and advise the client as to whether legal aid should be sought.<sup>456</sup> Lawyers are obliged to immediately inform their clients as soon as they foresee that the amount of a fee will be significantly higher than the estimate initially given to the client.<sup>457</sup>

The Dutch Rules of Conduct prohibit referral fees.<sup>458</sup> Contingency fees are also prohibited. The Dutch Rules of Conduct provide that lawyers:

may not agree on a “no win no fee” arrangement or similar arrangements ... and may not conclude agreements to the effect that their fee will be proportional to the value of the result obtained through their assistance, except where this is done in accordance with a collection rate which is customary and generally accepted among advocates in professional practice.<sup>459</sup>

The Dutch Rules of Conduct provide that an amicable settlement is often preferable to a lawsuit.<sup>460</sup> Dutch lawyers “must be meticulous and careful in financial matters ... and avoid any unnecessary expenses.”<sup>461</sup> This equally applies to the client’s opposing parties.<sup>462</sup>

In Belgium, similar to Germany and the Netherlands, the Flemish Code of Ethics prohibits referral fees. The Flemish Code of Ethics provides that a lawyer “may not ask for or accept any fee, advance, or other form

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<sup>450</sup> *Id.*

<sup>451</sup> German Rules of Professional Practice, para. 22.

<sup>452</sup> Federal Lawyers’ Act, para. 49(b)(4).

<sup>453</sup> *Id.*

<sup>454</sup> German Rules of Professional Practice, para. 23.

<sup>455</sup> *Id.*, Rule 25.

<sup>456</sup> *Id.*, Rule 24.

<sup>457</sup> *Id.*, Rule 26.

<sup>458</sup> Dutch Rules of Conduct, Rule 2 (2).

<sup>459</sup> *Id.*, Rule 25.

<sup>460</sup> Dutch Rules of Conduct, Rule 3.

<sup>461</sup> *Id.*, Rule 23.

<sup>462</sup> *Id.*

of payment for recommending another lawyer to a client or for sending a client to another lawyer. A lawyer may not receive such payment from another lawyer, except as part of an alliance among lawyers, or from any third party.”<sup>463</sup> Similarly, the OBFG Code of Ethics prohibits referral fees, as well as sharing the lawyer’s fees with other non-lawyer professionals.<sup>464</sup>

### Common Law

In the US, fees depend on the state jurisdiction, but common methods include hourly billing, fixed fees, and contingent fees. The ABA Model Rules require the lawyer to communicate the basis and rate of the fee, preferably in writing, before or within a reasonable time after commencing the representation.<sup>465</sup> Lawyers must provide their clients with the basis for charges and are subject to discipline for trying to extract an unreasonably high fee.<sup>466</sup> Factors that lawyers should consider in calculating a reasonable fee include:

- the time and labor required;
- the novelty and difficulty of the questions involved;
- whether the representation precludes the lawyer from undertaking other work;
- the amount that other lawyers charge for this type of work;
- the amount at stake and the results obtained;
- time limitations;
- the experience, reputation, and ability of the lawyer; and
- whether the fee is fixed or contingent.<sup>467</sup>

The ABA Model Rules allow US lawyers to accept property for the services, provided that this will not involve the acquisition of a proprietary interest in the client’s cause of action.<sup>468</sup>

*Pactum de quota litis* (contingent fees) are tolerated in the US. Often it includes a percentage of the client’s recovery in the case. However, contingent fees are prohibited in criminal cases and in domestic relations cases, such as the securing of a divorce, the amount of alimony, or the amount of the property settlement.<sup>469</sup> Contingent fees must be reasonable and agreed upon in writing.<sup>470</sup>

Generally, fee sharing with a non-lawyer is prohibited. The lawyer may, however, split legal fees with his or her law firm’s partners and

<sup>463</sup> Flemish Code of Ethics, Art. III. 2. 2. 1.

<sup>464</sup> OBFG Code of Ethics, Art. 4.39.

<sup>465</sup> ABA Model Rules, Rule 1.5(c).

<sup>466</sup> *Id.*, Rule 1.5(b).

<sup>467</sup> *Id.*, Rule 1.5 (a).

<sup>468</sup> *Id.*, Rule 1.8(a).

<sup>469</sup> *Id.*, Rule 1.5(d).

<sup>470</sup> *Id.*, Rule 1.5(e).

associates.<sup>471</sup> Referral fees are also prohibited. The ABA Model Rules allow reciprocal referral arrangements where the lawyer refers clients to another lawyer or non-lawyer, provided that the clients are informed of such an arrangement.<sup>472</sup> Such reciprocal referral agreements should be periodically reviewed to ensure compliance with a state's ethical rules.<sup>473</sup>

In the UK, the BSB Handbook allows conditional fee agreements that are similar to contingent fees under the ABA Model Rules. A conditional fee is an hourly fee that may include a premium percentage for success, agreed upon in advance.<sup>474</sup>

The BSB Handbook specifies that barristers may request an “upfront” fixed fee before agreeing to work on their behalf. This can only be done if it is a reasonable payment for the work being done.<sup>475</sup> If the amount of work required is unclear, barristers must consider staged payments rather than a fixed fee in advance.<sup>476</sup> If a barrister accepts an upfront fee in advance he or she must consider whether it is appropriate for the barrister to take the case and whether the barrister will be able to undertake the work within a reasonable timescale.<sup>477</sup>

Barristers are prohibited from paying or accepting referral fees.<sup>478</sup> The BSB Handbook specifies that this rule does not prohibit proper expenses that are not a reward for referring work, such as genuine and reasonable payments for clerking and administrative services; membership subscriptions to special bodies that appoint or recommend a person to provide mediation, arbitration or adjudication services; or advertising and publicity, which are payable whether or not any work is referred.<sup>479</sup>

### **National Legislation**

The MBA Code reflects the principle of the fair fees. Rule 1 of the MBA Code provides that the client's inability to pay the total amount of fees must not influence the quality of the legal assistance. Rule 1 reads that “[i]n case of a poor client who is not able to pay the total amount of the fee, this should not be of influence in reducing the legal assistance or in performing of the public function, taking into consideration the tradition and the honour of the advocacy's profession.”

