

**CONFLICTS OF INTEREST**  
**AND THE CLIENT'S CONSENT**  
**IN EUROPE**

by

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*"No man can serve two masters:  
for either he will hate the one, and love the other;  
or else he will hold to the one, and despise the other.  
Ye cannot serve God and mammon."  
Matthew, 6:24*

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

**I. IN GENERAL**

*"The question of conflict of interest may well be  
the most controversial current issue in the legal profession"  
Working Group for the revision of the CCBE Code of Conduct  
Report 18 November 1996*

Conflicts of interest are one of the most debated issues in the legal profession at the dawn of the 21<sup>st</sup> century.

However, conflict of interest is by no means restricted to the legal profession; our whole life, personal and professional, is full of such conflicts. Any relationship between two people carries the potential for a conflict of interest: Each party has its own interests, which may conflict with the interests of the other person.

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## II. DEFINITION OF CONFLICT OF INTEREST

A conflict of interest can be defined as a “situation in which a person, such as a public official, an employee, or a professional, has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties”.

There are three key elements in this definition. First, there is a private or personal interest. Often this is a financial interest, but it could also be another sort of interest, say, to provide a special advantage to a spouse or child. Taken by themselves, there is nothing wrong with pursuing private or personal interests. The problem arises when this private interest comes into conflict with the second feature of the definition, an “official duty” – quite literally the duty you have because of the office you hold or because you act in an official capacity. As a professional you take on certain official responsibilities, by which you acquire obligations to clients, employers, or others. These obligations are supposed to trump private or personal interests. Third, conflicts of interest interfere with the ability of professional responsibilities in a specific way, namely, by interfering with objective professionals to be objective and independent. Factors, like private and personal interests, that either interfere or appear likely to interfere with objectivity are then a matter of legitimate concern to those who rely on professionals – be they clients, employers, professional colleagues, or the general public.<sup>2</sup>

## III. CONFLICTS OF INTEREST IN ORDINARY LIFE

### 1. Unilateral of unipersonal conflicts

*“Video meliora, provoque  
deteriora sequor”  
Ovid*

Everyone in every part of his life faces constant oppositions between simultaneous but incompatible tendencies, wishes or drives, often leading to states of emotional tension.

We are constantly subject to internal confrontations. We face conflicts between our good inclinations and our bad tendencies. Ovid in the above quotation said: “I see and approve better things, but follow worse”. And along the same thought, St. Paul repeats: “it is not the good my will prefers, but the evil my will disapproves, that I find myself doing”.<sup>3</sup>

### 2. Bilateral or pluripersonal conflicts

But the most typical conflicts arise when our own interests have to fight with someone else’s interests.

<sup>2</sup> Michael McDonald, Ethics and conflict of interests, Centre for Applied Ethics, 2001.

<sup>3</sup> St. Paul, Romans, 7, 19.

While it is hard enough to resolve dilemmas when our personal rules of conduct conflict, the real difficulties arise when we have to make decision which affect the interests of others. We can work out what weight to give to our own rules through trial and error. But bilateral decisions require us to do the same for others by allocating weights to all the conflicting interests, which may be involved. Frequently, for example, we must balance the interests of employees against those of shareholders. But even that sounds more straightforward than it really is, because there may well be differing views among the shareholders, and the interests of past, present and future employees are unlikely to be identical<sup>4</sup>.

#### IV. CONFLICTS OF INTEREST IN POLITICS

Woodrow Wilson found it impossible to compromise on the locating of the graduate school of Princeton or on America's entry into the League of Nations. On the one hand, it was expedient for him to resign from Princeton; and, on the other, he brought on the worsening of his health which was to shorten his life. Was he merely a poor diplomat, or was he illustrating that some issues do not lend themselves to compromise? He had to act, as every executive must, whether his constituents were ready to move him or not<sup>5</sup>

Everybody who holds a public job or position is frequently at risk of finding themselves with conflict of interests: legislators<sup>6</sup>, politicians<sup>7</sup>, lobbyists, diplomats<sup>8</sup>, all are targets of such opposition. Many codes of ethics<sup>9</sup> and university policy rules<sup>10</sup> have been established to regulate such conflicts.

#### V. CONFLICTS OF INTEREST IN MEDICINE AND SCIENCE

Conflict of interest occurs often in medicine and science in a situation in which professional judgement regarding a primary interest, such as research, education or patient care, may be unduly influenced by a secondary interest, such a financial gain or personal prestige. There is nothing unethical in finding oneself in a conflict of interest. Rather, the key questions are whether one recognises the conflict and how one deals with it. Strategies include disclosing the conflict establishing a system of review and authorization, and prohibiting the activities that lead to the conflict<sup>11</sup>.

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<sup>4</sup> Adrian Cadbury, "Ethical managers make their own rules", in Ethics in practice. Managing the moral corporation, 1989, edited by Kennet R. Andrews, p. 71

<sup>5</sup> Louis William Norris, "Moral hazards of an executive", in Ethics in practice..., p. 35.

<sup>6</sup> Gerard Carrey, "Conflicts of interests: legislators, ministers and public officials", Transparency International.

<sup>7</sup> Andrew Stark, Conflict of interest in American public life, 2000.

<sup>8</sup> Susan Schmidt, "Ex-diplomat pleads guilty to conflict of interest in Chang case", Washington Post, 31 August 2001.

<sup>9</sup> See for instance: US Senate Ethics Manual; Ethics manual for members, officers and employees of the US House of Representatives; Canadian Lobbyists Code of Conduct; Irish Ethics in Public Office, etc.

<sup>10</sup> Stanford Research Administration, University of Illinois at Urbana-Campaign.

<sup>11</sup> Trudo Lemmens and Peter Singer, "Bioethics for clinicians, 17 Conflict of interest in research, education and patient care" in Canadian Medical Association Journal, 20 October 1998.

The objectivity of researches is an essential value in the scientific world and the basis for public confidence. Researchers should be led by their data, not by ulterior interests that might undermine the scientific integrity of this work. Concern is raised when financial considerations may compromise an investigator's professional judgement and independence in the design, conduct or publication of research. Public health service regulations are promulgated and international review boards are created to protect the judgement independence of the investigators<sup>12</sup>.

