Comparative Legal Ethics:

The United States and the European Union

Azish Filabi, CEO, *Ethical Systems*

Gregory D. Green, Associate, *Epstein Becker & Green, P.C.*

Kenneth G. Standard, General Counsel Emeritus/Of Counsel, *Epstein Becker & Green, P.C.*

Overview

Common v. Civil Law Systems

Confidentiality of client communications, loyalty, and professional judgment are some of the most recognized mainstays of a lawyer's code of conduct in both the United States and the European Union. That said, there are similarities and differences regarding the ethical regulation of lawyers in both common and civil law systems. To achieve an understanding of the similarities and dissimilarities between these two systems, this paper will focus on the legal systems in the United States and a select number of countries in Western Europe.

Lawyers in the United States practice common law approaches while those in the European Union embrace the civil law system. On the one hand, common law codes for regulating lawyers have a more formal and legalistic style expressed as rules rather than standards. On the other hand, the civil law approach is remarkably different. The civil law codes and norms are framed in more general terms with updated legal codes that specify the applicable procedure for lawyer regulation, including provisions emphasizing the collegiality of the Bar and duties lawyers owe to each other.[1]

The United States Common law approach derives its ethical codes from judicial decision making because

> [t]he nature of litigation in the United States is such that courts are called upon to interpret the rules of professional ethics much more than in the civil law system, giving rise to an extensive gloss on their meaning and application. Such rules thus 'directly enter

[1] Maya Bolocan, Professional Legal Ethics: A Comparative Perspective, CEELI Concept Paper Series, July 8, 2012, p.9

> the judicial arena where litigants can debate their application and meaning; trial courts can interpret them . . . and scholarly authors can comment upon the court's interpretation. . .[2]

In contrast, for example, with respect to the rules of evidence, "a judge [in the civil law system] exercises much greater control over the taking of evidence than in the United States.[3] In the European Union, unlike in the United States, a lawyer plays a more reduced role with issues pertaining to the code of lawyer conduct.[4] In the Unites States, lawyers appear before a judge to protest against another lawyer when he or she contravenes ethical rules of conduct. Contrarily, an issue regarding a lawyer's conduct in a civil law system is generally resolved before the local bar associations, charged with investigating and prosecuting lawyer's misconduct. Lawyers are active players in the United States in so far as they may make a motion before a judge to disqualify another lawyer from a judicial proceeding in connection with an ethical code violation. For example, in *National Medical Enterprises, Inc. v. Godbey*, the Texas Supreme Court disqualified a law firm based on the fact that one of its attorneys had obtained confidential information from the opposing party under a prior joint defense agreement in a substantially related matter.[5] The Court reasoned that the lawyer "simply could not honor his obligations under the joint defense agreement and, at the same time, prosecute the pending claims" against a participant in the prior joint defense arrangement.[6]

---

[2] *Id*. at 10.

[3] *Id*.

[4] *Id*.

[5] Nat'l Med. Enters. V. Godbey, 924 S.W.2d 127, 129-131 (Tex. 1996). The lawyer's conflict was imputed to his firm despite efforts to screen the confidential information from other lawyers at the firm.

[6] *Id*. at 129.

Another salient distinction between common and civil law countries regarding conflict of interest is that

> the approach taken by the United States and European civil law countries to conflicts of interest is remarkably different. In the United States, codes permit a client to waive most conflicts, provided that the client is fully informed and voluntarily assents. By contrast, civil law codes generally do not contain waiver provisions. Consequently, if a lawyer does not perceive a conflict, there is no need to withdraw from a representation. In other words, lawyers in civil law systems tend to view conflicts as 'a matter of [personal] ethics, not law. Conflicts are a matter of your relationship with your client.'[7]

Moreover, the civil law system of the European Union supports what is termed, "professional independence and autonomy"[8] from the client, whereas the common law system of the United States requires a total commitment from the lawyer to his client.[9]

Lawyer Regulation in the United States and the European Union

The European Union's embrace of liberal lawyer regulation has led to the growth of multijurisdictional practice ("MJP"). MJP is described as "the legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice law." Moreover, member states of the European Union have eliminated prohibitions on alternative legal practice structures ("ALPS"),

---

[7] *Id*. at 11.

[8] *Id*.