<sup>471</sup> *Id.*, See also cmt. [7].

<sup>472</sup> *Id.*, See also cmt. [7].

<sup>473</sup> *Id.*, See also cmt. [7].

<sup>474</sup> Courts and Legal Services Act 1990, Section 58.

<sup>475</sup> BSB Handbook, gC107.

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

<sup>478</sup> BSB Handbook, rC11.

<sup>479</sup> *Id.*, gC31.

Rule 8 of the MBA Code explicitly requires lawyers to “correlate his calculation with the client’s financial possibilities ... and charge the client below the tariff.” It also provides that lawyers must not ask for any reimbursement from an indigent client. Similar to the other codes discussed above, Rule 8 of the MBA Code requires lawyers “to inform the client about the amount of the expenses and reward for the representation, and also for costs in executing the public function at the time of taking over the case.”

According to Article 1 of the MBA Tariff For Reward and Compensation of Expenses for the Work of the Attorneys (“MBA Tariff”),<sup>480</sup> “[t]he attorney and the client are free to agree the reward and the expenses and the method as well as the means of payment, but not lower than those envisaged in the Tariff.”

### **Conclusion**

Although the rules regarding fees vary from jurisdiction to jurisdiction, the common and basic requirement is that lawyers must charge reasonable fees for their work. This means that fees must reflect the nature and complexity of the lawyer’s tasks, and lawyers must inform clients about the costs of their professional services, and strive to achieve the most cost effective resolution of the client’s matter. Lawyers engaging in cross-border practice must be aware of the limitations and requirements specific to the jurisdiction. Specifically, they must investigate whether *pactum de quota litis* (or contingent fees) are allowed and whether it is appropriate to ask for referral fees.

In the national practice, as in the countries discussed above, under Rule 8 lawyers must inform the client in advance about the expenses for the legal advice and representation. Unlike some civil law codes discussed above, the MBA Code stresses the lawyer’s duty to be fair in calculating fees in case of poor clients in Rules 1 and 8.

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<sup>480</sup> Tariff For Reward and Compensation of Expenses for the Work of the Attorneys, 14 October 2011, (“MBA Tariff”).

## Section 8: Continuing Legal Education. Competence. Training of Trainees

In order to maintain competence, a lawyer must remain current on the law and continue to improve his or her lawyering skills, meaning that he or she must make all necessary efforts to improve and excel. Continuing Legal Education (“CLE”) – training that lawyers continue receiving after their qualification – is vitally important. Many national bar associations make it a requirement, including the MBA. CLE ensures that lawyers are aware of changes in the law and procedure and how to conduct themselves ethically within the code of conduct. CLE equips lawyers with the necessary skills and practical experience to provide effective legal assistance and advice to their clients.

### CCBE

The CCBE Charter notes that “[r]ecently, post-qualification training (continuing professional development) has gained increasing emphasis in the response to rapid rates of change in law and practice and in the technological and economic environment.”<sup>481</sup> Many national professional rules stress that a lawyer must not take on a case he or she is not competent to handle. It is self-evident that lawyers are not able to effectively assist and advice clients without an appropriate education and training.<sup>482</sup>

The CCBE Code also makes it a requirement to “maintain and develop ... professional knowledge and skills.”<sup>483</sup> The CCBE Code notes that lawyers should take “proper account of the European dimension of their profession.”<sup>484</sup> The CCBE Commentary on the Charter explains that lawyers “must be aware of the growing impact of European law on their field of practice.”<sup>485</sup>

### IBA

The IBA Principles do not mention CLE. However, the lawyer’s competence is one of the IBA Principles.<sup>486</sup> According to the IBA Principles, the lawyer’s work must be carried out in a competent and timely manner and the lawyer should not take work that he or she cannot carry out in that manner.<sup>487</sup> The IBA Principles state that lawyers are “presumed to be knowledgeable, skilled, and capable in the practice of law.”<sup>488</sup>

<sup>481</sup> CCBE Commentary on the Charter, principle (g).

<sup>482</sup> *Id.*

<sup>483</sup> CCBE Code of Conduct, Art. 5.8.

<sup>484</sup> *Id.*

<sup>485</sup> CCBE Commentary on the Charter, cmt. on Art. 5. 8.

<sup>486</sup> IBA Principle, principle 9.

<sup>487</sup> *Id.*

<sup>488</sup> IBA Commentary, Explanatory note 9.2.

Accordingly, the client assumes that the lawyer has the ability and capacity to deal with the client's matter adequately.<sup>489</sup> According to the IBA, competence involves more than an understanding of legal principles. It means that the lawyer has an adequate knowledge of the practice and procedures, and knows effective client, file, and practice-managements strategies.<sup>490</sup>

## Civil Law

CLE is mandatory in most of the European countries. Often the basis for mandatory continuing legal education is contained in documents other than the codes of conduct or ethics.