## VI. CONFLICTS OF INTEREST IN BUSINESS

In 1976, the *Harvard Business Review* submitted a questionnaire on business ethics and social responsibility to 5,000 readers. One of the questions asked if they had ever experienced a conflict between what was expected of them as efficient, profit-conscious managers, and what was expected of them as ethical persons. Four of every seven of those who responded said that they had experienced such conflicts. The nature of compromising circumstances where conflicts between company interests and personal ethics was headed by honesty in communication (22.3%), followed by gifts, entertainment and kickbacks (12.3%) and fairness and discrimination (7.0%)<sup>13</sup>.

Businessmen must make continuous compromises. For one thing, they must choose between present and long-term values. Shall the dividends be higher or the capital improvements greater? Secondly, a conflict between individual and institutional values must often be resolved. Loyalty to an institution is fundamental to the institution's success. Yet an individual can hinder its success in spite of his loyalty. It may be better for the company for the vice president to be dismissed, though this could ruin his health and reputation. Again, shall decisions be made in the interest of few or many? Democratic morality commonly holds up its nose when legislative or executive action is taken or threatened that favours the few. Unquestionably, the most significant compromises are those that balance material and nonmaterial values.

Perhaps the chief evil in compromise lies in its apparent disregard of universal principle. An executive undermines his own influence if he becomes motivated largely by expediency. The great executives have been considered "men of principle", no matter how much they may have trimmed their sails on minor points. Virtue remains largely a habit of the will to follow principle, as Aristotle and Kant emphasised. Members of any institution want the security supplied by the knowledge that their executive is "unpurchable". Deviation from principle may become habit forming. Fear of mediocrity, short-sightedness, or unpredictability sets in when principle falls out<sup>14</sup>.

It has been said<sup>15</sup> that neither the proposition that business and spiritual considerations are separable nor the view that ethics is good business is a fully adequate guide for action. Both represent oversimplified attempts to find an easy way out of an

<sup>12</sup> NIH Guide, Financial conflicts of interest and research objectivity, 5 June 2000.

<sup>13</sup> Steven N. Brenner and Earl A. Molander, "Is the ethics of business changing?" in Ethics in practice..., p. 122.

<sup>14</sup> Louis William Norris, op. cit., p.38

<sup>15</sup> Edmund P. Learned, Arch R. Dooley, and Robert L. Katz, "Personal values and business decisions", in Ethics in practice... p. 54.

excruciatingly complex situation. How can the belief that in the long run good ethics is good business help the manager who is responsible for immediate results, particularly if attention to spiritual values entails a risk of financial loss or even immediate failure for the individual himself, the enterprise or both? Every decision involves a conflicting set of forces. This is particularly true in business, where the individual often finds himself forced to choose among personal values and ultimate loyalties that may be in sharp conflict with each other, with the values held by others (which look “right” from their points of view), or with urgent organisational considerations. The terrible task of leadership is to live with conflicts and tensions, to make discriminating judgements where necessary, and to find mutual relationships where possible. What is crucial is that the administrator realise that he always has a choice of what his behaviour or decision will be –(at least, if he is willing to accept the inevitable discomforts entailed by different courses of action). There are a multitude of forces in any organisational framework which make conflict inevitable and negative consequences unavoidable. Someone will always be placed under tensions or restrictions, or denied things that he believes to be rightly his. Individual interests must frequently be sacrificed for the good of the larger organisation. For these reasons we do not believe that it is satisfactory either to ignore spiritual considerations in business or to try to make spiritual and business considerations identical. Both approaches are oversimplifications: the former because it requires a man who wants to serve God to compartmentalise his life; the latter because it offers no way of dealing with the conflicts which occur in every decision-making situation. Neither recognises the inevitability of conflict or the complexity of the situation in which business decisions must be made<sup>16</sup>.

## **VII. CONFLICT OF INTERESTS AND PROFESSIONALS**

Professionals have to face multiple cases of conflicts of interest. The reason is because one of the most essential elements in professionalism is trust. Clients trust that the professional will dedicate all his effort to the relevant service without the interference of preoccupations.

Accountants, for instance, are facing an important conflict between the public interest and the best business interests of its members<sup>17</sup>.

On the other hand, conflict of interest are one of the stumbling stones which make ethically difficult the multidisciplinary practices between lawyers and accountants<sup>18</sup>.

## **VIII. CONFLICT OF INTEREST AND LAWYERS**

*“When a client employs an attorney, he has the right to presume, if the latter be silent on the point, that he has no engagement, which interfere, in any degree,*

<sup>16</sup> Edmund P. Learned and others, *op. cit.*, p55.

<sup>17</sup> Nigel Page, “Conflicting interests?”, *Legal business*, September 1992, p. 42.

<sup>18</sup> See for instance, Ramon Mullerat, “The multidisciplinary practice of law in Europe”, *Journal of Legal Education*, Vol 50, December 2000, Annex 4, pp. 481, ss.

*with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgement, or endanger his fidelity”.*  
Justice Joseph Story (1779-1845)<sup>19</sup>

## 1. In general

*“The pressures facing the legal profession worldwide challenge old rules and long-standing patterns of behaviour. In a world in which law firms grow in size, power and revenue and as other professions converge into areas previously reserved to the legal profession, it is not surprising that ethical rules face reassessment”.*<sup>20</sup>

Although everyone faces similar questions, the conflicting questions faced by lawyers are perhaps greater in number and intensity than those faced by most other people. Nor are the conflict rules in non-lawyer relationships (e.g., a business partnership) a sure guide in analysing lawyer’s conflict of interest. The lawyer-client relationship is unique by definition, i.e.; it is a relationship whose object is the rendering of legal advice and counsel<sup>21</sup>

My father, a solo practitioner working in litigation for individual clients in a provincial town in Spain, had very few conflicts of interest. Today, large firms of fifteen hundred lawyers or more with thirty or more offices specialising in business law, often deal with complex transnational transactions face many conflicts of interest. That is why conflicts of interest have become a central issue in legal ethics.