[9] *Id*.

resulting in a trend among countries worldwide to begin permitting ALPS, such as firms with non-lawyers who may own, manage, or work for the practice.[10]

This liberation across the European Union member states has significantly impacted the European legal market. For example, some law firms have been transformed into multi-disciplinary practices or full services practices where clients may be provided a one-stop shop to cater to all their needs, be it legal, consulting, financial or other services. This one-stop shop model has led to the need for greater specialization in certain areas of the law.[11] For example, there is a need for attorneys who solely practice in specific areas such as tax law, mergers and acquisitions and, corporate finance law, among others. These practices are said to promote freedom of initiative and competition and may benefit clients in terms of time, cost, and efficiency.[12]

Comparatively, the United States' legal system presents quite a contrast. Lawyers in the United States are constrained by individual state focused licensing and regulation. Lawyers must be admitted to a specific state in order to practice in that state. They may be able to appear before the court in a state in which they are not licensed through a *pro hac vice* admission or on other court order. These are the only ways through which a lawyer may engage in MJP in the United States. ALPS are restricted in the United States based on the Model Rules of Professional Conduct. Enacted in most states, the rules preclude nonlawyers from creating, owning or managing law firms, either alone or in partnership with lawyers (an exception, the District of

---

[10] Ramon Mullerat, *The Multidisciplinary Practice of Law in Europe*, 50 J. LEGAL EDUC. 481, 481 (2000).

[11] *Id*.

[12] *Id*.

Columbia allows minority-nonlawyer ownership of law firms) and multidisciplinary practices combining legal services with non-legal services are restricted.[13]

The Lisbon Treaty on European Union governs the European Union member states.[14] The relevant provision for lawyers relates to the free movement of services.[15] This freedom forms the basis for European Union lawyer regulation, whereby an admitted lawyer may presumptively practice anywhere in the European Union, with limited restrictions imposed by where the lawyer is admitted to practice.[16] This allows lawyers to practice across European jurisdictions, unlike in the United States, where lawyers are restricted to state practice because of state focused licensing and regulation.

The treaty grants professionals the right to establish a permanent practice throughout the European Union by requiring member states to allow foreigners to set up business or professional entities, or pursue self-employment.[17] It also authorizes legislation for the mutual recognition of qualifications and for harmonization of business regulations.[18]

The European Court of Justice, in the case, *Van Binsbergen*, established three guiding principles that form the basis for the regulation of lawyers within the European Union. This

---

[13] ABA Model Rules of Professional Conduct (2002), Rule 5.4, 5.5.

[14] Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. C 326/47 (providing the basis of EU law)

[15] Roger J. Goebel, *Lawyers in the European Community: Progress towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556, 566 (1992) (explaining that the freedom to provide services applies to intermittent practice, while the freedom of establishment protects a lawyer's right to practice in a new residence).

[16] Roger J. Goebel, *The Liberalization of Interstate Practice in the European Union: Lessons for the United States*? 34 INT'L LAW. 307, 339 (2000) (stating that there are very few limitations to MJP in the European Union).

[17] Melissa Pender, Contents: *European Union Law Issue: Multijurisdictional Practice and Alternative Legal Practice Structures: Learning from EU Liberalization to Implement Appropriate Legal Regulatory Reforms in the United States*, 37 FORDHAM INT'L L.J. 1575, 1584

[18] *Id.*

regulation stems from the Lisbon Treaty. First, each member state has the right to restrict the activities of professionals but only where such regulation is justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability.[19] Second, the rules must be non-discriminatory with regard to national origin and residence.[20] Third, an individual may challenge an infringing national rule by relying on the Treaty of Lisbon, as a right.[21] Following the guidelines set forth in *Van Binsbergen*, a more comprehensive directive on lawyers' rights emerged from the Lawyers' Establishment Directive. This directive provides guidance on how a lawyer, within the European Union, may practice law outside the jurisdiction in which he is admitted. A European Union lawyer may practice outside of his or her home state either by: 1) temporarily engaging in practice in a state where he is not admitted; or 2) applying for admission to the state where he is not admitted after practicing in such state for three years, subject to local review and rules.[22]

The United States' Constitution, unlike the European Union's Lisbon Treaty emphasizes state autonomy. Rules regarding the conduct of lawyers in the United States are largely created by states, with guidance from the Model Rules on Professional Conduct. That said, lawyers in the United states may practice across state lines on a limited basis – either on a motion before the courts, which allows the lawyer to temporarily gain bar admission outside his Bar State without

---

[19] *Van Binsbergen*, [1974] E.C.R. 1300, P 12.