In France, the French RIN provide for the lawyer's obligation of competence. To fulfil this obligation, lawyers must follow specific training in matters related to the execution of their duties.<sup>491</sup> Mandatory continuing legal training and its modalities are set out in the Decree of 21 December 2004 on professional education for lawyers.<sup>492</sup>

In Germany, professional training is required under the Federal Lawyers' Act.<sup>493</sup> The Federal Lawyers' Act provides for a general statutory duty to undertake continuing training, though there are no provisions as to the type and scope of the required training. The German Rules of Professional Practice require lawyers to train their trainees. Under Rule 28, lawyers must ensure that the activities of a trainee are geared towards the accomplishment of the educational goal.<sup>494</sup>

In the Netherlands, as long as the lawyer is registered at the Bar, he or she is obliged to excel in professional skills. Dutch lawyers are subject to sanctions in cases where they neglect this duty. Mandatory continuing training is regulated in a By-law on Permanent Education of the Netherlands Bar Association.<sup>495</sup>

In Belgium lawyers are also obliged to undergo professional training. Article 495 of the Judicial Code authorizes the Flemish Bar to adopt rules on CLE. Like in Germany, supervising lawyers must ensure that trainee lawyers perform their activities in compliance with ethical rules and acquire knowledge and practical skills.<sup>496</sup>

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<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> French RIN, Art. 6.2.1.5.

<sup>492</sup> Décret no. 2004-1386 du 21 décembre 2004 relatif à la formation professionnelle des avocats.

<sup>493</sup> Federal Lawyers' Act, para. 43.

<sup>494</sup> German Rules of Professional Practice, Rule 28.

<sup>495</sup> By-law on Permanent Education of the Netherlands Bar Association, 28 November 2003.

<sup>496</sup> Flemish Code of Ethics, Art. II. 1. 4. 1.



## Common law

In the US, under ABA Model Rule 1.1, in representing a client, a lawyer must act competently and with legal knowledge, skill, thoroughness, and preparation.<sup>497</sup> The ABA Model Rules specify that in determining whether a lawyer has the necessary skills to handle a matter, the lawyer must consider: a. the complexity and specialized nature of the matter; b. the lawyer's general experience and his training and experience in the specific field in question; c. the amount of preparation and study the lawyer will give to the matter; and d. whether it is possible to refer a matter to another competent lawyer.<sup>498</sup> Thoroughness and preparation in representation means that the lawyer inquires into and analyzes the facts and law in order to adequately prepare the matter.<sup>499</sup> Under the ABA Model Rules, lawyers must also keep abreast of changes in the law and practice and comply with the applicable continuing legal education requirements.<sup>500</sup>

In the UK, "provid[ing] a competent standard of work and service to each client" is one of the core duties under the BSB Handbook, which requires continuing professional development. The BSB Handbook points out that "merely complying with the minimum Continuing Professional Development requirements may not be sufficient."<sup>501</sup> A barrister should also ensure that he or she complies with any specific training requirements of the Bar Standards Board before undertaking certain activities: "for example, you [the barrister] should not attend a police station to advise a suspect or interviewee as to the handling and conduct of police interviews unless you have complied with such training requirements as may be imposed by the Bar Standards Board in respect of such work."<sup>502</sup> Similarly, a barrister may not undertake public access work without successfully completing the required training specified by the Bar Standards Board.

## National Legislation

Article 15(3) of the Attorney's Law provides that lawyers have "an obligation for constant professional development for the time of his/her professional mandate by means of training seminars, workshops etc." Rule 24 of the MBA Code specifies that lawyers must upgrade both professional and general knowledge by:

- Following cultural, scientific, and political achievements and events;
- Actively participating and cooperating with professional and expert organizations, magazines, and in their social activities.

<sup>497</sup> ABA Model Rules, Rule 1.1.

<sup>498</sup> *Id.*, cmt. [1].

<sup>499</sup> *Id.*, cmt. [5].

<sup>500</sup> *Id.*, cmt. [6].

<sup>501</sup> BSB Handbook, gC39.

<sup>502</sup> *Id.*

Unlike the other codes, Rule 24 of the MBA Code specifies that lawyers must “unselfishly share knowledge.” Rule 25 requires lawyers to “develop intellectual capabilities, professional and public activities in the frame of the advocacy profession.” Rule 26 adds that through continuous professional upgrading and raising of the personal and moral dignity, a lawyer fulfills professional obligation and qualifies for successful performance of the traditional function for defence of the “freedom, independence, human rights, humanity, and human dignity.” Lawyers also have an obligation to train trainees. Under Rule 28, lawyers must “pay special attention to work with the lawyer’s trainees and to take care for their successful professional upgrading and development.” Lawyers have special duties with regard to the ethical training of trainees. Under Rule 30, lawyers are obliged to “pay special attention in presenting to the trainee the principles of lawyer’s ethics, without which neither the professional practice, nor the knowledge would have appropriate value.”

### **Conclusion**

CLE ensures that throughout their career, lawyers keep abreast with law and jurisprudence, maintain the ethics of the profession, and enhance the standards of the practice of law. This is crucial for the lawyer’s ability to deal competently with all matters undertaken on the client’s behalf, which is a key factor in the lawyer-client relationship.

In the national context, CLE is mandatory, similar to the countries discussed above. Unlike the other codes, the MBA Code requires that continuing education goes beyond the purely legal. Under Rule 24, lawyers must upgrade both professional and general knowledge. Also, in contrast to the codes discussed in this Section, the MBA Code is explicit about the ethical duty to convey the lawyer’s knowledge unselfishly to other lawyers, especially to the associates and trainees.

## Section 9: Advertising

Prohibitions and restrictions related to advertising are specific to each jurisdiction. Generally, lawyers are permitted to advertise, subject to varying degrees of regulation.