The Working Group for the revision of the CCBE Code of Conduct<sup>22</sup> recognised that conflicts of interest:

*“... has become a subject of increased interest because of the trend towards bigger law firms. The bigger they get the more acutely they feel the conflicts of interest. Mergers between law firms create conflicts of interest because the merging firms often have clients that are in dispute with each other. It is necessary to discuss whether the current provisions are adequate when coping with the new developments in our profession...”*

*The rules on conflicts of interest are of fundamental importance to the trust of the public in the legal profession. Great care must therefore be exercised when looking at ways of coping with the development of the legal profession when writing the rules concerning conflict of interest.”*

The rules on conflicts of interest do not attempt the elimination of all possible conflicts; this is impossible. Even if we envisioned lawyers as ascetics, renouncing all self interest, devoted only to their calling, even if our notion of a lawyer was someone who served one client for the entirety of his career, of course, this is not so, conflicting interests would be present: The client’s interest would still conflict with the interests of

<sup>19</sup> Williams v. Reed, 3 Mason 405, 418, 29 F. Case No. 17.733 (C.C.Me. 1824).

<sup>20</sup> R.S.G. Chester, J.W. Rowley and Brett Harrison, “Conflict of interest, Chinese walls and the changing business of law”, B.L.I., issue 2, International Bar Association, 2000, p. 35.

<sup>21</sup> Hazard and al., op. cit., p. 620.

<sup>22</sup> Council of the Bars and Law Societies of the European Union (CCBE), Code of Conduct for Lawyers in the European Union, revised version 1999.

their parties and with the law itself. Dealing with conflicting interests is inherent in a lawyer's life<sup>23</sup>

## 2. Definition of conflict of interest for lawyers

The Working Group for the revision of the CCBE Code of Conduct made in its 18 November 1996 proposal a step forwards defining conflict of interest by proposing the introduction of a new subarticle 3.2.1 This subarticle described what a lawyer could do by way of representing or acting as legal advisor for more than one client without a conflict of interest occurring. With so many varying activities by lawyers it is of great importance to define as precisely as possible what is and what is not conflict of interest. The proposal did not go far enough in this respect. A regulation for conflict of interest should define as thoroughly as possible: both what is and what is not conflict of interest, and what it is in relation to submitting legal advice to as well as representing a client.

*"1. A conflict of interest exists where:*

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

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

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

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

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

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

## 3. Types of conflicts of interest

The four major kinds of conflicts of interest are:

1. Conflicts between the lawyer's personal interest and the interest of the client (e.g., the lawyer wishes to enter into business transactions with the client, receive a gift from the client, etc.)
2. Conflicts between the interests of two or more clients that the lawyer is concurrently representing. This is especially a problem in litigation matters but can also arise in nonlitigation situations.

<sup>23</sup> Hazard and al., op. cit., p. 619.

3. Conflicts between the client's interest and that of a third party to whom the lawyer owes obligations (e.g., a lawyer for the insurer representing the insured).
4. Conflicts between the lawyer's duties to a present client and the lawyer's continuing duties to a former client.<sup>24</sup>

Often conflicts of interest have an economic nature, but they are not always economic. For instance, a lawyer who becomes involved in a sexual relationships with a client should consider whether this may place his or her interests with those of the client<sup>25</sup>.

#### 4. Lawyer's ethical values protected

The policies underlying conflict of interests are basically two: loyalty and confidentiality.

Loyalty is one of the most important aspects of a lawyer's relationship with his client. In an adversary system, the client depends upon the lawyer's undiluted loyalty to his client's interests. The potential variety of interests which might dilute a lawyer's loyalty to his clients includes the lawyer's personal interests (e.g., financial security, prestige, and self-esteem) and the interests of third persons (family, friends, business associates, employer, the legal profession, and society as a whole).

Preserving a client's secrets and confidences is often as important to the client as winning his lawsuit or avoiding embarrassment or undue expense. Whereas loyalty relates to zeal or diligence, confidentiality relates to information which the client has entrusted to her lawyer.<sup>26</sup>

#### 5. The manifold issues of a lawyer's conflict of interest

The duty to avoid conflicting interests raises multiple issues, which we cannot analyse in this paper.

Amongst the more important are the following<sup>27</sup>:

- a. Does a conflict of interest appear when two clients with adverse or potentially adverse interests seek representation by the same lawyer in matters totally unrelated to the matter in which their interests differ?
- b. Is a lawyer allowed to sue a former client on behalf of a next client where the matter of the lawsuit is unrelated to the matter in which the former client was represented?
- c. Can two or more clients seek joint representation? What is the degree of adversity in their respective interest to prevent such joint representation?

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<sup>24</sup> ....

<sup>25</sup> The Guide for Professional Conduct of Solicitors. The Law Society, ed. 6<sup>th</sup>, 1999.

<sup>26</sup> Riobert H. Aronson and Donald T. Weckstern, Professional Responsibility, 1991, p. 223.

<sup>27</sup> Most of these issues are taken from Hazard and al., op. cit., p 620 and ss.

- d. Are lawyers of the same firm with a lawyer who is disqualified because a conflict disqualified them?
- e. What is a firm for the purposes of the rules on conflict? When associations/networks/corresponding firms are considered as a firm for these purposes
- f. Does the taint of disqualified lawyer travel with that lawyer if he or she moves from one firm to another?
- g. When the client is an organisation, who is the real client to whom the lawyer owes the duty of communication? From whom shall he take instructions on settlement? To whom does he owe the duty to keep confidences?
- h. Can a law firm with several international offices represent competing bidders.

Conflicts of interests constantly increase in number and in pecuniary consequences. Chester, Rowley and Harrison referred to one Oklahoma firm which was reportedly hit with a \$ 120 million claim for attempting to switch sides in an oil industry dispute; in 1996, Louisiana's appellate court upheld a \$ 5.5 million judgement against a lawyer who tried to act for both sides in a corporate merger; firms also had to forfeit fees, with Milbank Tweed reportedly losing a \$ 1.9 million free award in 1997 and Wilkie Farr almost \$ 3 million the following year<sup>28</sup>.