[20] *Van Binsbergen*, [1974] E.C.R. 1300, PP 18-27.

[21] *Van Binsbergen*, [1974] E.C.R. 1300, P 27.

[22] Pender, *supra* note 17, at 1591.

taking another exam; or 2) *Pro Hac Vice* Admission[23], which harmonizes state processes regarding out of state lawyers engaged in litigation.

A court may, in its discretion, and consistent with the standing rules of that court, admit a foreign lawyer to practice before it *pro hac vice* under such terms and limitations as that court sees fit. Typically, the foreign lawyer would be required to associate for the duration of that admission with an attorney regularly admitted to the practice of law in that court.[24]

A foreign (non U.S.) lawyer who wishes to be admitted to the practice of law in the United States would generally have to sit for the bar, the same as any other attorney, and may also have to meet additional requirements (since his or her foreign law school or other training might not comport with the requirements required by the state in question).

More important, there is no general or national license to practice law in the United States. Rather, attorneys are admitted to the practice of law in each individual state. After being admitted to a particular state, the foreign attorney then has the right to practice law in that state and that state alone. Further steps (beyond state admission) must be followed to gain permission to appear as an attorney in the federal courts, before the Supreme Court, before the Internal Revenue Service, and in various other contexts within the United States.

---

[23] An "out-of-state" lawyer is a person not admitted to practice law in this state but who is admitted in another state or territory of the United States or of the District of Columbia and not disbarred or suspended from practice in any jurisdiction. An out-of-state lawyer is "eligible" for admission *pro hac vice* if that lawyer:

a. lawfully practices solely on behalf of the lawyer's employer and its commonly owned organizational affiliates, regardless of where such lawyer may reside or work; or

b. neither resides nor is regularly employed at an office in this state; or

c. resides in this state but (i) lawfully practices from offices in one or more other states and (ii) practices no more than temporarily in this state, whether pursuant to admission *pro hac vice* or in other lawful ways.

ABA Model Rule on Pro Hac Vice Admission, dated August 2002.

[24] *Id*. A foreign lawyer is a person admitted in a non-United States jurisdiction and who is a member of a recognized legal profession in that jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, and who is not disbarred, suspended or the equivalent thereof from practice in any jurisdiction.

Law Firm Structures

The main distinction between organization and structure of the legal profession in the United States and European countries is that the United States has a unitary system while it is divided by function in most European countries. In European civil law countries

> functions typically associated with the practice of law in the European Union . . . are generally divided among at least three different categories of legal [professionals]: 1) those . . . who may represent clients in court (e.g., advocates in France . . . and *rechtsanwalts* in Germany); 2) those who advise on and document the transfer of real and personal property (e.g., notaries in France, Italy and Spain); and those who counsel clients on business transactions (e.g., the former *avouees* and *conseil juridique* in France.[25]

Because law firms in the European Union are free from restrictions on their practices, law firm structures are far more liberal in their formation than in the United States. For example, in Italy, several areas of legal regulation have been liberalized, leading to the formation of multidisciplinary partnerships.[26] With new national regulations regarding business structures in the legal profession, individual European member states allow non-lawyers to partner with lawyers or to participate in ownership and management of law firms.

> The member state reform that has attracted the most attention is the United Kingdom's decision to embrace ALPS, after conducting research on consumer preferences and needs. The United Kingdom's 2007 Legal Services Act

---

[25] Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Code of Conduct by U.S. And Foreign Lawyers*, in 32 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1117, 1148-49 (Oct. 1999).

[26] The Bersani Decree-Law of 4 July 2006 (transposed into law on 4 August 2006) (liberalizing professional regulation in Italy).

