

(Second version)

## **LAWYERS' CONFLICTS OF INTEREST**

**(with a proposal for the review  
of art. 3.2 of the CCBE Code of Conduct)**

by

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

### **PURPOSE**

*"The question of 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  
Final Report February 1998*

The purpose of this paper is twofold: to identify areas in which the traditional conflicts of interest rules can be updated for today's legal practice, and to make a proposal towards the revision of art. 3.2 of the CCBE Code. The paper is divided into four chapters: the first considers conflicts of interests in life in general; the second concentrates on conflicts of interest in the legal profession; the third discusses the revision of art. 3.2 of the CCBE Code; and the fourth proposes a new text for art. 3.2.

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## **FIRST. CONFLICTS OF INTEREST**

### **I. In general**

Conflicts of interests are by no means restricted to the legal profession; daily life is full of such conflicts. Any relationship between two people carries the potential for a conflict of interests. Each party has its own interests, which may conflict with the interests of the other person.

Generally, a conflict of interests is a situation in which a person, such as a public official, a businessman or a professional, has a private or personal interest sufficient to at least appear to influence the objective exercise of his or her duties.

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

Conflicts of interest have become an important issue in today's world. Enron/Arthur Andersen/WorldCom and subsequent scandals in the USA and in the EU that have shaken the world economy and the confidence of investors, have their origin in unresolved conflicts of interests of managers, analysts, financial advisers, auditors and lawyers.

### **II. Personal interior conflicts**

*“Video meliora, provoque,  
deteriora sequor”  
Publius Ovidius (Ovid)*

As mentioned earlier conflicts of interest do not exclusively affect the legal profession. Each individual has his own internal conflicts. Everyone faces constant oppositions between incompatible tendencies, wishes or drives, often leading to states of conscience or emotional tension.

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

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 better things, try them but follow worse”. And along the same thought, St. Paul said: “it is not the good my will prefers, but the evil my will disapproves, that I find myself doing”<sup>3</sup>. As Chesterton<sup>4</sup> put it, “the perplexity of life arises from there being too many interesting things in it for us to be interested properly in any of them”.

### **III. Bilateral or pluripersonal conflicts**

*“Such an adjustment of conflicting interests as gives each adversary the satisfaction of thinking he has got what he ought not to have, and is deprived of nothing except what was justly his due”*  
*Ambrose Bierce, The Devil’s Dictionary (definition of compromise)*

However, typical conflicts arise when our own interests clash with someone else’s interests.

While it is hard enough to resolve internal dilemmas, the real difficulties arise when we have to make decisions which affect the interests of others. Through trial and error, we can work out what weight to give our own rules, but bilateral decisions require us to do the same for others by allocating weights to all the conflicting interests, which may be involved. For example, businessmen must balance the interests of employees 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>5</sup>.

### **IV. Conflicts of interest in politics**

*“Experience suggest that the first rule of politics is never to say never. The ingenious human capacity for manoeuvre and compromise may make acceptable tomorrow what seems outrageous or impossible today.”*  
*William S. Shannon, “Vietnam: America’s Dreyfus Case”, The New York Times, 3 March 1968*

Woodrow Wilson found it impossible to compromise on the location of school of Princeton University or on America’s entry into the League of Nations. On one hand, it was expedient for him to resign from Princeton and, on the other, he brought on the worsening of his health, which shortened his life. Was he merely a poor diplomat, or was he illustrating that some issues do not lend themselves to compromise? He had to act, as every executive must, whether his constituents were ready to move with him or not<sup>6</sup>.

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<sup>3</sup> St. Paul, Romans, 7, 19. Robert Browning, Men and women, 1855: “When the fight begins within himself, a man’s worth something”.

<sup>4</sup> G.K. Chesterton, Tremendous Trifles, 1909.

<sup>5</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>6</sup> Louis William Norris, “Moral hazards of an executive”, in Ethics in practice...., p. 35.

Everybody who holds a public office or position is frequently at risk of finding themselves trying to solve conflicts of interests whether they be legislators<sup>7</sup>, politicians<sup>8</sup>, lobbyists, diplomats<sup>9</sup>, all are targets of such opposition. Many codes of ethics<sup>10</sup> and university policy rules<sup>11</sup> have been established to regulate such conflicts.

## V. Conflicts of interest in science

Conflicts of interests often occur in science and medicine in situations where professional judgement regarding a primary interest, such as research, education or patient care, may be unduly influenced by a secondary interest, such as financial gain or personal prestige. There is nothing unethical in finding oneself in a conflict of interests. Rather, the key issues are whether one recognises the conflict and then how one 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>12</sup>.

Researchers' objectivity is not only an essential value in the scientific world, it is also the basis for public confidence. Researchers should base findings on their data, not by ulterior interests that might undermine the scientific integrity of their work. The situations where financial considerations may compromise an investigator's professional judgement and independence in the design, conduct or publication of research raises concerns. Public health service regulations are promulgated and international review books are created to protect researcher's independence of judgement<sup>13</sup>.

## VI. Conflicts of interest in business

*"Western doctors take the Hippocratic Oath before becoming physicians and lawyers swear to protect the rule of law, but businesspeople have no comparable creed by which to live. Strictly speaking, the only obligation businesspeople have is to obey the law and make a profit."<sup>14</sup>*

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 out of every seven of

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<sup>7</sup> Gerard Carrey, "Conflicts of interests: legislators, ministers and public officials", [Transparency International](#).

<sup>8</sup> Andrew Stark, [Conflict of interest in American public life](#), 2000.

<sup>9</sup> Susan Schmidt, "Ex-diplomat pleads guilty to conflict of interest in Chang case", [Washington Post](#), 31 August 2001.

<sup>10</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>11</sup> Stanford Research Administration, University of Illinois at Urbana-Champaign.

<sup>12</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.

<sup>13</sup> [NIH Guide, Financial conflicts of interest and research objectivity](#), 5 June 2000.

<sup>14</sup> Voigt, Kevin. "Businesspeople can strive to avoid common pitfalls through the 'three M's'." [The Wall Street Journal Europe](#). 3 September, 2002.

those who responded said that they had experienced such conflicts. The nature of compromising circumstances between company interests and personal ethics was characterized by honesty in communication (22.3%), followed by gifts, entertainment and kickbacks (12.3%) and fairness and discrimination (7.0%)<sup>15</sup>.