### CCBE

The CCBE Code provisions on advertising provide that lawyers are entitled to inform the public about their services. This information must be accurate and not misleading, and must not violate the duty of confidentiality.<sup>503</sup> The same applies to the personal publicity by a lawyer in any form of media such as by press, radio, television, and by electronic commercial communications.<sup>504</sup> The Explanatory Memorandum to the Code provides that the term “personal publicity” covers publicity by firms of lawyers, as well as individual lawyers, as opposed to corporate publicity organized by Bar and Law Societies for their members as a whole.<sup>505</sup> It further notes that rules regulating advertising vary considerably among states. Under the CCBE Code, there is no overriding objection to personal publicity in cross-border practice. Lawyers nevertheless must abide by the restrictions and prohibitions laid down in their domestic professional rules, as well as restrictions laid down by host state rules in which they practice.<sup>506</sup>

### Civil Law

In France, personal publicity is permitted “in so far as it provides the public with necessary information.”<sup>507</sup> Personal publicity must be “true, ... respect professional confidentiality and shall be carried out with dignity and taste.”<sup>508</sup> The French RIN prohibit any act of canvassing or solicitation.<sup>509</sup> Canvassing is an act of offering services by personally visiting or sending a representative to the residence of a person, or to work places or any public place.<sup>510</sup> Solicitation is a personal offer to perform services without being invited to do so.<sup>511</sup>

The French RIN prohibit any laudatory or comparative statements and any statements relating to the identity of clients. Permissible means of publicity under the RIN include colloquia, seminars, trainings and professional courses.<sup>512</sup> Lawyers are also permitted to list the address,

<sup>503</sup> CCBE Code of Conduct, Art. 2.6.

<sup>504</sup> *Id.*

<sup>505</sup> CCBE Explanatory Memorandum, cmt. on Art. 2.6.

<sup>506</sup> *Id.*

<sup>507</sup> French RIN, Art. 10.1.

<sup>508</sup> *Id.*

<sup>509</sup> *Id.*, Art. 10. 2.

<sup>510</sup> *Id.*

<sup>511</sup> *Id.*

<sup>512</sup> *Id.*, Art. 10. 3.

name of the lawyer and the Bar to which the lawyer belongs, as well as professional honors, university degrees, and duly acquired areas of practice.<sup>513</sup>

Similar rules apply in Germany. The German Rules of Professional Practice prohibit publicity as to success rates or turnovers.<sup>514</sup> References to cases and clients may only be made provided the respective client has explicitly given his consent.<sup>515</sup> In Germany, advertising in newspapers, as well as the use of informational letters and the brochures are generally allowed. Lawyers are allowed to give personal information and information about their services provided the information supplied is objective and relates to their professional activities.<sup>516</sup>

In the Netherlands, the Dutch Rules of Conduct do not contain any rule regulating advertisement. A specific Regulation on Publicity regulates advertisement.<sup>517</sup> Comparative publicity, by naming another lawyer, is not allowed.<sup>518</sup> Generally, lawyers are allowed to cooperate with the making of advertisements that have the apparent aim to attract attention in a commercial way for the exercise of their profession, although there are certain restrictions.<sup>519</sup> It is not allowed to state the names of the clients in the lawyer's advertising.<sup>520</sup> Regulation on Publicity provides that in the advertisement, prices for legal services must be stated clearly and unambiguously.<sup>521</sup> It is not allowed to advertise by stating the minimum prices only.<sup>522</sup>

In Belgium, under the Flemish Code of Ethics, the lawyer is not allowed to conduct any misleading advertising.<sup>523</sup> A lawyer may not intentionally and without invitation try to solicit the clients of another lawyer through advertising. It is also prohibited to advertise a personalized range of services for a particular case or file without being invited to do so.<sup>524</sup>

According to the Flemish Code of Ethics, lawyers may not advertise that their specific expertise in one or more areas of law unless there is convincing basis of knowledge and experience in that area. Also, lawyers may not advertise any results achieved or the number of the cases

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<sup>513</sup> *Id.*, Art. 10. 4.

<sup>514</sup> German Rules of Professional Practice, para. 6.

<sup>515</sup> *Id.*

<sup>516</sup> *Id.*

<sup>517</sup> Verordening op de Publiciteit ("Regulation on Publicity"), Art.3, 31 December 2006, available at [http://wetten.overheid.nl/BWBR0004440/geldigheidsdatum\\_31-12-2006](http://wetten.overheid.nl/BWBR0004440/geldigheidsdatum_31-12-2006).

<sup>518</sup> Regulation on Publicity, Art. 3.

<sup>519</sup> *Id.*, Art. 10.

<sup>520</sup> *Id.*, Art. 11.

<sup>521</sup> *Id.*, Art. 8.

<sup>522</sup> *Id.*

<sup>523</sup> Flemish Bar, Code of Ethics, Art. III. 1. 7.2.