> implemented many significant changes, placing regulatory control of the profession in the Legal Services Board and the Office for Legal Complaints, and declaring that a majority of members of both entities must be non-lawyers. Furthermore, the Act permits the Board to consider new business models, based on the view that the market will benefit from legal advice offered with other business services.[27]

Based on this manifestation, several types of law firms, with non-lawyers joining the partnership, have emerged in the United Kingdom. These alternative legal practice structures include: "legal firms owned by passive investors, firms that issue stock to non-lawyers to raise capital, multidisciplinary practices, and firms owned, in part, by non-lawyers but limited to providing legal services."[28]

The United States presents a sharp contrast with law firm structures compared to the European Union. All fifty states in the United States prohibit lawyers from sharing fees with non-lawyers.[29] However, due to technological advancements in legal practice, some lawyers in the United States have circumvented the rules against multidisplinary practices or alternative legal practice structures by being innovative. While maintaining the core values of professional ethics, such innovations have led to the emergence of non-traditional legal service providers. For example, online legal services are regarded as non-traditional legal providers. These non-traditional legal service providers aim to "offer

---

[27] Pender, *supra* note 17, at 1607.

[28] *Id*. at 1608.

[29] *Id*.

consumers easy access to basic legal forms and legal services."[30] For example, clients may now log into legal services websites such as Rocket Lawyer, Legal Zoom, and Avvo and use the platform for legal services.[31] For instance, one may access the service online to create a testamentary will. Another non-traditional legal service now occurs in general merchandise retail stores such as Walmart where small "law stores" within the retail store provide "fast, face to face legal services in convenient Walmart locations."[32] Accordingly, these small law stores offer "free first in-person meeting with an attorney with extended hours and prices far lower than [one] you would find at a law firm."[33]

Paramount to these non-traditional legal services in the United States are the ethical concern and regulation of these non-traditional practices. These legal services may employ non-lawyers who are not subject to the Rules of Professional Conduct, thereby creating an immediate problem as to what rules would apply to them.[34] Also, the form of

---

[30]. Christina Couto, *Future of the Legal profession: As field evolves, New York attorneys chart new territory*, NYSBA, September/October 2016, Vol. 58. No. 5

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] ABA Model Rule 5.3 outlined the responsibilities regarding nonlawyer assistance:
With respect to a nonlawyer employed or retained by or associated with a lawyer:

> (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> > (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;
> > (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

lawyer advertising may not align with the Advertising and Solicitation rules and guidelines in the Rules of Professional Conduct. For example, Avvo's legal services website advertises that you can "get the legal help you need at a fixed price," and "every five seconds someone gets free legal advice from Avvo."[35] This kind of advertising may be unethical and essentially, goes against the grain of the Model Rules of Professional Conduct.

Professional Ethics

Lawyer Advertising – Solicitation

Advertising and solicitation among lawyers is one of the most contentious areas in legal ethics. Scholars often assert that lawyer advertising and solicitation frequently leads to mistrust and threatens to discredit the legal profession.[36] In the United States, lawyers advertise their services to obtain clients in various ways. The United States Supreme Court held that lawyers have the right to First Amendment protections of commercial free speech and that the states may not ban them from advertising.[37] However, each state of the forty-three states that adopted the ABA Model Rules of Professional Conduct provides the necessary guidelines to regulate lawyer advertising and solicitation. The guidelines require lawyers to advertise their services in ways that are not false or misleading. The ABA Model Rules in the United States lists four provisions banning false or misleading representations:

---

[35] Couto, *supra* note, 30.

[36] Bolocan, *supra* note 1 at 11.

[37] Bates v. State Bar Arizona, 433 U.S. 350 (1977).

1) A communication is false or misleading if it "contains a material misrepresentation of fact or law."[38] This standard prevents lawyers from misstating their credentials or any aspect of their services.
2) A lawyer must not "omit a fact necessary to make the statement considered as a whole not materially misleading."[39]
3) Lawyers may not make a communication "likely to create an unjustified expectation about results the lawyer can achieve."[40]
4) Communications must not "compare the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."[41] For example, lawyers should avoid using terms such as, "highly qualified" or "best lawyers in town."[42]

Another limitation on lawyer advertising and solicitation in the United States is the prohibition on solicitation of a prospective client in-person or via telephone contact. On the one hand, a lawyer may not contact a prospective client if the lawyer has no family or professional relationship with that person and the contact is solely for the lawyer's pecuniary gain.[43] This prohibition prevents "ambulance chasing." On the other hand, direct mail is permissible in some instances. Unlike "ambulance chasing," direct mail gives the potential client the option to ignore the mail.[44]

---

[38] ABA MRPC, Rule 7.1(a).