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

Great executives have been considered "men of principle", for no matter how much they may have trimmed their sails on minor points, virtue remains largely a habit of the will to follow principles. As Aristotle and Kant emphasised, members of any institution want the security supplied by the knowledge that their executive is "unpurchasable". Deviation from principle may become habit-forming. Fear of mediocrity, short-sightedness, or unpredictability sets in when principle falls out<sup>16</sup>.

It has been said<sup>17</sup> that in business 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 sharply conflict with one another, 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. There are a multitude of forces in any organisational framework which make conflicts inevitable and negative consequences unavoidable. Someone will always be placed under restrictions or denied things that he believes to be rightly his. More often than not, individual interests must be sacrificed for the good of the larger organisation.

Lawyers, as professionals who often face conflicts of interest, are in the best position to identify the conflicts that may occur to their clients. Sol M. Linowitz, senior partner of Coudert Brothers,<sup>18</sup> asked a colleague how was it that so many lawyers were becoming chairmen of companies, and he was told "not to deal with legal problems but to know when there is a legal problem". Linowitz further relates a personal experience when sitting on a board, as he realised that there was a real conflict in a merger which the management had not seen.

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<sup>15</sup> Steven N. Brenner and Earl A. Molander, "Is the ethics of business changing?" in *Ethics in practice...*, p. 122.

<sup>16</sup> Louis William Norris, *op. cit.*, p. 38.

<sup>17</sup> Edmund P. Learned, Arch R. Dooley, and Robert L. Katz, "Personal values and business decisions", *Ethics in practice...* p. 54.

<sup>18</sup> Sol M. Linowitz, *The Betrayed Profession*, p.64.

Martin Wolf, The Financial Times' columnist referring to the flaws of modern capitalism in November 2002<sup>19</sup> referred to the career businessman's lack of accountability, lack of transparency and institutional failure and added "everything is made far worse by a plethora of conflicts of interests: financial conglomerates are more concerned with pleasing corporate management than with maximising the values of funds they control; outside directors owe more loyalty to the managers who choose them than to the shareholders they represent; and accountants owe more to the people who employ them than to the investors who rely on their work.

## **VII. Conflicts of interests and professionals**

Professionals have to face cases of conflicts of interests often because an essential element in the professional-client relationship is trust. Clients trust that the professional will dedicate all his efforts to the relevant service without the interference from other preoccupations.

Take as an example, accountants. They must deal with important conflicts between the public interest and the best business interests of its members<sup>20</sup>. Arthur Andersen's story is another example of this type of conflict of interests. But, even today the US accounting regulator has been considering banning accounting firms from doing tax work for audit clients, because, according to Paul Walckers, former chairman of the Federal Reserve, this could breach the maxim that accountants should not audit their own work<sup>21</sup>.

On the other hand, conflicts of interests compose just one of the stumbling stones which makes the multidisciplinary practice between lawyers and accountants ethically difficult<sup>22</sup>.

Today, some support that traditional legal analysis has led conflicts of interests to legal rules that are too severe and unjustifiable and are inept to deal with the problems that arise in a modern sophisticated commercial society<sup>23</sup>.

## **SECOND. CONFLICTS OF INTEREST AND THE LEGAL PROFESSION**

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

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<sup>19</sup> Martin Wolf, "The flaws of modern capitalism", The Financial Times, 19 November 2002.

<sup>20</sup> Nigel Page, "Conflicting interests?", Legal business, September 1992, p. 42.

<sup>21</sup> Andrew Parker, "Auditors should end tax role", Financial Times, 17 March 2003.

<sup>22</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.

<sup>23</sup> Justice Aikens, Foreword to Charles Hollander and Simon Salzedo, Conflicts of interest & Chinese Walls, Sweet & Maxwell, 2000.

## I. In general

Although others face similar questions, the conflicts questions lawyers face are perhaps greater in number and intensity than those faced by most other people. The rules regarding conflicts in non-lawyer relationships are not a sure guide in analysing a lawyer's conflict of interest. The lawyer-client relationship is unique by definition; i.e., it is a relationship whose objectives are the rendering of legal advice and counsel<sup>24</sup> and the provision of justice in the world.

Globalisation, the development of bigger firms and the change of methods in which lawyers operate has led to the call for a need to revise and harmonise conflict of interest rules. The Working Group for the revision of the CCBE Code<sup>25</sup> in 1999 recognised that conflict 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.”*

But this is easier said than done. For instance as Hans-Jürgen Hellwig says, the rules on conflicts of interest should be seen in the context of the legal definition and public perception of a lawyer in any given jurisdiction. In the civil law tradition, a lawyer, with regard not only to his court work but also to his legal advice, is considered an instrument in the administration of justice, an officer of the legal system and a co-minister of justice and the clients' consent to representation of conflicting interests is therefore irrelevant. In common law countries, a lawyer has no such position, or has it only with regard to court work and not when advising a client out of court. In those countries conflict rules are primarily derived from the lawyer's contractual duties vis-à-vis his client and accordingly, the clients may waive the conflict rules. Therefore, there will be no significant harmonisation of conflict rules unless there is harmonisation of the underlying definition of the lawyer's role in a democratic society that follows the rule of law<sup>26</sup>.

## II. Proliferation of lawyers' conflicts of interests

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<sup>24</sup> Geoffrey Hazard and al., *op. cit.*, p. 620.

<sup>25</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.

<sup>26</sup> Hans-Jürgen Hellwig, Vice-president of the German Bar Association, “Independence, conflicts and secrecy”, European Lawyer, April 2001.

Globalisation, sophistication of corporations and financial transactions, the ever greater role of lawyers in such transactions and the growing of large firms have caused conflicts of interests to proliferate in the legal profession.

However, many lawyers tend to ignore conflicts or justify their intervention in spite of the conflict. Sol M. Linowitz<sup>27</sup> exclaims: “Until recently, it would have been unthinkable that a lawyer would have interests that might conflict with those of his clients. Now, conflicts sometimes grow so severe that courts must remind lawyers that the privilege of confidentiality in communications between clients and lawyers exists to benefit the client, not the lawyer....”