## 6. The rules

### A. In general

Codes of ethics regulate conflicts of interest very differently. The codes of ethics of the common law tradition (f.i., the ABA Model Rules) tend to do it with great detail while the ones of the civil law tradition (f.i., the CCBE Code of Conduct) tend to do it concisely.

### B. The CCBE Code of Conduct<sup>29</sup>

The CCBE Code of Conduct, section 3.2 regulates the conflict of interest in Europe

#### *“3.2 Conflict of interest*

*3.2.1 A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.*

*3.2.2 A lawyer must cease to act for both clients when a conflict of interests arises between those clients and also whenever there is a risk of breach of confidence or where his independence may be impaired.*

*3.2.3 A lawyer must also refrain from acting for a new client if there is a risk or a breach of confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of three affairs of the former client would give an undue advantage to the new client.*

*3.2.4 Where lawyers are practising in association, paragraphs 3.2.1 and 3.2.3 above shall apply to the association and all its members”.*

<sup>28</sup> Chester, Rowley and Harrison, *op. cit.*, p. 37.

<sup>29</sup> Code of Conduct of the CCBE, 1988, revised 1998.

C. The ABA Model Rules of Professional Conduct<sup>30</sup>*“Rule 1.7. Conflict of interest: General rule*

*“(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:*

*(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the client; and*

*(2) each client consents after consultation*

*(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:*

*(1) the lawyer reasonably believes the representation will not be adversely affected; and*

*(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved*

*Rule 1.8 Conflict of interest: Prohibited transactions*

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

*(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;*

*(2) the client is given a reasonable opportunity to seek advice of independent counsel in the transaction; and*

*(3) the client consents in writing thereto.*

*(b) A lawyer shall not use information relating to representation of a client to disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.*

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

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

*(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplate litigation, except that:*

*(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and*

*(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.*

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

*(1) the client consents after consultation;*

*(2) there is no interference with the lawyer’s independence of professional judgement or with the client-lawyer relationship; and*

*(3) information relating to the representation of a client is protected and required by Rule 1.6.*

*(g) A lawyer who represents two or more clients shall not participate in making an agreement settlement of the claims or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of All the claims and pleas involved and the participation or each person in the settlement.*

<sup>30</sup> American Bar Association, Model Rules of Professional Conduct, 1999.

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

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

*(j) A lawyer shall not require a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:*

- (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and*
- (2) contract with a client for a reasonable contingent fee in a civil case”.*

D. The international Code of Ethics of the International Bar Association (IBA) 1998

“Rule 13

*Lawyers should never represent conflicting interests in litigation. In non-litigation matters, lawyers should do so only after having disclosed all conflicts or possible conflicts of interest to all partners concerned and only with their consent. This Rule also applies to all lawyers in a firm”.*

E. The Richtlinien für die Ausübung des Rechtsanwaltsberufes, für die Überwachung der Pflichten des Rechtsanwaltes und für die Ausbildung in Austria

*“§ 10. Vorhehmste Berufspflicht des Rechtsanwaltes ist die Treue zu seiner Partei. Interessen des Rechtsanwaltes und Rücksichten auf Kollegen haben im Widerstreit zurückzutreten.*

*§ 11. Der Rechtsanwalt darf Auftrag und Vollmacht in der Regel nur von demjenigen annehmen, dessen Interessen ihm anvertraut werden.*

*§ 13. Hat es der Rechtsanwalt von nur einer Partei übernommen, Vertragsverhandlungen zu führen oder einem Vertrag zu verfassen, so ist er berechtigt, diese Partei in einem Rechtsstreit aus diesem Vertrag zu vertreten, wenn auch die andere Partei von einem berufsmäßigen Parteienvertreter beraten war oder der Rechtsanwalt sogleich ausdrücklich erklärt hatte, nur seine Partei zu vertreten.*

*§ 14. Hat der Rechtsanwalt eine Gesellschaft ausschließlich über Auftrag eines Gesellschafters oder ausschließlich auf Grund der von diesem erteilten Information vertreten oder beraten, so ist ihm die Vertretung und Beratung dieses Gesellschafters in Angelegenheiten seines Gesellschaftsverhältnisses nur gestattet, sofern er nicht gleichzeitig die Gesellschaft vertritt oder berät.”*

F. The Code of Ethics for the legal profession in Spain

*“Artículo 13.- relaciones con los clientes*

*(...)*

*4.- El abogado no puede aceptar la defensa de intereses contrapuestos con otros que esté defendiendo, o con los del propio abogado.*

*Caso de conflicto de intereses entre dos clientes del mismo Abogado, deberá renunciar a la defensa de ambos, salvo autorización expresa de los dos para intervenir en defensa de uno de ellos.*

*Sin embargo el Abogado podrá intervenir en interés de todas las partes en funciones de mediador o en la preparación y redacción de documentos de naturaleza contractual, debiendo mantener en tal supuesto una estricta y exquisita objetividad.*

*5.- El Abogado no podrá aceptar encargos profesionales que impliquen actuaciones contra un anterior cliente, cuando exista riesgo de que el secreto de las informaciones obtenidas en la relación con el antiguo cliente pueda ser violado, o que de ellas pudiera resultar beneficio para el nuevo cliente.*

*6.- El Abogado deberá, asimismo, abstenerse de ocuparse de los asuntos de un conjunto de clientes afectados por una misma situación, cuando surja un conflicto de intereses entre ellos, exista riesgo de violación del secreto profesional, o pueda estar afectada su libertad e independencia.*

*7.- Cuando varios Abogados formen parte o colaboren en un mismo despacho, cualquiera que sea la forma asociativa utilizada, las normas expuestas serán aplicables al grupo en su conjunto, y a todos y cada uno de sus miembros.”*

#### G. The Bundesrechtsanwaltsordnung and the Berufsordnung in Germany

##### Bundesrechtsanwaltsordnung:

“Dritter Teil. Die Rechte und Pflichten des Rechtsanwalts und die berufliche Zusammenarbeit der Rechtsanwälte.

##### 43 a. Grundpflichten des Rechtsanwalts

...