[39] *Id*.

[40] ABA MRPC, Rule 7.1(b).

[41] ABA MRPC, Rule 7.1(c).

[42] *See* Virginia State Bar Ethics Opinion 1297 (1989).

[43] ABA MRPC, Rule 7.3(a)

[44] Under Model Rule 7.3(c) direct mail solicitations to potential clients known to be in need of legal services in a

Lawyer advertising is strictly regulated in European countries, too. The Council of Bars and Law Societies of Europe ("CCBE") code employs a 'conflict of law' approach,' which specifies that a lawyer should not advertise where it is not permitted.[45] The CCBE code's provision on advertising covers publicity by law firms, as well as individual lawyers, as opposed to corporate publicity organized by bars and law societies for their members as a whole.[46] Many European Union countries have abandoned traditional rules on advertising, allowing for some advertising, though not as liberally as in the United States. For example, in *France*, lawyer advertising was strictly prohibited until 1991, when it was authorized by a decree.[47] French lawyer advertising is governed by local bar regulations. Similar to the United States, lawyer advertising in France must be truthful and not misleading.[48] In like manner, French lawyers must not engage in the canvassing of clients unless it is requested by the clients.[49] They may advertise by the use of brochures, phone books, sponsorship of legal events, seminars and professional shows.

In Italy, lawyer advertising is regarded as potentially harmful to the dignity of the Italian legal profession. To safeguard the profession against such harm, Italian lawyers must 'honestly' and 'truthfully' advertise their services.[50] Advertising is strictly limited to the use of brochures,

---

particular matter must be labeled as "Advertising Material" on the envelope and at the beginning and ending of any recorded message.

[45] CCBE Code, Article 2.6.

[46] Explanatory Memorandum and Commentary to the CCBE Code, 2.6.

[47] Decree n. 91, 1197 of November 21, 1991, Article 161.

[48] National Council of Bars' Code of Conduct (1999), Article 10.1

[49] *Id*.

[50] Codice Deontologico Forense (Ethical Code for Italian Lawyers, 1999), Article 17.

letterhead, professional, telephone or other directories, and telematic networks (including those with international circulation). Solicitation is prohibited – seen as being offensive to the dignity of the profession.[51]

In Spain, the traditional restrictions on lawyer advertising have been substantially relaxed. Permitted lawyer advertising must be truthful and respectful to the dignity of potential clients.[52] As in the United States, there must be no direct or indirect solicitation of accident victims.[53] Like Spain, Germany has broad rules for regulating lawyer advertising.

Formation of the Lawyer-Client Relationship

Generally, lawyer codes of conduct are built on the assumption that a client-lawyer relationship exists, but do not mention how this occurs.[54] For example, in the United States, the ABA Model Rules require duties of competence, obedience, diligence, communication, confidentiality and loyalty to clients. The CCBE code imposes similar duties to clients.[55] A lawyer-client relationship can be created either by private agreement between the parties or by court appointment.

In the United States, courts are empowered to appoint an attorney in both criminal and civil cases if the party is unable to afford to pay for private legal services.[56] Lawyers are

---

[51] *Id*.

[52] Ethical Code for It Estatuto General de Abogacía Española (2001), Article 25 (1).

[53] Id. (2) (e).

[54] ABA MRPC, Rules 1.1-1.4, 1.6, and 1.7-1.13.

[55] CCBE Code, General Principles and Relations with Clients.

[56] Bothwell v. Republic Tobacco Co., 912 F. Supp. 1221 (D. Neb. 1995).

obligated to serve when they are appointed by the courts, unless there is a conflict of interest.[57] The CCBE code requires similar compliance. For example, it is considered a violation of disciplinary rules when an Italian lawyer refuses, without adequate justification, to act as appointed counsel.[58]

Other than court appointment, a lawyer-client relationship is formed through contract law. In the United States, this contract is formed when a prospective client or a client seeks legal advice and the lawyer agrees to provide such legal advice. The client would then arrange for payment for the advice received. In civil law countries, lawyer-client relationships are formed in a way similar to those in the United States.