It used to be that a lawyer would work in one or two firms for their entire legal career. Now, lawyers change firms as often as four or five times in the same period. This has created a new problem regarding conflicts of interests as the courts have not changed the relevant laws and still allow the disqualification of counsel based on the imputation doctrine that each and every lawyer at a firm is deemed to know everything that the other lawyers at the firm know<sup>28</sup>. The 2000 case of *County of Los Angeles v. United States District Court*<sup>29</sup> held that law firms in California may use Chinese Walls to prevent a conflict of interest of one lawyer being imputed to the entire firm. This is especially important as many firms are so large that its members don't know, even by sight, all the people working within the firm, and numerous firms have several branches of the main office. In the latter situation, a lawyer from an office in the States may never have physical contact with any matter that the office in Abu Dhabi deals with. However, with the technological advancements of today, with shared file servers etc., attorneys in a firm can access information from another of the firm's office instantaneously.

### **III. Definition of lawyer's conflict of interest**

*“Probably the chief problem with conflicts of interests lies in their identification”*<sup>30</sup>

Sol M. Linowitz<sup>31</sup> reminds us that speaking to a seminar on conflicts of interests at the 1972 ABA convention, Richard H. Paul of Paul Weiss said when he advised clients confronted with conflicts situations: “My one and only touchstone in this: In answering them, I ask myself, ‘how would it look in the New York Times?’”.

Defining conflicts of interest in general can be done in a positive way, as a struggle between opposing forces, but when referring to a lawyer's conflict of interest, it is generally defined negatively, as a prohibition to participating in such clashes of

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<sup>27</sup> Sol M. Linowitz, *The Betrayed Profession*, 1994, p.40. See the mentioned cases of highly distinguished lawyers who incurred in conflicts of interests.

<sup>28</sup> SeLegue, Sean M., “Ethical Walls Find Acceptance in Ninth Circuit”, Rogers Joseph O'Donnell & Phillips Professional Liability News, Issue 8, March 2002.

<sup>29</sup> 223 F.3d 990 (2000).

<sup>30</sup> Donald Nicholson and Julian Webb, *Professional Legal Ethics. Critical Interrogations*, 1999, p. 129, n. 41 who cite R. Gramston, *Legal ethics and professional responsibility*, 1995, p.17 and A. Paterson, *Legal ethics: its nature and place in the curriculum in Cranston*, 1995, p.17.

<sup>31</sup> Sol M. Linowitz, *op.cit.* p.228.

opposing interests. The lawyer can serve different clients, different masters, but not if the clients have opposing interests.

Conflicts are arrangements which are adverse to the interests or are to the disadvantage of present or former clients. The CCBE Code does not define conflicts of interests, but (art. 3.2.1) only prohibits conflicts (“to represent or act on behalf of two or more clients in the same matter if there is a conflict or a significant risk of a conflict, between the interests of those clients”). The ABA Model Rules (Rule 1.7) also define conflicts of interests as a prohibition of a lawyer representing one client in a manner “directly adverse to another client” or under circumstances causing the lawyer’s representation of the client to “be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer”.

#### **IV. Conflicts of current situations**

The situations of conflicts for lawyers are so numerous and varied as life itself. Obviously, conflicts in litigation cases are more easily detectable than in transactional matters.

The modern economy raises new conflicts problems. For instance:

- What if a lawyer attended a beauty parade and failed to get the work? Will he be precluded subsequently from acting for the other party?
- Is a lawyer who has given some very preliminary advice at an initial meeting, i.e. by a wife in a divorce suit, and the wife finally uses a different lawyer, allowed to represent the other party, i.e. the husband?

#### **V. Types of conflicts of interest**

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

- a) Conflicts between the lawyer’s personal interests and the interests of the client (e.g. the lawyer wishes to enter into business transactions with the client, receive a gift from the client, etc.)
- b) Conflicts between the interests of two or more clients that the lawyer is concurrently representing. Especially a problem in litigation matters, this now arises more and more in non-litigation situations.
- c) Conflicts between the client’s interests and those of third parties to whom the lawyer owes obligations, for instance, when a third party pays the lawyer’s fee (e.g. a lawyer for the insurer representing the insured).
- d) Conflicts between the lawyer’s duties to a present client and the lawyer’s continuing duties to a former client<sup>32</sup>.

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<sup>32</sup> Thomas D. Morgan, Legal ethics, 1996, p. 60.

## **VI. The values protected by the conflicts' prohibition**

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

*Grievance Committee v. Rottner*<sup>33</sup>

### **1. The lawyer's values**

There are many classifications of the lawyer's ethical duties. Nicholson and Webb<sup>34</sup> sustain that lawyers owe three types of duties: a) to clients; b) to the administration of justice; and c) to specific third parties and the general public. Duties to clients, in turn, are further divided into: a) loyalty; b) diligence; and c) confidentiality. Loyalty itself is said to encompass its own set of duties, which are: a) zeal; b) integrity; and c) independence. The obligation to avoid conflicts would be, in my view, a consequence, at the same time of the duties of loyalty, independence and zeal.

However, the reasons supporting the duty to avoid conflicts are based on different lawyer's ethical obligations, depending on the type of conflict of interest. What usually leads to the profession in the conflicts of interests between the fiduciary obligation of loyalty owed by the lawyer to an existing client and the obligations owed to another existing or former client whose interests conflict. In the case of the existing clients conflicts, it is the conflict between two competing obligations of loyalty. In the case of conflicts between existing clients and former clients, it is the conflict between the obligation of loyalty to the existing client versus the obligation of confidentiality to the former client<sup>35</sup>.

### **2. Independence**

Independence is the quintessence of a lawyer's activities. There is no free society and no free man without independent lawyers. Independence means that lawyers must not allow themselves to be restricted in their acting on behalf of or in giving advice to their clients. Many of the lawyer's ethical duties derive from the need to act independently. Hand in hand with independence is confidentiality. The basis of confidentiality on the part of the lawyer is the need for the client to have total confidence in his lawyer and to rely on him to handle the matter he is charged with.

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

### **3. Confidentiality**

Confidentiality (“professional secrecy” according to the civil law system or “confidentiality” or “attorney-client privilege” according to the common law system) is

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<sup>33</sup> *Grievance Committee V. Rottner*, 152 Conn. 59, 203 A.2d 82(1964) cited from Morgan and Rotunda, *op.cit.*, p. 55.