<sup>524</sup> *Id.*, Art. III. 1. 7. 3.

handled or the success rate. Lawyers may provide such information if asked or if it is expected in a comparative study or award procedure.<sup>525</sup> Lawyers are permitted to advertise the cases handled and the identity of the clients upon their consent.<sup>526</sup>

The OBFG Code of Ethics distinguishes between (a) functional advertising – any public communication for the purpose of promoting legal profession; (b) personal advertising (or personal publicity) – any public communication for the purpose of promoting the author and providing information about the nature and quality of professional practice; and (c) soliciting – any form of communication of information for the purpose of seeking new clients, including the personal contact between the lawyer and a potential customer to offer professional services.<sup>527</sup> Functional advertising is only performed by relevant authorities.<sup>528</sup> Lawyers are obliged to perform personal advertising with “loyalty, dignity, tact, honesty and ... respect to professional secret and the lawyer’s independence.”<sup>529</sup> Lawyers must provide only objective information that can be verified by the OBFG or the bâtonnier.<sup>530</sup> Comparative advertising is prohibited.<sup>531</sup> Under the OBFG Code of Ethics, it is not allowed to identify the clients and base the personal advertising on the information about tariffs and promises about the results of representation.<sup>532</sup> Soliciting is only allowed when the lawyer personally contacts an existing client, a former client or someone related, and can reasonably expect that that person is expecting an offer of services. It is not allowed to contact a potential client unless the client invited or authorized to do so. In soliciting, lawyers must refrain from any acts that will likely distort or affect the client’s ability to make a free choice.<sup>533</sup>

### **Common Law**

In the US, under ABA Model Rule 7.1, a lawyer is subject to discipline for any statement about the lawyer or his or her services that is false or misleading. Generally, a statement is considered false or misleading if it omits material information, creates unrealistic expectations, or makes unsubstantiated comparisons. The Model Rules permit trade names of law firms, as long as they are not misleading. Lawyers are not allowed to pay people for recommendations.

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<sup>525</sup> *Id.*, Art. III. 1.7.5.

<sup>526</sup> *Id.*

<sup>527</sup> OBFG Code of Ethics, Art. 5.1.

<sup>528</sup> *Id.*, Art. 5.2.

<sup>529</sup> *Id.*, Art. 5.3 (unofficial translation by author.)

<sup>530</sup> *Id.*

<sup>531</sup> *Id.*

<sup>532</sup> *Id.*, Art. 5.5-5.6.

<sup>533</sup> *Id.*, Art. 5.7.

In the US, before naming sample clients in an advertisement, a lawyer must obtain the client's consent.<sup>534</sup> Under Rule 7.3, a lawyer must not seek fee-paying work by initiating personal or live telephone contact, or real-time electronic contact. However, lawyers are not prohibited from sending truthful, non-deceptive letters to persons known to face a specific legal problem.<sup>535</sup>

In the UK, barristers may engage in advertising and promotion of their practice. Advertisements must be accurate and not misleading, so that it does not diminish confidence in the legal profession.<sup>536</sup> Advertisements should not be based on direct comparisons or direct criticism of other barristers.<sup>537</sup> Barristers are also permitted to provide information regarding the barrister's rates and the nature of the legal services, as well as information about particular cases if the client consents.<sup>538</sup>

### **National Legislation**

The MBA Code prohibits lawyers from making misleading and inaccurate advertisements. Under Rule 25, lawyers are not allowed “to use their own private activities opposite to the principles from the code, and especially in order to point out its advocacy profession, or in any other way to advertise the same.”

The MBA Code limits the use of law firm name for advertisement. Under Rule 32, the “firm of the lawyer's office shall be visible on the building where the office is located, but neither shape nor content shall be used for advertisement.”

According to Article 13 of the Book of Rules for Disciplinary Liability (“the Disciplinary Rulebook”), advertising is not prohibited if lawyers’ “general data are being published on Internet WEB site and public newspapers (media) such as: name, address, telephone, area of work, without releasing costs and services, as well as personal and professional qualities.”

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<sup>534</sup> ABA Model Rules, Rule 7.1.

<sup>535</sup> *Id.*, Rule 7.3.

<sup>536</sup> BSB Handbook, gC57.

<sup>537</sup> *Id.*

<sup>538</sup> *Id.*

## **Conclusion**

The regulation of advertising varies from jurisdiction to jurisdiction. One must be aware of the prohibitions and restrictions, especially, when engaging in cross-border practice. As seen in the national rules discussed above, misleading advertisements are impermissible and a lawyer making such advertisements will be subject to discipline. Similarly, the MBA Code explicitly prohibits misleading and false representations in advertisements. Under Rule 25, lawyers are not allowed to use any activities, opposite to the MBA Code, in order to distinguish the lawyer's profession or to advertise it in any way. Similar to the countries discussed above, within the national practice, advertising allows providing the name, address, contacts, specialization, as well as personal and professional qualities.





## Section 10: Discipline

Acts of misconduct and violation of ethical principles and duties may invoke disciplinary actions. According to the Preamble of the MBA Code, “[d]isrespecting the rules and principles of the Code ... represents a violation of discipline.”

Independence and impartiality are the key features of any disciplinary system. According to the UN Basic Principles on the Role of Lawyers, a variety of approaches is possible: “Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court....”<sup>539</sup> As seen from various disciplinary systems described below, and as stated in the UN Basic Principles on the Role of Lawyers, disciplinary proceedings should be always “subject to an independent judicial review.”<sup>540</sup>

Generally, in European civil law countries, local bar associations are charged with investigating lawyer’s misconduct, whereas in common law systems, this task is supervised by the courts.

### CCBE

The CCBE Code of Conduct notes that the failure of a lawyer to observe the rules provided in the Code may result in disciplinary actions.<sup>541</sup> The disciplinary proceedings are left to the competent authorities, concerned responsible for the administration of lawyers’ discipline.<sup>542</sup>

CCBE has a Working Group on disciplinary matters that compiled a Summary of Disciplinary Proceedings and Contact Points in the EU and EEA Member States, providing brief information on disciplinary bodies, proceedings, sanctions, enforcement, and communication in a number of European countries.<sup>543</sup>

### IBA

The Preamble of the IBA Principles indicates that the IBA Principles are not to be used as criteria for imposing liability, sanctions, or disciplinary measures of any kind. The IBA commentary to Principle 1 notes that professional discipline, and professional supervision in general, should be organized and carried out in a manner that guarantees that administration of the legal profession is free from undue or improper influence, whether governmental, by the courts or otherwise.<sup>544</sup>

<sup>539</sup> UN Basic Principles on the Role of Lawyers, para. 28.