Important to the lawyer client relationship are the fiduciary responsibilities owed to the client – competence and diligence. In the United States, the ABA Model Rules require competent and diligent legal representation. Competence implies "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[59] Diligence requires "promptness in representing a client,"[60] as well as commitment and dedication to the interests of the client, and zeal in advocacy upon the client's behalf.[61]

Similarly, the CCBE Code prohibits lawyers from undertaking a matter unless it can be handled "promptly."[62] It further provides that lawyers should not accept cases that they know, or

---

[57] ABA MRPC, Rule 6.2.

[58] Ethical Code for Italian Lawyers (1999), Article 11 (II)

[59] ABA MRPC, Rule 1.1.

[60] *Id*., Rule 1.3.

[61] *Id*., cmt 1.

[62] CCBE Code, Article 3.1.3.

ought to know, they are not competent to handle without co-operating with a lawyer who is competent.[63] Once a matter has been undertaken, lawyers must advise and represent clients "promptly, conscientiously and diligently."[64] For example, the French Code provides that lawyers owe to their clients "a duty of competence as well as of dedication, diligence and care."[65]

Professional Liability and Indemnity Insurance

"In the United States, the law of legal malpractice clarifies the contours of professional duty and offers clients a monetary remedy when breach of such a duty causes clients harm. The standard of care defines the necessary level of competence. Lawyers, like other professionals, are required to exercise the skill and knowledge normally possessed by members of their profession."[66] Damages are directly attributable to the lawyer if any harm results from the lawyer's omission or negligence during representation of the client.

In The European Union, the CCBE code requires all lawyers to be insured against claims based on professional negligence, or to notify their clients if they are not able to obtain such insurance. For instance, insurance is mandatory for lawyers who are admitted to the Paris Bar, as it is required for lawyers in Germany, the Netherlands, Poland, and Romania.[67]

---

[63] *Id*.

[64] CCBE Code, Article 3.1.2.

[65] National Council of Bars' Code of Conduct (1999), Article 1.

[66] Bolocan, *supra* note 1, at .27.

[67] *Id*. at 27-28.

The Attorney Client Privilege (Confidentiality)

A lawyer's duty of confidentiality owed to clients is a hallmark of the client-lawyer relationship, and is endorsed in the ethical standards regulating the legal profession both in the United States and in European countries.[68]

> Without this guarantee, there is a danger that a client would lack the trust which enables him to make full and frank disclosure to his lawyers, and, in turn, the lawyers would lack sufficient (and it may be important) information required to enable the lawyer to give full and comprehensive advice to the client or represent him effectively. Without that trust, the client would not have the assurance that he can be full and frank with his lawyer, which is essential for providing full and accurate legal advice and support and is therefore a crucial guarantee for the fair trial process.[69]

In contrast to the United States, where the lawyer's duty of confidentiality prevents disclosure of information relating to the client to other persons, the ethical and professional codes of most European countries extend such duty to cover communications between lawyers. For example, in France, professional secrecy encompasses not only written or verbal exchanges between the lawyer and her client, but also those between lawyers:

> The terms of the Penal Code are such that any "secret" communicated in confidence to a lawyer in his professional capacity by any person is covered by the obligation of professional secrecy. The obligation (and the corresponding rights) therefore extend, not only to information communicated to a lawyer by his client, but also to information

---

[68] *Id*. at 30.

[69] Council of Bars and Law Societies of Europe, CCBE RECOMMENDATIONS: On the protection of client confidentiality within the context of surveillance activities.

communicated by the opposing party, by his lawyer or by a third party, provided that the information constitutes a "secret" and has been communicated in confidence.[70]

In the United States, attorney client privilege includes any communication between client and lawyer for the purposes of providing legal services within the course of the attorney's employment. This privilege however, is not protected if a third party who does not work for the lawyer is present at the time of the communication. Communications that involve the performance of non-legal functions by an attorney are also not protected. Additionally, the privilege does not apply for the purposes of committing a crime or fraud.[71] In the United States, materials prepared in anticipation of litigation are not discoverable and are protected under the work product doctrine immunity rule.[72] Prepared materials may include written statements, private memoranda and personal recollections recorded by the attorney. This immunity does not apply to materials prepared in the ordinary course of business or when litigation is not reasonably anticipated.