<sup>34</sup> Donald Nicholson and Julian Webb, *op.cit.*, 1999, p 104.

<sup>35</sup> Charles Hollander and Simon Salzedo, *Conflicts of Interest and Chinese Walls*, Sweet & Maxwell, London, 2000, p.11.

one of the essential principles of the lawyer's function. The CCBE Code (art 2.3) proclaims that confidentiality is "a primary and fundamental right and duty of the lawyer" and that "it serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the state".

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

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

#### **4. Loyalty**

The special feature of the fiduciary in the obligation of loyalty to the person for whom he acts. He has an obligation to defend and advance the interests of the persons to whom he owes the fiduciary obligation<sup>36</sup>.

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

*"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter or circumstances which gives rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principle is entitled to the simple-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not place himself in a position where his duty and his interests may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his client... he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary"*<sup>37</sup>

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

## **VII. The rules**

### **1. In general**

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<sup>36</sup> Hollander and Salzedo, op.cit. p.13.

<sup>37</sup> Lord Millet in *Bristol & West Building Society v Mathew* [1998] Ch. 1.18, cited by Hollander and Salzedo, op.cit., p.14.

Before transcribing some basic rules concerning conflicts of interests, I would like to make two preliminary remarks:

First, common law jurisdiction rules concerning legal ethics are generally more detailed and casuistic than the civil law rules, which tend to be conceptual, concise and inspirational. One must only compare the ABA Model Rules which dedicate 26 pages to these matters (with comments) and the CCBE Code, which only dedicates 12 lines. There may be several reasons for the latter approach such as smaller firms, less litigation and the fact that ethical rules are the field of the bars rather than of the courts.

Second, the rules governing conflicts of interest should be applicable to all areas of law. One cannot have separately drawn up rules for litigation, corporate, private client law, etc. The rules must be uniform and applicable throughout the profession. On one hand, the division within the different areas is never clear cut, whereas on the other, having different sets of rules may help induce a division of the legal profession. In recent years, there have been calls from large sophisticated firms to have one set of rules for sophisticated financial clients and operators and another for the rest.

## **2. Some basic rules in particular**

a) The CCBE Code<sup>38</sup> (section 3.2) regulates the conflicts of interest in Europe:

### *“3.2 Conflicts of interest*

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

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

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

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

b) The ABA Model Rules of Professional Conduct as previously mentioned are more lengthy and detailed. The rules are contained in section 1. The relevant rules are 1.7 through 1.18 excluding 1.13 through 1.15 and 1.17.

#### *Rule 1.7: Conflict of Interest: Current Clients*

*(a) except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:*

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<sup>38</sup> CCBE Code, 1988, revised 1998.

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

*Rule 1.8: Conflict of Interest: Specific Rules*

- (a) *A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:*
  - (1) *the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*
  - (2) *the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*
  - (3) *the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*
- (b) *A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.*
- (c) *A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.*
- (d) *Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.*
- (e) *A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:*
  - (1) *a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and*
  - (2) *a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.*

- (f) *A lawyer shall not accept compensation for representing a client from one other than the client unless:*
  - (1) *the client gives informed consent*
  - (2) *there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and*
  - (3) *information relating to representation of a client is protected as required by Rule 1.6.*
- (g) *A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.*
- (h) *A lawyer shall not:*
  - (1) *make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement, or*
  - (2) *settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.*
- (i) *A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:*
  - (1) *Acquire a lien authorized by law to secure the lawyer's fee or expenses; and*
  - (2) *Contract with a client for a reasonable contingent fee in a civil case.*
- (j) *A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.*
- (k) *While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.*

*Rule 1.9: Duties to former clients*

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

- (1) *use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or*
- (2) *reveal information relating to the representation except as these Rules would permit or require with respect to a client.*

*Rule 1.10: Imputation of conflicts of interest: general rule*

- (a) *While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.*
- (b) *When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:*
  - (1) *the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and*
  - (2) *any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.*
- (c) *A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.*
- (d) *The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.*

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

- (a) *Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:*
  - (1) *is subject to Rule 1.9(c); and*
  - (2) *shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing to the representation.*
- (b) *When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:*
  - (1) *the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and*
  - (2) *written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.*
- (c) *Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise*

*available to the public. A firm with which that lawyer is associate may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.*

- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:*
  - (1) is subject to Rules 1.7 and 1.9; and*
  - (2) shall not:*
    - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice of nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or*
    - (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer is serving as a law clerk to a judge, other adjudicative officer or arbitrator may be negotiated for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).*
- (e) As used in this Rule, the term "matter" includes:*
  - (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and*
  - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.*

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

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

*Rule 1.16: Declining or terminating representation*

- (a) *Except as stated in paragraph (c), a lawyer shall not represent a client, or where a representation has commenced, shall withdraw from the representation of a client if:*
- (1) *the representation will result in violation of the rules of professional conduct or other law;*
  - (2) *the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or*
  - (3) *the lawyer is discharged.*
- (b) *Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:*
- (1) *withdrawal can be accomplished without material adverse effect on the interests of the client;*
  - (2) *the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;*
  - (3) *the client has used the lawyer's services to perpetrate a crime or fraud;*
  - (4) *the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;*
  - (5) *the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;*
  - (6) *the representation will result in an unreasonable financial burden on the lawyer or has rendered unreasonably difficult by the client; or*
  - (7) *other good cause for withdrawal exists.*
- (c) *A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.*
- (d) *Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.*

*Rule 1.18: Duties to prospective client*

- (a) *A person who discusses with a lawyer the possibility of forming a client-attorney relationship with respect to a matter is a prospective client.*
- (b) *Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not sue or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.*
- (c) *A lawyer subject to paragraph (b) shall not represent a client with interest materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this*

- paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).*
- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:*
- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:*
  - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and*
    - (i) the disqualified lawyer is timely screened from an participation in the matter and is apportioned no part of the fee therefrom; and*
    - (ii) written notice is promptly given to the prospective client.*

### **VIII. Bolkiah v KPMG AQ**

This famous judgment refers to accountants, but it is perfectly applicable to lawyers.