*(4) Der Rechtsanwalt darf keine widerstreitenden Interessen vertreten.*

##### § 45. Versagung der Berufstätigkeit. (1) der Rechtsanwalt darf nicht tätig werden:

*1. wenn er in derselben Rechtssache als Richter, Schiedsrichter, Staatsanwalt, Angehöriger des öffentlichen dienstes, Notar, Notarvertreter oder Notariatsverweser bereits tätig geworden ist;*

*2. wenn er als Notar, Notarvertreter oder Natiratsverweser eine Urkunde aufgenommen hat und deren Rechtsbestand oder Auslegung streitig ist oder die Vollstreckung aus ihr betrieben wird;*

*3. wenn er gegen den Trägen des von ihm verwalteten Vermögens vorgehen soll in Angelegenheiten, mit denen er als Konkursverwalter, Vergleichsverwalter, Nachlaßverwalter, Testamentsvollstrecker, Betreuer oder in ähnlicher Funktion bereits befaßt was;*

*4. wenn er in derselben Angelegenheit außerhalb seiner Anwaltstätigkeit oder einer sonstigen Tätigkeit im sinne des § 59 a Abs. 1 Satz 1 bereits beruflich tätig war; dies gilt nicht, wenn die berufliche Tätigkeiti beendet ist.*

*(2) Dem Rechtsanwalt ist es untersagt:*

*1. in Angelegenheiten, mit denen er bereits als Rechtsanwalt gegen den Träger des zu verwaltenden Vermögens befaßt war, als Konkursverwalter, Vergleichsverwalter,*

*Nachlassverwalter, Testamentesvollstrecker, betreuer oder in ähnlicher Funktion tätig zu werden;*

*2. in Angelegenheiten, mit denen er bereits als Rechtsanwalt befaßt war, außerhalb seiner anwaltstätigkeit oder einer sonstigen Tätigkeit im sinne des § 59 a Abs. 1 Satz 1 beruflich tätig zu werden.*

*(3) Die Verbote der Absätze 1 und 2 gelten auch für die mit dem Rechtsanwalt in sozietät oder in sonstiger Weise zur gemeinschaftlichen Berufsausübung verbundenen oder verbunden gewesenen Rechtsanwälte und Angehörigen anderer Berufe und auch insoweit einer von diesen im sinne der Absätze 1 und 2 befaßt war."*

### Berufsordnung:

#### "§ 3. Widerstreitende Interessen, Versagung der Berütätigkeit

*(1) Der Rechtsanwalt darf nicht tätig werden, wenn er, gleich in welcher Funktion, eine andere Partei in derselben Rechtssache im widerstreitenden Interesse bereits beraten oder vertreten hat oder mit dieser Rechtssache in sonstiger Weise im sinne der §§ 45, 46 Bundesrechtsanwaltsordnung beruflich befaßt war.*

*(2) Das Verbot gilt auch, wenn ein anderer Rechtsanwalt oder Angehöriger eines anderen Berufes im sinnes des § 59 a Bundesrechtsanwaltsordnung, mit dem der Rechtsanwalt in Sozietät, zur gemeinschaftlichen Berufsausübung in sonstiger Weise (Anstellungsverhältnis, freie Mitarbeit) oder in Bürogemeinschaft verbunden ist oder war, in derselben Rechtssache, gleich in welcher Funktion, im widerstreitenden Interesse berät, vertritt, bereits beraten oder vertreten hat oder mit dieser Rechtssache in sonstiger Weise beruflich befaßt war.*

*(4) Wer erkennt, daß er entgegen den Absätzen 1 oder 2 tätig ist, hat unverzüglich davon seinen Mandaten zu unterrichten und alle Mandate in derseblen Rechtssache zu beenden."*

## H. Règlement intérieur harmonisé des barreaux de France

### "Article 4: le conflit d'intérêts

#### 4.1. Principes

*L'avocat ne peut être le conseil, le défenseur ou le représentant de plusieurs parties dans une même affaire s'il y a conflit entre leurs intérêts ou, sauf accord des parties, s'il existe un risque sérieux d'un tel conflit.*

*Le principe du libre-choix de l'avocat par le client trouve ses limites dans la prise en considération des conflits d'intérêts.*

#### 4.2. Définition

Conflits d'intérêts. Il y a conflit d'intérêts:

- *dans la fonction de conseil, lorsque, au jour de sa saisine, l'avocat qui a l'obligation de donner une information complète, loyale et sans réserve à ses clients ne peut mener sa mission sans compromettre, soit par l'analyse de la situation présentée, soit par l'utilisation des moyens juridiques préconisés, soit par la concrétisation du résultat recherché, les intérêts d'une ou plusieurs parties;*

- dans la fonction de représentation et de défense, lorsque, au jour de sa saisine, l'assistance de plusieurs parties conduirait l'avocat à présenter une défense différente, notamment dans son développement, son argumentation et sa finalité, de celle qu'il aurait choisie si lui avaient été confiés les intérêts d'une seule partie;
- lorsqu'une modification ou une évolution de la situation qui lui a été initialement soumise révèle à l'avocat une des difficultés visées ci-dessus.

Risque de conflit d'intérêts. Il existe un risque sérieux de conflits d'intérêts, lorsqu'une modification ou une évolution prévisible de la situation qui lui a été initialement soumise fait craindre à l'avocat une des difficultés visées ci-dessus.

Absence de conflit d'intérêts. Il n'y a pas conflit d'intérêts:

- lorsque après avoir informé ses clients et recueilli leur accord, l'avocat dans ses différentes fonctions cherche à concilier leur contrariété d'intérêts. Dans un tel cas, l'avocat ne peut être le conseil ou le défenseur d'une partie dans la même affaire en cas d'échec de la conciliation;
- lorsqu'en plein accord avec ses clients, l'avocat leur conseille, à partir de la situation qui lui est soumise, une stratégie commune, ou si, dans le cadre d'une négociation, des avocats, membres d'une même structure interviennent séparément pour des clients différents, informés de cette commune appartenance.

#### 4.3. Limites de l'intervention de l'avocat

Abstentions. L'avocat doit, sauf accord des parties, s'abstenir de s'occuper des affaires de tous les clients concernés lorsque surgit un conflit d'intérêt, lorsque le secret professionnel risque d'être violé ou lorsque son indépendance risque de ne plus être entière.