<sup>540</sup> *Id.*

<sup>541</sup> CCBE Code of Conduct, Ar. 1.2.1.

<sup>542</sup> See CCBE Code of Conduct, Arts. 1.6, 3.3.3, and 3.8.6.

<sup>543</sup> CCBE Summary of Disciplinary Proceedings and Contact Points in the EU and EEA Member States, (“CCBE Summary”) available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/Table\\_discipline\\_\\_Ma1\\_1335781934.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Table_discipline__Ma1_1335781934.pdf)

<sup>544</sup> IBA Principles, Commentary to Principle 1.

The IBA adopted the IBA Guide for Establishing and Maintaining Complaints and Discipline Procedures.<sup>545</sup> Similar to the IBA Principles, the IBA Guide is non-binding and intended as a model to assist bar associations in adopting or adapting their own basic complaints and discipline procedures.<sup>546</sup> Generally, it recommends adopting a local code of conduct with fundamental principles against which a lawyer's conduct will be judged; a fair, impartial and independent Complaint Handling Body with powers of mediation and dismissal; procedural and documentary provisions for rules when responding to a complaint made; education and information requirements to ensure clients are aware of the complaints process against lawyers, as well as guidance on Disciplinary Tribunals and Appeal Tribunals to observe due process of law.

### **Civil law**

In France, the Bar association is responsible for adjudicating misconduct proceedings.<sup>547</sup> Each local Bar association has a Council carrying out disciplinary functions. The Bâtonnier is the authority in charge of disciplinary actions.<sup>548</sup> Article 1.4 of the French RIN provides professional misconduct can lead to disciplinary sanction. French lawyers are also subject to disciplinary proceedings for breaches of honor outside their professional life.<sup>549</sup> Disciplinary sanctions can amount to a warning, an official reprimand, a temporary suspension which cannot exceed three months and an exclusion from the lawyer's profession.

In Germany, Section 113 of the Federal Lawyers' Act provides that if a lawyer breaches his or her duties under the Federal Lawyers' Act or Rules of Professional Practice, the Lawyer's Disciplinary Court can impose sanctions. The German Federal Bar has no disciplinary jurisdiction. Disciplinary matters are dealt with in the first instance - the regional Bar, which are self-regulatory bodies supervised by the Ministry of Justice of the particular region to which it belongs. The individual regional Bars are responsible for professional supervision. The regional Bar ensures that the lawyers who are members of the Bar observe their professional obligations, and it has the power to enforce certain sanctions if a lawyer infringes against his professional obligations.<sup>550</sup> Under Section 114 of the Federal Lawyers' Act, disciplinary sanctions

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<sup>545</sup> The IBA Guide for Establishing and Maintaining Complaints and Discipline Procedures was approved by the IBA Council in October 2007, ("IBA Guide"), available at <http://www.ibanet.org/Publications>.

<sup>546</sup> IBA Guide, Preamble.

<sup>547</sup> "Any court that considers a lawyer committed at the hearing a breach of his obligations imposed by his oath, may inform the Attorney General to prosecute the lawyer before the disciplinary body to which he belongs." Loi no. 71-1130 du 31 décembre 1971, Art. 25 modifié par Loi no. 2004-130 du 11 février 2004 – art.33 JORF 12 février 2004 (unofficial translation by author).

<sup>548</sup> See CCBE Summary, France.

<sup>549</sup> State Decree, 27 November 1991, Arts.180 and 183 (unofficial translation by author).

<sup>550</sup> CCBE Summary, Germany.

may include: warnings, cautions, fines of up to twenty-five thousand euros, a ban on acting as representative and lawyer in certain fields of law for a period of between one and five years, or exclusion from the legal profession.

In the Netherlands, the Dutch Rules of Conduct indicate that the content of disciplinary proceedings is determined by the Disciplinary Court on the basis of “the advocate’s oath, by-laws and the three rules cited in article 46 of the Act on Advocates, which may be summarized as follows: looking after the interests of the clients; complying with the by-laws of the Netherlands Bar Association; acting in a manner befitting a decent advocate.”<sup>551</sup> The Dutch Rules of Conduct also provide that its provisions “are meant as guidelines to advocates in exercise of their profession. While they may also serve as guidelines to the Disciplinary Courts, they shall not be binding upon them, as the Disciplinary Appeals Tribunal has often ruled.”<sup>552</sup> Sanctions include warning, reprimand, prohibition to practice (a maximum of one year and comprises every field of law); disbarment, publication of the disciplinary body’s decision.<sup>553</sup>

In Belgium, similar to France, the various local Bars are all self-regulatory disciplinary bodies. There is a Council of the Order (“Conseil de l’Ordre”/“Raad van de Orde”) in each national Bar. In each area of a Court of Appeal there is a Disciplinary Council of Appeal. These are external disciplinary tribunals before which the decisions of the Council of the Order may be appealed. Sanctions include warning, censure, reprimand, suspension, disbarment, or a fine.<sup>554</sup>

### **Common law**

In the US, the ABA adopted the Model Rules for Lawyer Disciplinary Enforcement (“ABA Disciplinary Rules”), which reflects the ABA policy on the proper structure of disciplinary proceedings. As in case with the ABA Model Rules, the majority of the states currently follow the ABA Disciplinary Rules. The Preamble of the ABA Disciplinary Rules provides that court has “exclusive responsibility within this state for the structure and administration of the lawyer discipline, ... and has inherent power to maintain appropriate standards of professional conduct.”<sup>555</sup>

A lawyer’s bar can also reprimand the lawyer, impose fines, or suspend or revoke a lawyer’s license to practice law.<sup>556</sup> For instance, were a US lawyer to act on a client’s instructions not to attend trial lawyer, he or she can be subject to two types of sanctions: litigation sanctions

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<sup>551</sup> Dutch Rules of Conduct, Art. 1.1.