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

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

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

Hollander and Salzedo<sup>39</sup> outline five major principles of the Bolckiah case as follows:

- a. a clash between fiduciary obligations owed to two clients a professional acts for at the same time, with conflicting interests. This conflict is deemed an “existing client conflicts”. If the professional chooses to represent both, he is in breach of his fiduciary duty and cannot represent both clients. The conflict is then a conflict of the company, firm, etc. and not just a conflict of the professional.
- b. Even when a professional has informed consent to act for two clients with conflicting interests, there are circumstances where the professional will be unable to act for both parties.
- c. Although a fiduciary duty does not exist in a situation where a professional acts for an existing and former client with conflicting interests, the breach is classified as that of fiduciary duty.
- d. A real risk must exist for a professional to not act for a client whose interests conflict with those of a former client.
- e. The professional may be able to utilise the concept of a Chinese wall to separate his client’s interests from those of another of the firm’s client’s interests.

## **IX. Chinese walls**

In its most basic form, Chinese walls are the separation of information regarding a particular matter from the rest of the information in a professional firm to prevent its free flow throughout the firm. It is a division that intends to allow professionals within the same firm to advise clients with conflicting interests with the aim to protect client confidentiality.

The courts in England in the Prince Jefri<sup>40</sup> case said that when a firm constructed a Chinese wall there should be at least the following:

- physical separation of various departments of a firm;
- training and education to ensure staff are aware of the need to keep confidential information secret;
- strict procedures and sanctions where the wall is crossed;
- and monitoring by compliance officers.

Varying procedures exist for implementing Chinese walls, including: locked rooms for containing relevant documents; restricted access to certain parts of buildings and monitoring any person who enters those areas; written rules on maintaining confidentiality; and separate teams working on the different sides to a matter<sup>41</sup>.

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

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<sup>39</sup> Ibid.

<sup>40</sup> Prince Jefri Bolckiah v. KPMG [1999] 2 WLR 215

<sup>41</sup> Smith, Peter. “Chinese Walls: Maintaining client confidentiality”. [www.practicallaw.com/A9489](http://www.practicallaw.com/A9489).

examine Chinese walls and the other procedures in place for controlling the flow of information.

The erection of Chinese walls brings into question these vital factors. The duty of confidentiality, for example, is usually only overridden for very serious cases of public interest in respect to contemplated crimes, frauds and misdeeds including civil wrongs.<sup>42</sup> However, the duty of confidentiality is such that where there is any genuine risk of disclosure of information confidential to a past or present client then a Chinese wall should not be erected. Some may argue that this risk can be overridden by the consent of the client.

Although some codes of practice in Europe place a ban on Chinese walls, there have been many examples where un-officially they have been used. Indeed, the Law Society of England and Wales has recently published a consultation paper contemplating “Chinese walls” in certain situations where there is a conflict of interest.

The main argument for opposing Chinese walls is that they do not really solve the conflict nor do they protect the fundamental principles of the profession, in other words, independence, confidentiality and trust, which are vital factors to a client and cannot be circumvented in serving another client. As Justice Megarry said in *Spector v Ageda*, a “solicitor must be remarkable indeed if he can feel assured of holding the scales evenly between himself and his client”.<sup>43</sup>

It has been said that Chinese walls test self-regulation to the limit. It is quite difficult to ensure the absolute confidentiality of each client’s affairs where there are conflicting interests.<sup>44</sup> In the case of *Re A Firm of Solicitors*<sup>45</sup>, Lord Justice Parker stated that in his “judgment, any reasonable man with knowledge of the facts in the case concerned, including the proposals for a Chinese wall, would consider that some confidential information might permeate the wall...I doubt very much whether an impregnable Chinese wall can ever be created”.

Chinese walls should not be constructed solely for financial reasons, so that a firm may retain its clients and payment of fees. As one corporate partner at a top 10 City firm put it: “the simple truth is that turning down work due to conflicts is all well and good in a booming M&A market, but when it comes to a downturn, everyone’s principles go out the window. Chinese walls are, in my experience, utterly pointless when you have IT systems that allow you to access information on any client or transaction within seconds”<sup>46</sup>.

The CCBE Working Group considered the need to include the provision of Chinese walls, the argument put forward is based on the public interest to access justice and is the following<sup>47</sup>:

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<sup>42</sup> Donald Nicholson and Julian Webb, *Performed Legal Ethics Critical Interrogations*, 1999, p.104, quoting Gurry 1984, ch XV, Brindle and Dean 1985, pp.115-119.

<sup>43</sup> [1973] Ch 30, 47.

<sup>44</sup> Smith, Peter. “Chinese Walls: Maintaining client confidentiality”. [www.practicallaw.com/A9489](http://www.practicallaw.com/A9489).

<sup>45</sup> *The Times*, 20 June, 1991.

<sup>46</sup> “Firms want new conflicts watchdog,” *Legal Week*, 20 February 2003.

<sup>47</sup> *Review of the CCBE Code of Conduct Final Report* by the Working Group, nominated by the CCBE’s Standing Committee, February 1998, p. 77

*“On many occasions the CCBE has discussed those characteristics of the legal profession that sets it apart from other liberal professions, particularly from other professions engaged in the provision of legal, financial and other business advice. The strict rules against avoidance by lawyers of conflicts of interest are one of those characteristics. Those rules 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 focus on cases involving the difficulties created by e. g., the emergence of very large firms, with clients bases deriving from the goodwill of the firm’s constituent parts; the possible exclusion of clients from specialised advice concentrated within one group; and the definition of circumstances in which a client of today is no longer a client tomorrow for the purposes of such rules. It appeared to the Working Group that the problems posed by these examples are not merely problems caused to the lawyer by the restructuring of his or her professional firm, which are necessarily the means of the lawyer to render his or her livelihood. There are also problems that bring into question the ability of the lawyer to render his or her services in the public interest and in the interests of the proper functioning of the legal and justice systems. It is not in the public interest or in the interest of the administration of justice that, without good reason the client is deprived of the representation of his or her choice.”*

In my view, Chinese walls are one of the devices, which have come with or have cooperated in the commercialisation of the legal profession and may help in the loss of public confidence in the profession.