In ne peut accepter l'affaire d'un nouveau client si le secret des informations données par un ancien client risque d'être violé, ou lorsque sa connaissance des affaires de ce dernier est susceptible de favoriser le nouveau client de façon injustifiée.

Cas particuliers. Lorsqu'il existe un risque sérieux de conflit d'intérêts, l'avocat doit obtenir l'accord de l'ensemble des parties concernées avant d'accorder son concours à plus d'une partie.

Si l'avocat sollicité successivement par plusieurs parties dans une même affaire n'accorde pas à toutes son concours, il ne peut conserver la défense des intérêts d'une ou plusieurs d'entre elles qu'en respectant les règles ci-dessous énoncées.

L'avocat peut continuer à s'occuper des autres dossiers des clients concernés sans avoir à solliciter leur accord, lorsque son maintien dans ces dossiers, étrangers au conflit d'intérêts survenu dans l'affaire en cause, n'entrave pas son indépendance et n'affecte pas le respect du secret professionnel.

Structures professionnelles et modes d'exercice. Lorsque des avocats exercent en groupe, les dispositions relatives aux conflits d'intérêts sont applicables au groupe dans son ensemble et à tous ses membres.

Elles s'appliquent également aux avocats exerçant leur profession dans une structure de mise en commun de moyens à partir du moment où, à l'intérieur de cette structure, il existe un risque de violation du secret professionnel."

I. Rules of the Consiglio Nazionale Forense in Italy

*“Art. 37. (Conflict of interest). – A lawyer shall refrain from accepting any employment that may create a conflict with the interests of a client.*

*I. A conflict of interest arises if the acceptance of a new client may result in a violation of confidentiality applicable to information supplied by another client, if the knowledge which the lawyer has about an existing client’s business provides an unfair advantage to the new client, or if the representation of an existing client limits the lawyer’s independence in carrying out the new representation.*

*II. A lawyer who assists a married couple in a family controversy may not represent either of them in a subsequent controversy between the husband and wife.”*

J. Circular Concerning Regulations to the Courts of Law Act, Chapter 11 (Regulations for advocates) of Norway

*“3.2. Conflicts of interest*

*3.2.1. An advocate must refrain from undertaking an assignment if this may give rise to a risk that the advocate’s duty of loyalty, discretion or his independence could be disturbed.*

*3.2.2 (Double representation)*

*An advocate must not in the same case counsel, represent or act on behalf of two or more clients if the clients have conflicting interests in the case or there is a clear risk to this effect.*

*The advocate may nevertheless undertake joint assignments for two or more clients with conflicting interests in one and the same case with a view to find a solution. If he has represented or represents one or more of the clients, information to this effect should be given. Before the advocate undertakes an assignment of this nature, the clients should be informed in advance of the potential conflicts that are present. If the joint assignment does not lead to a solution of the case, the advocate cannot represent any of the parties in the further handling of the case.*

*3.3.3. (Client collision)*

*Outside the same case, an advocate can only accept assignments for one client against one of the advocate’s other clients if the latter does not object and if it is clear that there is no reason for concern because of the different nature of the assignment or the nature of the client. The advocate shall inform both parties about this.*

*3.3.4. (Assignments against former clients)*

*An advocate must exercise care before accepting assignments against a former client.*

*The advocate must refrain from undertaking assignments if the advocate’s knowledge about the circumstances of a former client may be used in a prejudicial manner to the advantage of the new client or might inflict injury on the interests of the former client.*

*3.3.5. When an advocate practices law in a company or with community of office with other advocates, the rules about conflicts of interests are applicable to the community and to its participants.”*

K. The Guide to the Professional Conduct of Solicitors of the Law Society of England and Wales, 6<sup>th</sup> Edition 1993

“12.06 conflict.

*Principle: A solicitor must not act, or must decline to act further, where there is a conflict of interests between:*

- (a) *the solicitor and the client or prospectual client;*
- (b) *the solicitor’s firm and the client or prospective client;*
- (c) *two existing clients; or*
- (d) *an existing client or former client and a prospective client”*

“ 15.01 When instructions must be refused.

*Principle: A solicitor or firm of solicitors should not accept instructions to act for two or more clients when there is a conflict or a significant risk of a conflict between the interests of those clients.”*

“15.03 Conflict arising between two or more current clients.

*Principles: A solicitor or firm of solicitors must not continue to act for two or more clients where a conflict of interest arises between those clients”*

“15.04 Acting for seller or buyer.

*Principle: A solicitor must not act for both seller and buyer on a transfer of land or an interest in land or for a lender and borrower in a private mortgage unless he or she is able to do so in compliance with Rule 6 of the Solicitors Practice Rules 1990”*

“15.05 Solicitor’s interests conflicting with clients

*Principle: A solicitor must not act where his or her own interests conflict with the interests of a client or a potential client”*

As I said earlier, regarding ethical rules in general, the common law jurisdiction rules (US, UK, Australia, etc.) are generally more detailed and casuistic than the civil law rules (France, Germany, Spain, Italy) which tend to be conceptual and shorter. One must only compare the ABA Model Rules and the CCBE Code of Conduct.

With regard to the conflict of interests rules in particular, the civil law rules are generally very concise. There may be several reasons: smaller firms, less litigation, and the fact that ethical rules are the field of the bars rather than of the courts.

It is clear, however, that the present regulation of conflicts of interest needs to be updated to the present circumstances. In England the need of a new regulatory approach has been especially recognised because the current rules are criticised “for failing to reflect modern business practices, the needs of large corporate clients, the vastly increased size of firms and the global nature of practice today”. In this respect the City of London Law Society produced a report for a review of conflict of interests in July

Those rules are one of the foundations upon which “secret professionnel” and its common law equivalents are based. However, there are cases in which these rules provide tensions with the practise of the law in everyday circumstances. Such examples focuss on cases involving the difficulties created by e. g. the emergence of very large firms, with clients bases deriving from the goodwill of the firm’s constituent parts; the possible exclusion of clients from specialised advice concentrated within one group; and the definition of circumstances in which a client of today is no longer a client tomorrow for the purposes of such rules.