Exceptions to the duty of confidentiality include:

1. to prevent reasonably certain death or substantial bodily harm;
2. to secure legal advice about the lawyer's compliance with these Rules;
3. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the

---

[70] www.iadclaw.org/assets/1/7/17.11_FRANCE.pdf.

[71] The attorney-client privilege does not apply to a communication occurring when a client:
(a)consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
(b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud. See Restatement, Section 82.

[72] Federal Rules of Civil Procedure, Rule 26.

lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

4. to comply with other law or a court order.[73]

The European ethical professional codes are somewhat similar to those of the United States, with some exceptions to the duty of confidentiality. For instance, in England, confidentiality may be breached "when the client is seeking help in commission of a crime, when the solicitor has been unknowingly used by the client in the commission of a crime or fraudulent act, and when disclosure is necessary for the solicitor to establish a defense to a criminal charge."[74] For barristers in England,

> whether or not the relation of counsel and client continues a barrister must preserve the confidentiality of the lay client's affairs and must not without the prior consent of the lay client or as permitted by law lend or reveal the contents of the papers in any instructions to or communicate to any third person (other than another barrister, a pupil, in the case of a Registered European Lawyer . . .) information which has been entrusted to him in confidence or use such information to the lay client's detriment or to his own or another client's advantage.[75]

In Europe, the decision making power is vested in the lawyers while in the United States it is vested in the client.

---

[73] ABA MRPC, Rule 1.6 (b).

[74] Bolocon, *supra* note 1 , at 35 citing Andrew Boon and Jennifer Levin, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES 256-58 (1999).

[75] Bar Standard Boards, *Regulating Barristers – Conduct of work by practicing barristers*, https://www.barstandardsboard.org.uk/regulatory-requirements/the-old-code-of-conduct/the-old-code-of-conduct/part-vii-conduct-of-work-by-practising-barristers/.

Law Practice Topics presented in the Trans Pacific Partnership ("TPP") Agreement

The Trans Pacific Partnership is a multinational trade agreement among twelve countries: the US, Japan, Malaysia, Vietnam, Singapore, Brunei, Australia, New Zealand, Canada, Mexico, Chile and Peru. The trade agreement "aims to deepen economic ties between these nations, slashing tariffs and fostering trade to boost growth. Member countries are also hoping to foster a closer relationship on economic policies and regulation."[76] The agreement intends to create a single economic market, much like the European Union. Although the TPP has been signed by these countries, the agreement must be ratified by at least six countries before it goes into effect.

The United States has indicated that there will be "no changes in US's' existing rules concerning how and when foreign attorneys may practice law in a particular state."[77] To ensure that no change occurs, there will an implementation of a backstop which will prevent "states from making their rules any less accommodating toward practice by lawyers licensed in other countries."[78] Countries may request "consultation" about a US state rule if they believe the rule substantially impedes cross border supply of legal services.[79]

TPP created a private justice system, termed as the investor-state dispute settlement ("ISDS"). The ISDS is an instrument of public international law that resolves investment conflicts without creating state to state conflict, protects citizens abroad, and signals potential

---

[76] *TPP: What is it and why does it matter*? (July 27, 2016) http://www.bbc.com/news/business-32498715.

[77] *Proposed Trans-Pacific Partnership Aims to Ease Bars on Cross-Border Legal Practice*, ABA/BNA Manual on Professional Conduct, Vol. 31, No. 2.3, 679.

[78] *Id*.

[79] *Id*.

investors that the rule of law will be respected.[80] "ISDS arbitration is needed because the potential for bias can be high in situations where a foreign investor is seeking to redress injury in a domestic court, especially against the government itself. While countries with weak legal institutions are frequent respondents in ISDS cases, American investors have also faced cases of bias or insufficient legal remedies in countries with well-developed legal institutions."[81] For lawyers who serve as arbitrators in international trade disputes, the signatory country will develop a code of conduct for "panelists" serving as arbitrators in order to safeguard the integrity of the dispute settlement mechanism.[82]

---

[80] Office of the Nited States Trade Reprsentative, *Fact Sheet: Investor-State Dispute Settlement,* https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.

[81] *Id*.

[82] *Proposed Trans-Pacific Partnership Aims to Ease Bars on Cross-Border Legal Practice*, *supra* note 77, at 681.