## **X. The client’s consent**

### **1. The client’s waiver**

Sometimes conflicts of interest can be waived by clients (what is called “client’s consent”). There are situations in which full disclosure and consent of both clients will not suffice for a lawyer 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 (the “non-consentable conflict”). Nobody can accept that a lawyer acts both for the criminal and the victim even if both parties would consent. Some litigations, however, i.e. divorces agreed by the parties – could represent a different picture. In transactional commercial practice, the situation is more subtle. There are fields of law where the client’s consent may be more effective in terms of neutralising the conflict than in others. For instance, a commercial lawyer may represent several companies of the same sector. But he cannot represent two leading competing corporations in one sector.<sup>48</sup>

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<sup>48</sup> In Spain, it is usual that a simple lawyer is granted power of attorney for both the seller and the buyer of a villa to formalise the transfer before a notary public.

However, conflicts 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 in jurisdictions which view the lawyer mainly as a service provider, the client's consent or waiver is more decisive<sup>49</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 addressing 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>50</sup>.

## **2. The 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 the Privy Council in Clark Boyce v. Moriat<sup>51</sup>:

*"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 preferentially with the benefit of independent legal advice.

Sometimes it may be difficult for lawyers to fully inform a potential client of possible conflicting interests, because of obligations of confidentiality. Such information could not be disclosed to a potential client in order to obtain fully informed consent. As a consequence, the requirements of preserving privilege and protecting confidential information.

## **XI. New approaches to the regulation of conflicts**

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<sup>49</sup> Hans-Jürgen Hellwig. See note above.

<sup>50</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".

<sup>51</sup> Clark Boyce v. Moriat (1994), 1.A.C. 428 at 435.

Due to the enlargement of the size of law firms, the new methods of providing legal services and the sophistication on some financial clients, the strict traditional rules of conflicts of interests do not fit with many modern situations and that the rules would need to be changed and sometimes smoothed.

As Chester, Rowley and Harrison have put it: “The pressures facing the legal profession worldwide challenge old rules and long-standing patterns of behaviour. In a world in which law firms grow in size, power and revenue and as other professions converge into areas previously reserved to the legal profession, it is not surprising that ethical rules face reassessment”<sup>52</sup>.

Hollander and Salzedo write that “one problem that bedevils this area of the law (fiduciary obligations of professionals) is that the rules are based on traditional rules related to fiduciaries developed in the distant past. These traditional rules, when taken with the rules that for the purpose of fiduciary obligations treat firm, partnerships or corporations on simple entities, are simply inadequate to cope with the sophistication of modern society, with huge multi-disciplinary partnerships and massive financial conglomerates”. This trend is particularly supported when the conflict comes between partners of the same firm who defend conflicting interests. The same authors say that “the fact is that equitable rules, when coupled with the rules that focus on firm and partnerships rather than individuals owing fiduciary duties, have lagged behind modern commerce and need recommendations”<sup>53</sup>.

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

Firstly, it overlooks the fact that the legal profession has moved away from having its primary role as trial lawyers change to a predominantly advisory role. Unlike the situation fifty years ago, the prototype of a lawyer today is the “transactional lawyer”, rather than the “trial lawyer” and the number of transactional lawyers exceeds the number of trial lawyers. This leads to a far more complex question of when the conflict of interests occurs, or in other words a far more difficult definition of conflicts of interests. Secondly, it overlooks the clear public interest aspects involved. This is not just a question of whether new fast-growing law firms should be allowed to retain clients in a way that would otherwise contravene the traditional conflicts of interests regulations. Nor is it just an internal matter of competition between lawyers, rather it is a serious question of considerable public interest concerning access to expertise or even access to justice. Therefore, it cannot be treated as an internal affair of the legal profession. Thirdly, the traditional regulations of conflicts of interests prevent us from

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<sup>52</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>53</sup> Hollander and Salzedo, *op.cit.* p.11 and 33.

conducting an adequate analysis of the problems raised by the recent developments of the legal profession. The different forms of activity within our profession lead to more problems of properly defining conflicts of interest properly; the development towards large law firms and more sophisticated lawyer – client relations; and the whole development of our profession into larger units, etc. These are a cry for a more subtle analysis of the problem.<sup>54</sup>

Chester, Rowley and Harrison also warn that the old rules were premised on the notion that lawyers would likely practice by themselves or in small firms in which lawyers were intimately involved in the practice, collaborating closely and sharing common knowledge and experience. While that model still dominates the profession in the world in pure numbers, where the majority of lawyers work in firms with fewer than ten lawyers – the market for legal services has resulted in large, economically powerful and professionally sophisticated firms. Ethical rules that presented few problems for solo practitioners or small firms now fit uncomfortably into the larger legal landscape<sup>55</sup>.

Some Bars are sensitive to this preoccupation. In England, for instance, the need of a new regulatory approach has been especially recognised because critics of the current rules claim they fail to reflect the modern business practices of today, along with the demands and needs of large corporate clients, the increase in firms' sizes and the global nature of today's practice of the profession.

The legal profession as it stands today is progressing and developing at an enormous rate, and new issues of conflicts of interests are constantly arising. It is not always clear when a conflict of interests arises, and in certain circumstances it is difficult to know for sure that one is acting in accordance with their ethical duty. There is therefore an urgent need to clarify and update conflicts of interests rules so that lawyers are able to make decisions with the full confidence that they are not in breach of their ethical duties.

In my view, the rules need to be updated clearly defining the conflicts of interests and contemplating the different situations where they arise. Bearing in mind, however, the importance of the conflict of interest rules, we must be careful not to unnecessarily smooth the principle that the lawyer can serve two masters.

### **THIRD. THE REVISION OF THE CCBE CODE OF CONDUCT**

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

*CCBE Working Group, Report, February 1998*

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<sup>54</sup> CCB Working Group for the revision of the CCBE Code. The Working Group was chaired by the Norwegian lawyer Helge Kolrud, current President of the CCBE.

<sup>55</sup> Chester, Rowley and Harrison, *op. cit.*, p. 36.