It appears to the Working Group that the problems posed by these examples are not merely problems caused to the lawyer by the re-structuring of his or her professional firm, which are necessarily the means of the lawyer to render his or her livelihood. There are also problems that bring into question the ability of the lawyer to render his or her services in the public interest and in the interests of the proper functioning of the legal and justice systems. It is not in the public interest or in the interest of the administration of justice that, without good reason the client is deprived of the representation of his or her choice.

## **IX. THE CLIENT’S AUTHORISATION**

### **1. In general**

As indicated earlier, conflict of interest and waivers to it depend a great deal on the concept that each jurisdiction may have of the lawyer. Jurisdictions where the lawyer is fundamentally considered an element of the administration of justice (officer to the court, co-ministry of justice) the client’s consent or waiver as a means to justify the conflict is less relevant, while jurisdictions which concern the lawyer mainly as a service provider, the client’s consent or waiver is more decisive.

On the other hand, there are fields of law where the client’s consent may be more effective in terms of neutralising the conflict than in others. There are circumstances under which full disclosure and consent of both clients will not necessarily stop disciplinary procedures against a lawyer who attempts to represent conflicting interests. In general, in litigation the conflict of interest as a bar for the lawyer’s intervention cannot be waived in any circumstance. Nobody can accept that a lawyer acts both for the criminal and the victim even if both clients would consent. Some litigations, however, i.e. divorces agreed by the parties – could represent a different picture. In transactional commercial practice, the situation is even more subtle. A commercial lawyer may represent several companies of the same sector. But he cannot represent two leading competing corporations in one sector.

### **2. The client’s consent**

Is the client authorisation always sufficient to justify the conflict? We should therefore discuss whether such consent should always be sufficient and how the consent should be sought and given.

Conflicts of interest arise in all transactions. In real estate transactions, for instance, house buyers often rely on the real estate agent to recommend an attorney to handle the transaction. When this occurs there is automatically a conflict of interest. Theoretically, the lawyer should vigorously negotiate on behalf of the client. In much real estate transaction, however, the lawyer is more concerned with pleasing the real estate agent, to get more referrals. As a consequence, the client may not get uncompromised legal advice. Rather, the attorney may be attempting to satisfy the broker. Another kind of conflict of interest involves an attorney who represents both sides of a transaction. In many real estate transactions the same attorney represents both buyer and seller. To avoid ethical problems, the attorney has both the buyer and seller sign a letter authorising the lawyer to act for both sides<sup>36</sup>.

To avoid disqualifications, firms increasingly employ provisions in retainer agreements whereby the client agrees to waive certain future conflicts should they arise. These provisions usually relate to successive conflicts, i.e., conflicts that may occur after the firm has concluded redressing the client who signs the waiver. But the provisions sometimes apply to concurrent representation, in the last case the courts refused to enforce a release permitting the lawyer subsequently to represent his client's opponent in the same matter<sup>37</sup>.

### 3. The client's consent needs to be informed

In many fields other than law, for instance in medicine, when clients' consent is discussed, it is generally requested to be duly informed.

In the legal field, Chester, Rowley and Harrison affirm that even if courts recognise that consent may neutralize potential conflicts, the requirements of "informed consent" are set high. They cite what the Privy Council in Clark Boyce v. Moriart:

*"Informed consent means consent given in the knowledge that there is a conflict between the parties and that as result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other".*

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

It may also be difficult for lawyers to fully inform a potential client of possible conflicting interests, because of legal professional privilege or separate obligations of confidentiality. Such information could not be disclosed to a potential client in order to obtain fully informed consent. In practice, such disclosure will be made immensurably

<sup>36</sup> Hilton L. Stein, How to sue your lawyer, 1989, p.37.

<sup>37</sup> Re Boone, 83 Fed. 944, 957 (n.D. Cal. 1897). The court said that "the client may waive a privilege which the relation of attorney and client confers upon him, but he cannot enter into an agreement whereby he consents that the attorney may be released from all the duties, burdens, obligations and privileges pertaining to the duty of attorney and client... Courts owe a duty to themselves, to the public, and to the profession which the temerity or improvidence of clients cannot supersede".

more difficult by the requirements of preserving privilege and protecting confidential information. It is always difficult for fiduciaries to protect themselves from beneficiaries by means of gratuitous waivers<sup>38</sup>.

#### 4. The position of the different jurisdictions

As we have advanced, the rules of the different regulations concerning the client's consent tend to be concise.

The Spanish rule (art. 13.4) provides that in case of conflict between two clients, the lawyer must withdraw from the defence of both, "*unless with the express authorisation of both clients to intervene in defence of one of them*".

The French rule (art. 42.) provides that when there is a serious risk of conflict the lawyer "*must acquire the agreement of all concerned parties before granting his assistance to more than one party*".

The Norwegian rule (art. 3.3.3) sets out that an advocate can only accept assignments for one client against one of the advocate's other clients "*if the latter does not object*" and it is clear that there is no reason for concern because of the different nature of the assignment or the nature of the client.

The Italian regulation not even mentions the possibility of client's consent.

It is probably the Law Society Rules which cover conflict of interests with more detail in Europe. Chapter 15 of the Guide to the Professional Conduct of Solicitors<sup>39</sup> on Conflict of Interests contains several detailed rules on this matter (15.01 when instructions must be refused; 15.02 Relevant Knowledge; 15.03 Conflict arising between two or more current clients; 15.04 Acting for seller and buyer; 15.05 Solicitor's interest conflicting with client's; 15.06 Commissions; 15.07 Solicitor holding power of attorney; 15.08 Gifts to solicitors; Annex 15.A guidance – conflict arising on the amalgamation of two firms of solicitors; Annex 15.B Guidance – examples of offices and appointments where solicitors should decline to act.

Some of those rules and their commentaries refer to the client's consent as a way to avoid the consequences of the conflict. Rule 15.02 provides that if a solicitor has required relevant knowledge concerning a former client during the course of acting for that client, the solicitor must not accept instructions to act against the client since, as the commentary explains, any knowledge acquired by a solicitor whilst acting for the former client is confidential and cannot be disclosed without the client's consent. The situation is delicate because the solicitor cannot act for the present client but cannot reveal to the present client the information he acquired from the former client.