<sup>552</sup> *Id.*

<sup>553</sup> CCBE Summary, The Netherlands.

<sup>554</sup> CCBE Summary, Belgium.

<sup>555</sup> ABA Model Rules for Lawyer Disciplinary Enforcement, (“ABA Disciplinary Rules”), Preamble.

<sup>556</sup> ABA Disciplinary Rules, Rule 10.

by a tribunal and disciplinary sanctions by his or her bar.<sup>557</sup> A tribunal can impose heavy fines from the bench. For example, in *Fletcher v. HPN Holdings*, the Defence lawyer was sanctioned \$6,000 for among other litigation abuses, walking out of a deposition and failing to appear at other scheduled depositions.<sup>558</sup>

In the UK, barristers can be subject to administrative fines and warnings by the Professional Conduct Committee (“PCC”),<sup>559</sup> or the matter could be referred to a Disciplinary Tribunal for formal professional misconduct hearings.<sup>560</sup> The Disciplinary Tribunal is empowered to disbar or suspend a barrister’s practicing certificate.<sup>561</sup>

### **National Legislation**

Article 30(1) of the Attorney’s Law provides that lawyers “are accountable for the professional and conscientious discharging of the legal profession and for upholding the repute of the profession.” Article 30(2) lists “particularly serious infringements of the legal profession...:

- nonperformance or obviously negligent performance of the affairs in the sphere of legal aid and carrying out the public mandates;
- failure of action according to powers and nonperformance of actions that the attorney is obliged to undertake in protecting the client’s rights and interests; and
- breach of confidentiality.”

Article 30(3) further indicates that the MBA shall determine “more closely the breaches of the professional duties and reputation of the legal profession.”

Under Article 31(1) of the Attorney’s Law, sanctions for violation of ethical duties and principles may include a public warning, a fine (amount up to ten annual Bar membership fees) or a temporary suspension up to a year. Under Article 31(2), lawyers who are subject to the disciplinary procedure, can be issued “a temporary work ban”, pending the duration of the disciplinary procedure, and not exceeding thirty days. Article 31(3) provides that “the manner and the procedure for a temporary work ban are set out in an Act (...).”

The MBA Statute establishes the organization of the disciplinary system. Under Article 26, the Disciplinary Prosecutor initiates and presents a disciplinary indictment against an MBA member for disciplinary violations. The Disciplinary Prosecutor has 3 deputies. Under Article 27 of the MBA Statute, the Disciplinary Court decides upon the Disciplinary

<sup>557</sup> ABA Model Rules, Rule 8.5.

<sup>558</sup> *Fletcher v. HNP Holdings*, Case No. F064864 (Cal. Dist. Ct. App. 8 April 2014) (unpublished).

<sup>559</sup> Bar Standards Board Enforcement Regulations, rE50-E52.

<sup>560</sup> *Id.*, rE56.

<sup>561</sup> *Id.*, rE160.

Prosecutor's requests. The Disciplinary Court consists of 3 members, including the president. The work of the Disciplinary Prosecutor and the Disciplinary Court is further regulated by the Disciplinary Rulebook.

According to Article 1 of the Disciplinary Rulebook, disciplinary system protects and ensures the respect of the bar and profession, conscious performing of lawyers' activities, protects citizens from eventual abuses, and promotes legal safety and rule of law. Article 2 lists the disciplinary bodies of the MBA: Disciplinary Prosecutor, Disciplinary Court and Council of Appeal.

Under Article 5, Disciplinary Prosecutor investigates the facts in the complaint, collects evidence against the suspect, as well as, in favor of the suspect, and submits the complete case to the Disciplinary Court. According to Article 7, Disciplinary Court is the first instance to decide upon the case. Article 9 provides that each member of the Disciplinary Court "is obliged to study the disciplinary accusation, and impartially, lawfully and justifiably act and decide upon it." The Council of Appeals reviews the appeals on the decision of the first instance. Under Article 11, Council of Appeals consists of five members, including the president who manages the work of the Council of Appeals.

Article 12 lists "serious disciplinary breaches". Article 12(1) addresses violation of various conflict of interests rules:

- a. Providing legal assistance or refusing to provide legal assistance against the law, jeopardizing the interests of the client;
- b. Providing legal assistance in the same case in which the lawyer has appeared as a judge, public prosecutor, state attorney, or as a civil servant;
- c. Drafting a bilateral legal act in favor of only one party;
- d. Providing legal assistance to a client, when in previous case a lawyer has been representative of the other party in a legal matter arising from the same case; and
- e. Providing legal assistance for adverse parties.

Another serious breach that may result in a disciplinary action under Article 12(1) is "cooperation with fake-attorneys and persons who illegally conduct legal work."

Article 12(1) indicates that a refusal to provide legal assistance will be justified in case of conflict of interests, work-overload that prevents appropriate legal assistance, when the client has not fulfilled its obligations regarding the procedural costs and the lawyer's fee, when the client refuses to cooperate or shows disrespect to the lawyer, or in other circumstances which are full responsibility of the client.