## **I. The CCBE Code of Conduct and its revisions**

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

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

## **II. The CCBE Working Group’s works**

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

In its present form, art 3.2 CCBE Code is very concise. In addition, the Working Group raised the issue of the necessity to update and revise the article to embrace new legal practices and to provide fuller definitions of its constituent parts. The Working Group considered that the Code’s provisions could be updated and revised in the following areas:

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

### **2. Defining conflicts of interest**

The Working Group made, in its 18 November 1996 proposal, a step forward in affirmatively defining conflicts of interests by proposing the introduction of a new sub-article 3.2.1. This sub-article described what a lawyer could do by way of representing or acting as legal advisor for more than one client without a conflict of interest occurring:

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

Although, there were some negative comments to this approach, the Working Group in 1998 believed that with so many varying activities by lawyers, it was of great importance to define as precisely as possible, affirmatively and negatively, what is and what is not a conflict of interest. A regulation for conflicts of interests should define as thoroughly as possible: both what is and what is not a conflict of interest, and what it is in relation to providing legal advice, as well as representing a client. Therefore, the group proposed to introduce a new sub-article 3.2.1.:

- “1. A conflict if interest exists where:*
- 1.1 When acting as an adviser for several clients, the lawyer, having the obligation to give his clients complete and loyal information without any reservations, be it through factual analysis, cannot do so without compromising the interests of one or several of his clients.*
- 1.2 In his function as representative or defender of several clients, the lawyer has to present a defence or pleading which in its development, argumentation or final presentation is different from what it would have been if he had only represented one of his clients.*
- 2. A conflict of interest does not exist where:*
- 2.1 A lawyer acts as a legal adviser for several persons or other legal entities when they ask the lawyers to assist them in realisation of a common project between clients.*
- 2.2 A lawyer acts as a representative, adviser or defender of more than one client in the same case or matter where the interests of the clients are the same.*
- 2.3 A lawyer who with their express consent acts as mediator, conciliator or arbitrator between two or more clients with conflicting interests, cfr. 1.1 and 1.2 above”.*

This proposed position only contemplated one type of conflicts: the one between existing clients and ignored other types like conflicts between clients and his own interest, with third parties to whom the lawyer owes an obligation and with a former client (see Second, V).

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

The Working Group also expressed its concerns over the possible exclusion of clients from specialist advice concentrated within one specialist group, as the Report says, it is not in the public interest nor in the interest of the administration of justice that, without good reason, the client is deprived of the representation of his or her choice.

The Working Group put forth the proposal below to introduce “a necessary flexibility in the wider interests of the public”. The proposal, in short, sanctioned the use of Chinese walls to avoid the conflict:

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

- a. allowing a client access or continued access to the lawyer of his or her choice, who is also better able than any other lawyer of comparable standing to handle the relevant matter competently and without the*

- duplication of costs that would be occasioned by refusing or discontinuing a relevant retainer, and/or*
- b. permitting the client to have access to a limited number of specialist lawyers available in the relevant locality, and having*
    - i. taken all measures required for the protection of confidences and*
    - ii. made full disclosure of relevant facts to each client concerned*
- the partner or associate of that lawyer accepts instructions to act for another client with a conflicting interest in any relevant matter. It will normally be appropriate that the burden of establishing that factors 1, 2, a) and b) are satisfied in any given case should be upon the lawyer, lawyers or firm whose conduct falls into question in this respect.”*

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

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

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

It further states that in order:

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

As I said, I am sceptical about Chinese walls and similar devices. When conflicts of interests exist there are good reasons why a lawyer should stop acting for the client: independence, confidentiality and trust. These are the vital ingredients for the freedom of the profession, and that when one of these elements is compromised, then so is the lawyer’s ability to represent his client. It may not make business sense to turn away a client, but it makes sense to keep the profession ethical.

Chinese walls may be operative for other professions which do not require the same level of independence or confidentiality as lawyers. Chinese walls, if set with all the precautions and security, may in some cases alienate the conflict. But, in my view, accepting Chinese walls and therefore permitting some firms to deal with conflicting interests plays against the good image and the public perception of the lawyer.

Rules on conflicts of interests must be strong in defining when a lawyer must stop acting for a client or potential client. Recent corporate scandals, on the both sides of the Atlantic, show that when conflicts proliferate and ethics are devalued, the system overheats and produces disastrous results for all those concerned. Instead of using an “emergency valve” to cool down the situation, it seems more sensible to use a “shutdown switch” and cease acting for the client, therefore ensuring that no disaster will take place.

As mentioned earlier, the Law Society of England and Wales published a consultation paper allowing firms of solicitors to build Chinese walls in certain situations where

there is a conflict of interest. The professional guidelines and law in England do not allow nor prohibit the official use of such a device, yet, there are examples of when they have been unofficially allowed. The proposals have not yet been agreed and may well be rejected in light of the recent corporate scandals. The proposals and their results should be looked at when considering whether to include this provision in a revised article for conflicts of interest.

#### **4. Conflicts of interest and lawyers values in the proposal**

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

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

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

#### **5. Conflicts of interests and the consent of the client**

##### **A. In general**

The revised text of the CCBE Code 1998 reproduces section 3.2 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 conflicts 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 proposal of the Working Group**

The current CCBE Code has no provisions concerning the client's consent to the lawyer acting in a conflict of interests. In the Working Group's point of view, this makes the provisions a bit unrealistic. It is very practical that the lawyer should ask for and get 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 contravene of the conflicts 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 Code does not require for the consent to be valid and that the client requests independent advice. 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, the prohibition shall not be effective to the extent the client or clients give his or their consent to such acts.*
- 2. Even if the clients give their consent, the lawyer is still prohibited from acting if his obligation of confidence is breached or his independence impaired by such acts.*
- 3. A valid consent by the client must be based on a request from the lawyer that gives the client a full and open disclosure of the problem”.*

## **6. Conflicts of interest and lawyers practicing in association**

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

In the commentary to the ABA Model Rules Rule 1.10 “on the imputation of conflicts of interest: general rule”, the term “firm” is defined as:

*“lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.”*

Consideration should be given as to whether a more concise definition should be adopted to provide legal certainty or a commentary added to the effect that the definition is to be understood as broadly as possible.

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

The Working Group in its report of 18 November 1996, proposed that a provision be inserted regarding when a lawyer may act as a mediator, counsellor or arbitrator. However, this was surprisingly omitted in the alternatives proposed by the Working Group. It is common in today's practice that lawyers act as such when the interests of clients are the same, and therefore, it should be up for discussion on whether it should be included or not.