In Rule 15.03 the principle is that a solicitor must not continue to act for two or more clients where a conflict of interests arises between those clients. The commentary adds that in that case the solicitor must cease to act for both clients, unless he can without embarrassment and with propriety, continue to represent one client with the other's

<sup>38</sup> Clark Boyce v. Moriat (1994), 1.A.C. 428 at 435.

<sup>39</sup> The Guide to the Professional conduct of Solicitors of the Law Society, 6<sup>th</sup> Edition, 1993.

consent. A solicitor may only continue to represent one client if not in possession of relevant confidential knowledge concerning the other obtained whilst acting for the other. Even in such case, the consent should be sought if the other client (usually through his new solicitor) and the solicitor should proceed in the absence of such consent only if there is no good cause for its refusal. The commentary to Rule 15.03 also refers to the conflict arisen following the amalgamation of firms, since clients of the individual firms may become clients of the new firms. If the interests of such clients conflict, the new firm must cease to act for both clients if, without embarrassment and with propriety, the new firm can continue to represent one client with the other's consent.

Rule 15.06 also establishes the principle that solicitors shall account to their clients for any commission received more than 20 £ unless, having disclosed to the client in writing the commission, they have the client's agreement to retain it.

## 5. The CCBE Code and the clients' consent

### A. In general

We have transcribed the text of section 3.2 of the CCBE Code. The revised text of the 1998 amendment reproduces the text of the original Code 1988. Such a text does not refer to the possibility that the lawyer is authorised to act in a situation of conflict with the client or clients' consent.

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

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

### B. The position of the Working Group

The Working Group for the revision of the CCBE Code in its report of 18 November 1996 contained a proposal to start section 3.2 on conflict of interests with a new subarticle, which reads as follows:

*"3.2.1 A lawyer may act as a legal adviser for several persons or other legal entities when they ask the lawyer to assist in the realisation of a common project.*

*A lawyer may act as a representative, adviser or defender for more than one client in the same matter when the interest of the clients is the same.*

The Working Group was not in total agreement on how the question of conflicts of interest should be regulated in the amended CCBE Code and it restricted itself to propose the transcribed next subarticle in order to state positively what a lawyer can do in situations where doubts may arise. Except for that proposal, the Working Group did not propose changes in the original text. This did not mean that they considered the text adequate, but that the questions need a more thorough discussion before they could draw a final conclusion.

The Working Group pointed such problems as were raised by the development of bigger firms, a rapid development in most CCBE Member States. This development makes conflict far more frequent than before. In smaller countries a rigid conflict of interest rule might prevent access to specialists for many clients.

There is need to explore further the limits of the regulations discussing such questions as when client ceases to be a client. It should also be looked into the question of whether transparency and acceptance by clients can constitute a relief from the rules of conflict of interest.

#### C. The proposal of the Working Group

The current CCBE Code of Conduct has no provisions concerning the client's consent to the lawyer acting in contravention of the conflict of interest regulation. In the Working Group's point of view, this makes the provisions a bit unrealistic. It is very practical that the lawyer asks for and gets the consent of his client to act.

The Working Group proposed that the Code accepts that the client by giving his consent, entitles the lawyer to act in a way that otherwise would have been in contravention of the conflict of interest regulation. The Working Group added that the consent must be given only after a full and open disclosure of the problem and its consequences by the lawyer. The lawyer must be responsible for proving that consent has been given in the specific circumstances.

The provision cannot, however, be generally applicable. In the view of the Working Group the client's consent cannot help the lawyer where his acts would breach the confidence towards the client or impair his independence. Therefore, it proposed that the following provision be included in art. 3.2:

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

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

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

#### D. Conclusion

Taking into account the potential for controversy around the problems of conflict of interest the Working Group suggested that as alternative 1 is submitted the present text of clause 3.2. As alternative 2 is proposed the present text with the emergency provision added. This could serve as a reconciliation between the traditional regulation and the needs of a modern legal profession without making too big changes. As alternative 3 presented a text with the rest of the changes proposed above.

Alternative 1:

(See the current text in point 5.B above).

Alternative 2

“3.2. *Conflict of interest*

- 3.2.1. *A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.*
- 3.2.2. *A lawyer must cease to act for both client when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where his independence may be impaired.*
- 3.2.3. *A lawyer must also refrain from acting for a new client if there is a risk of a breach of confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.*
- 3.2.4. *In the application of the provisions of Article 3.2 of the Code and subject to relevant rulings of his own competent professional authority or authorities, the lawyer shall not normally be considered to have acted in breach of those provisions if, exceptionally, in the interests of*
1. *allowing a client access or continued access to the lawyer of his or her choice, who is also better able than any other lawyer of comparable standing to handle the relevant matter competently and without the duplication of costs that would be occasioned by refusing or discontinuing a relevant retainer, and/or*
  2. *permitting the client to have access to a limited number of specialist lawyers available in the relevant locality, and having*
    - a) *taken all measures required for the protection of confidences and*
    - b) *made full disclosure of relevant facts to each client concerned*
- the partner or associate of that lawyer accepts instructions to act for another client with a conflicting interest in any relevant matter.*
- It will normally be appropriate that the burden of establishing that factors 1, 2, a) and b) are satisfied in any given case should be upon the lawyer, lawyers or firm whose conduct falls into question in this respect.”*

Alternative 3

*“3.2. Conflict of interest*

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

*3.2.2. A conflict of interest exists where:*

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

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

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

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

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

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

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

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

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

*3.2.5. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.*

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

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

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

## 6. **In conclusion**

Like in so many aspects, the rules of conflicts of interests in Europe can be described as a “patchwork”. With some exceptions, laconism is the general rule when regulating conflicts of interest for lawyers.

The efforts of the Working Group when revising the CCBE Code did not have the necessary good results as far as giving the modern solution to conflicts of interest.

Conflicts of interests need an urgent reform in Europe. The rules of the Member States need to be harmonized and substantially revised in order to regulate the conflicts in the new environment.