Under Article 12(2), another serious disciplinary breach is failing to act in the client's interests or acting against the client's instructions, which results in the damage to the client. Article 12(3) deals with professional secret. A lawyer commits a serious disciplinary violation if: a lawyer

reveals a secret without the client's permission, except in cases determined by Law; or if a lawyer abuses the confidential information against a party.

Article 13 lists "other breaches", such as:

- a. Offering representation and legal assistance for fees contrary to the amount determined by the MBA Tariff;
- b. Insulting colleagues, judges, representatives of state bodies in performing professional functions;
- c. Refusing to provide back the files provided by a party, despite the fact that the party has paid the remuneration and expenses;
- d. Failing to report persons that illegally provide legal assistance to the MBA;
- e. Acting contrary to the provisions of the Law against Money Laundering;
- f. Failing to inform the MBA about the change of the office or law firm' address;
- g. Failing to act upon the decisions of the MBA bodies;
- h. Violating the obligation to undergo CLE;
- i. Appearing before the court without the robe;
- j. Advertising contrary to the MBA Code and searching for a client in contemptible manner;

Articles 12 and 13 apply to lawyer's trainees.

## **Conclusion**

Unlike in the US, where disciplining of lawyers is under the supervision of the judicial branch, in most European countries local bar associations are in charge of this task. Similar to most civil law countries discussed above, the MBA is tasked with the disciplinary proceedings, with disciplinary decisions being subject to appellate review.

Articles of the Discipline Rulebook, adopted by the MBA according to the Attorney's Law and the MBA Statute, correlate with the basic ethical principles discussed in this material. Thus, Article 12 ensures disciplinary sanctions for violation of the principle of independence and conflict of interests rules, the principle of loyalty to the client's interests, and respect of professional secret and confidentiality. Article 13 covers the rest of ethical principles, such as fairness of lawyer's fees, CLE, diligence, honesty, integrity and fairness.

## Conclusion

This material attempted to explore and address the main issues surrounding the topic of professional ethics by drawing comparisons between ethical principles in various national jurisdictions and in the national jurisdiction. Despite many differences that stem from different cultural and ethical perceptions, as well as the variations in legal systems, there are core values of the legal profession worldwide based on the universal principles of professional independence, honesty, integrity and fairness, confidentiality, avoidance of conflict of interests, diligence, competence etc.

This material does not attempt to identify or indicate the best practices, but to provide a contextual understanding of the main issues and assist lawyers to approach the ethical dilemmas in their professional practice. As one can observe, no code can provide prescriptions for every occasion. Inevitably, there are circumstances when lawyers will need to look beyond the code's prescriptions, exercising measured discretion, tempered by experience and a strong dose of common sense. In such situations, it is of utmost importance that lawyers are inspired and guided by these central and universal principles, discussed in several Sections of this material. Taking all the nuances together, the message is clear: exercising professional ethical obligations requires diligence, professional skill, commitment and personal dedication that enable responsible day-to-day legal practice.





## ANNEX 1 – Table of principles and corresponding provisions

ETHICS PRINCIPLES		
Extracted from the Attorney's Law and the MBA Code		
Section	Attorney's Law	MBA Code
Independence	Arts. 5, 15	Rules 1, 2, 3, 5, 7, 9, 13, 14, 22, 26, 34
Honesty, Integrity and Fairness		Rules 7, 11, 13, 14, 15, 17, 18, 19, 22, 23
Loyalty to the Client's Interests		Rules 2, 3, 5, 11, 13, 18, 15
Confidentiality	Arts. 3-a (3), 17, 21(2)-(4)	Rules 2, 4, 6, 9, 11, 13, 18, 20, 21, 22, 23, 31
Conflict of Interest	Art 17(3)-(4)	Rules 3, 4, 5, 14
Diligence	Arts. 11, 17	Rules 5, 7, 9, 11, 15, 16
Lawyer's Fees		Rules 1, 8
Continuing Legal Education. Competence. Training of Trainees	Art 15(3)	Rules 24, 25, 26, 29, 30, 31
Advertising		Rules 25, 32

## List of short names and abbreviations

<b>ABA</b>	American Bar Association
<b>ABA Disciplinary Rules</b>	Model Rules for Lawyer Disciplinary Enforcement
<b>Attorney's Law</b>	National Attorney's Law
<b>BSB</b>	Bar Standards Board, UK
<b>CCBE Charter</b>	Council of Bars and Law Societies of Charter of Core Principles of the European Legal Profession
<b>CCBE Code of Conduct</b>	CCBE Code of Conduct for Lawyers
<b>Disciplinary Rulebook</b>	Book of Rules for Disciplinary Liability
<b>Dutch Rules of Conduct</b>	Rules of Conduct of the Netherlands Bar Association
<b>Flemish Bar</b>	Orde van Vlaamse Balies (Order of Flemish Bars), Belgium
<b>French RIN</b>	Règlement Intérieur National – RIN (National Internal Regulations of the Legal- Profession), France
<b>IBA</b>	International Bar Association
<b>MBA</b>	The national Bar Association
<b>MBA Code</b>	Code of Professional Ethics of the Attorneys, Attorney's Professional Associates and Attorney's Trainees of the MBA
<b>MBA Tariff</b>	MBA Tariff For Reward and Compensation of Expenses for the Work of the Attorneys
<b>OBFG</b>	Ordre des Barreaux Francophones et Germanophones de Belgique (Order of Francophone and Germanophone Bars), Belgium
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>US</b>	United States