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

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

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

The proposed text could therefore read:

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

#### **8. Personal interests and financial and business relationships**

In Europe contingency fees and similar arrangements (*pactum de quota litis*) used to be generally prohibited as contrary to the proper administration of justice because they are deemed to encourage speculative litigation and are liable to be abused<sup>56</sup>. For example, in a litigation case a client may want to seek more damages while the lawyer may be ready to accept the settlement offered to collect his fees sooner.<sup>57</sup> A conflict therefore

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<sup>56</sup> CCBE Code of Conduct, art. 3.3.; Hamelin et Damien, *op.cit.*, p. 338: “[L’avocat] doit assurer son indépendance matérielle en ce sens que les honoraires ne doivent pas être liés de manière étroite au profit pécuniaire que le client tire du procès”. In the United Kingdom a “conditional fee” has been authorized.

<sup>57</sup> The recent novel, *The King of Torts*, by John Grisham refers to a mass, tort lawyer, who settles with a pharmaceutical company on behalf of thousands of victims of a purported defective drug for a relatively low compensation, insufficient to cover the damages suffered by some of his clients who later on sued their own lawyer.

clearly emerges as to the interests of both parties. Today, however, this prohibition is not so generalised. Some countries permit contingency fees (i.e. Finland), and in some others the prohibition is challenged by the courts (Spain).

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

Prohibited dealings between lawyers and clients are not currently dealt with in the CCBE Code (unlike in the ABA Model Rules – Rule 1.8) and I propose that this should also be discussed in any update to the article.

### **III. The Working Group's alternative proposals**

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

Alternative 1 (art. 3.2 in its present form):

#### *“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 the affairs of the former client would give an undue advantage to the new client.*
- 3.2.4 Where lawyers are practising in association, paragraphs 3.2.1 and 3.2.3 above shall apply to the association and all its members”.*

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

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

### Alternative 3

- “3.2. Conflict of interest*
- 3.2.1. In the field of conflict of interest the lawyer must be especially attentive towards and maintain respect for his obligation of confidentiality towards his client and his duty to remain independent. The lawyer must not act in a way that may cause a risk of breach of his confidence or impairment of his independence.*
- 3.2.2. A conflict of interest exists where:*
- 3.2.2.1.1. When acting as an adviser for several clients, the lawyer, having the obligation to give his clients complete and loyal information without any reservations, be it through the factual analysis, through the submission of the specific result gained, cannot do so without compromising the interests of one or several of his clients.*
  - 3.2.2.1.2. In his function as representative or defensor for several clients, the lawyer has to present a defence or pleading which*

*in its development, argumentation or final presentation is different from what it would have been if he had only represented one of the clients.*

- 3.2.3. *A conflict of interest does not exist where:*
- 3.2.3.1.1. *A lawyer acts as a legal adviser for several persons or other legal entities when they ask the lawyer to assist them in realisation of a common project between the clients.*
  - 3.2.3.1.2. *A lawyer acts as a representative, adviser or defensor for more than one client in the same case or matter where the interests of the clients are the same.*
  - 3.2.3.1.3. *A lawyer who with their express consent acts as a mediator, conciliator or arbitrator between two or more clients with conflicting interest, cfr. 3.2.2. above.*
- 3.2.4. *If a lawyer is prohibited from performing any acts for one or more clients in accordance with this Clause 3.2., the prohibition shall not be effective to the extent the client or clients give his or their consent to such acts.*  
*Even if the clients give their consent, the lawyer is still prohibited from acting if his obligation of confidence is breached or his independence impaired by such acts.*  
*A valid consent by the client must be based on a request from the lawyer that gives the client a full and open disclosure of the problem.*
- 3.2.5. *A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.*
- 3.2.6. *A lawyer must cease to act for both client when a conflict of interests arises between those clients.*
- 3.2.7. *A lawyer must also refrain from acting for a new client if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.*
- 3.2.8. *Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.7 above shall apply to the association and all its members.”*

#### **FOURTH. PROPOSAL OF REVISION**

On the basis of the work previously done by the Deontology Committee in the last revision of the CCBE Code and the considerations made in the previous chapters, I propose that the Deontology Committee should study and discuss the following proposal for art. 3.2:

##### **“3.2 Conflicts of interest**

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

- 3.2.2 *In the field of conflict of interest the lawyer must be especially attentive towards and maintain respect for his professional duties to remain independent and of loyalty and confidentiality towards his or her client or former client. The lawyer must not act in a way that may result in impairing his or her independence or a breach of his or her loyalty or confidentiality.*
- 3.2.3 *A conflict of interest exists where:*
- 3.2.3.1 *When acting as an adviser for several clients, the lawyer, having the obligation to perform his or her duties in the best interests of his other clients, cannot do so without compromising the interests of one or more of his or her clients.*
- 3.2.3.2 *When acting as defender of several clients, the lawyer has to present a pleading which in its development, argumentation or final presentation is different from what it would have been if they had only represented one of his or her clients.*
- 3.2.4 *A conflict of interest does not exist where:*
- 3.2.4.1 *A lawyer acts as an adviser or defender for several persons or other legal entities when they ask the lawyers to assist them in realisation of a common project between clients, and so long as their interest remains common.*
- 3.2.4.2 *A lawyer acts as a representative or adviser of more than one client in the same case or matter where the interests of the clients are the same, even if they have competing interests.*
- 3.2.4.3 *A lawyer acts as a mediator, conciliator or arbitrator between two or more clients with competing interests, with their informed consent.*
- 3.2.5 *A lawyer may not advise, defend or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.*
- 3.2.6 *A lawyer must cease to act for both clients when a conflict of interests arises between those clients.*
- 3.2.7 *If a lawyer is prohibited from performing any acts for one or more clients in accordance with this sub-article 3.2, the prohibition shall not be effective to the extent the client or clients give his or their informed consent to such acts.*
- 3.2.8 *In no circumstances shall a lawyer act for several clients if the advice or defence includes the assertion of a claim by one client against another client represented by the lawyer in the same legal proceeding. Even if the clients give their consent, the lawyer is still prohibited from acting if his or her obligation of confidence is breached or his or her independence is impaired by such acts, or continuing to act if such a breach or impairment occurs after the clients have given their consent.*
- 3.2.9 *A lawyer must refrain from acting for a new client if the knowledge which the lawyer possesses of the affairs of the former client would give an advantage to the new client at the expense of the former client.*

*3.2.10 Where lawyers are practising in association, paragraphs 3.2.1 and 3.2.5.7 above shall apply to the association and all its members.*

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

Barcelona 26.11.2003