

**FBE Intermediate Meeting – 2<sup>nd</sup> October 2009 – Valencia**

**Presentation by Michael Cosgrave**

The introduction to the meeting talks about the Essential Role of the Legal Profession, the Right of Defence and Conflict of Interests and the introduction to today's session suggests the possibility of Common Norm on Conflicts of Interest and an endeavour to understand and apply this to European Lawyers.

I am not a legal philosopher and the opinions I set out are my own but my role here is to set out some of the points which should be considered in our discussion of the topic and to make the discussion worthwhile.

The first point to consider is the nature of ethical rules so far as they concern society and the role of the lawyer in society. We have tended to assume that all well ordered or properly functioning societies or social orders require rules of law and therefore require persons skilled in the knowledge, understanding and practice of the laws to help their fellow citizens in understanding or dealing with relationships between themselves and their fellow citizens or themselves and the organisation of the state. This can generally be regarded as recognition of the role of law in society as the respect for the rule of law in society and lawyers tend to consider that their part in society and the law is important if not pivotal. It should be understood however that there are others, generally non-lawyers, who would not hold such a view and would question the beneficial effect of the lawyer in society.

However, we have to assume some degree of recognition of and acceptance of laws but these do not require ethical rules in their administration or of themselves in the lawyers treatment of them or those they seek to assist. If the laws are the basic conduct rules of society the ethical rules are those which arguably derive from the human interaction with other members of their own society including the lawyers. If

there are such rules then they must essentially derive from or at least be influenced by the moral basis of the society in which they operate. This means that the perception of what is a moral or therefore an ethical rule will change according to the moral perspective of the state in question and there may in fact be many divergent views of what is moral or ethical. Such divergency could make it very difficult to understand, let alone establish, common ethical rules.

This is not to suggest that there are no ethical rules or moral values but to remind us all that the existence of a common moral or ethical base should not be assumed and we should bear this in mind in our discussion.

The second aspect to consider is the role of the lawyer himself. If the lawyer is part of the system of administration or functioning of the law is he the servant of society, or of his client or something of both depending upon the nature of the matter in which he is engaged whether it is criminal, litigation or non-litigation. If lawyers consider that their role is essential in the proper functioning of the rule of law in society how can they avoid having some degree of duty to that society to the courts of that society as well as to the client who seeks to engage their skills as advocate or as legal adviser. The client may instruct the lawyer on the understanding that the lawyer will only deal with him and his information and evidence and his particular problem but the lawyer on the other hand may consider that he has an additional duty to society in the form of the court and that additional duty may then be in conflict with his interest and duty to act for his client and his duty to the court. We are all aware that in some jurisdictions both civil and common law the lawyer's role is created by statute and various countries have also created laws which stipulate the circumstances in which the lawyer will resolve his conflicting duties in favour of the state and its criminal investigative branch. Various forms of money laundering directions are in point. Even before these it has generally been an obligation in most jurisdictions for the lawyer to avoid being in a position of conflict which would arise if

he engaged in criminality with a client or assisted or concealed the performance of a criminal act by a client.

Thus so far, we have lawyers who consider the rule of law important in the proper functioning of a civil society and that they have a part in that which may in certain circumstances have a conflict with the interests of their instructing client and their own perceived or stipulated role in the function of law. This conflict can undermine the right to defence – the right to the proper recourse to a lawyer for defence in allegations of criminality.

We should then consider the question of the conflict of interest between clients or competing clients. If the lawyer is instructed to act for more than one defendant in a criminal prosecution is his duty to his client(s) essentially in conflict; if he declines to act for more than one is he thereby denying the others access to a proper defence since only one defence lawyer will be funded? If the lawyer has instructions to act for a client in respect of a transaction can he accept instructions from another in competition with that one or if he acted for one client in a transaction which was not concluded for that client can he act for a different client in a separate transaction relating to the same subject matter or is the lawyer in any of these cases in conflict between the proper interests of both clients? For example, if a lawyer acts for a client in the unsuccessful purchase of a company can he act for another purchaser client of the same company or can he act for a seller of the same company.

The third conflict situation is where the interests of the client conflict with the lawyer's own interests – any form of contingency fee is an example where it may be in the client's interests not to settle the case or conclude the transaction but the lawyer may press to conclude because he wants the certainty of his fee even if it might be less than the final figure – half a loaf is better than none.

These are three examples of conflicts of interest between the lawyer acting for a client and his duty to the court, between the lawyer acting for different and competing client interests and between the lawyer's own interests in competition with those of his client.

Instinctively one feels that all the conflicts listed are wrong – but is this because of a legal rule, a moral or ethical rule or a practical rule. Are the conflicts the same in each case:- for example the conflict between the interests or rights of the client and the lawyer's duty to defend those as against upholding the duty to the court are matters which tend to be resolved as matters of the constitution of the state in question and its adherence or otherwise to any recognised code of Human Rights; whereas the conflict between the interests of competing clients is more closely a question of confidentiality or privilege or secrecy and the duty not to disclose to one client information obtained when acting for another – this would tend to be an ethical rule – in respecting the privacy or secrecy of the information which the client has entrusted – but it is also practical in that if clients understand that what they divulge to their lawyer may be used for others they will question the extent to which they should have confidence in and instruct that lawyer; the third situation where the lawyer's interests conflict with those of his client means that the lawyer is not giving best advice, not acting impartially and is personally involved in the outcome of the case – these would seem to be breaches of both ethical and practical rules – if you are known to do deals which are not in your client's best interests you will not gain many new clients.

These conflicts are generally prohibited by rules of conduct of the various bars and law societies in all jurisdictions and the rules in question may have a moral or ethical basis but the basis is not always clear or agreed and it would seem preferable to try to work to a common rule or common code of conduct which reflects generally

recognised proper conduct even if the legal or moral basis for their original terms is not universally accepted.

As you will readily understand the subject is extensive and my treatment of it is only superficial and I look forward to hearing both other contributors to the initial debate and to the detailed exposition from each country and across the international organisations.