CCBE RESPONSE TO THE SOLICITORS REGULATION AUTHORITY CONSULTATION CONCERNING THE AMENDMENT OF RULES 3 (CONFLICTS OF INTEREST) AND 4 (DUTY OF CONFIDENTIALITY) OF THE SOLICITORS' CODE OF CONDUCT 2007

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CCBE response to the Solicitors Regulation Authority consultation concerning the amendment of rules 3 (conflicts of interest) and 4 (duty of confidentiality) of the Solicitors' Code of Conduct 2007

The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. In addition to membership from EU bars, it has also associate and observer representatives from a further ten European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European citizens and lawyers.

This is the CCBE's response to the Solicitors Regulation Authority (SRA) consultation concerning the amendment of rules 3 (conflicts of interest) and 4 (duty of confidentiality) of the Solicitors' Code of Conduct 2007[1].

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a) On the proposed amendment to rule 3 concerning conflict of interests

*** Question 1:**

It is important to examine the potential benefits and risks that the proposed amendment generates:

- for the client,
- for the law firm,
- for the legal profession,
- for Europe.

On the interest of the client

The consultation paper suggests that clients want this reform and that it would be beneficial to them. And yet, it is an erroneous notion of the relationship between lawyers and their clients.

First, the principle upon which the legal profession is based is independence, also necessary with regard to the client. A client cannot oblige a lawyer to act contrary to the lawyer's conscience nor code of conduct.

Furthermore, the basic interest of the client instructing a lawyer is to obtain the highest quality of advice and protection. It is the principle of trust. And yet, if the lawyer is subject to different interests, the lawyer would be forced to prioritise them and thus to favour one client at the expense of others.

What will be the criterion of choice?

It is possible that it would be the nature and amount of fees which one client brings in, in relation to another. Never, in the consultation, is the issue of the solution of conflicts of interest envisaged when this becomes so exacerbated that the same firm cannot support it. And yet, the firm will choose a client.

Does this not damage the interest of the other client and to a greater extent than if the firm had refused, from the beginning, to act for both with conflicting or potentially conflicting interests?

[1] The UK delegation officially dissents from the CCBE position at the request of the Law Society of England and Wales. It does so on the principle that the CCBE should not interfere in national matters unless requested to do so by the national delegation concerned. The other members of the UK delegation reserve their position on the substance of the issue.

In effect, if the rule is amended so that it is relaxed, the second client will be forced to instruct another firm while time has passed and the firm originally instructed has prospered, by the amount of fees earned.

The second client will have further difficulty in educating the new firm. This will cost more (fees to the former firm and fees to the new firm).

The long-term interest of the client is to see all conflicts of interests settled immediately. It would be proper to protect clients through strict conflict of interest rules and not to take into consideration the short-term interest of one particular client.

The conflict of interest rule, application of the principle of trust, aims to protect the interest of all clients and the public interest.

In short, the objective of this proposal, formulated by the CLLS, is to favour the few biggest law firms, operating in an international context. It is a matter thus of reinforcing an oligopolistic situation.

This situation accumulates in a niche area in a legal domain.

Consequently, the relaxation of the conflict of interests rule would permit these few law firms to concentrate all the clients, including those having conflicting interests, in the few firms who have different teams.

The oligopolistic situation would thus be reinforced, preventing the entry as much for persons, in their specialised fields of activity, as for new law firms, or the mobility of clients with whom the conflicts of interest exist, towards other firms. Such a restriction on offers of services would go against the interest of legal clients as the outcome would narrow the offer of legal services.

In the same way, if the immediate interest of certain clients can be satisfied, their long-term interest is threatened.

And yet, every oligopolistic situation necessarily leads to an increase in the price of the service and, sometimes, a decrease in the quality.

Finally, the client who would wish to render their advisor liable, on account of a dereliction of the duty of advice, in the presence of exacerbated conflict of interests, will not instruct other firms who will have exactly the same practices.

Eventually, this will lower firms' levels of professional, ethical responsibility.

On the interest of firms

The risk to their responsibility has been raised by the SRA and the Law Society. However, the Law Society considers that the firm is best placed to judge the conflict of interests.

It is a matter, in fact, according to the phrase of the American economist James Buchman – Nobel Prize in Economics – of trusting "the fox to guard the henhouse".

It is in effect the law firms who must decide their self-disqualification. But, that presupposes the capacity of the firm to persuade one of their associates to give up a client and to manage the conflicts generated by a potential confrontation between associates.

These conflicts will multiply as a result of the trend towards concentration, specialisation. Associates consider themselves equal. It would be proper therefore to put into place a regime of additional control of conflicts of interest and to impose an ethical behaviour such as self-disqualification on an associate.

Necessarily, the conflict will go to a committee responsible for managing conflicts. It will therefore have, in its possession, all of the information concerning both clients to be able to manage the conflict, which will lead to questions concerning the effectiveness of "Chinese Walls". Moreover, while the amendment should prevent this, it risks leading to the breaking-up of firms as a result of the intensity of the conflict.

On the interest of the profession

The amendments proposed by the CLLS are conceived in the exclusive interest of a very small number of law firms. It is a matter of a minority practice within the profession, of an idiosyncrasy centred over London.

Thus, a minority of law firms, certainly amongst the largest, would impose an amendment of a rule, already accepted by all the regulations, to the detriment of the majority.

As mentioned above, the development of public trust, at the level of a profession and its members, is slow and complex. Again, trust is necessarily achieved through the concentration and nature of the industry. This trust can only be maintained through the existence of an increase in professional ethical values.

The social development of trust in the legal profession, so central to this type of particular economic market, cannot – for reasons belonging to a minority of law firms – be achieved to the detriment of the great majority.

Care must be taken not to undermine the essential "markers" of our identity and our professional reputation, which are independence and trust.

On the interest of Europe

Europe, the objective of which is the general protection of the interests of consumers and litigants, must not lower the high level of protection conferred by the current codes of conduct.

Professional ethical requirements permit the loosening of the noose around the market.

The new model of regulation, negotiated between the profession and each member state, must provide new guarantees of legal services to the client's benefit and the public interest and not relax the ethical rules or amend them. The financial crisis has shown that "deregulation", confusion and lack of clarity has led to the crisis and contributed to undermining confidence in the forces of economy, finance, and services.

The relaxation of the conflict of interest rules could go against the necessary restoration of confidence precisely where it has been weakened.

Finally, if the proposals were adopted, this amendment of a core professional conduct rule could lead to hindering the creation of a European Code of Conduct under the aegis of the CCBE which constitutes, at the time of globalisation of legal services, freedom of movement of services which is a genuine demand from clients and a necessary harmonisation of Europe for lawyers.

*** The second, third, and fourth questions** also concern the risks of this amendment considering that it must apply to "sophisticated clients".

Thus it is a matter, in the amendment now adopted, of making a distinction between activities (contentious and advice) and between clients.

With regard to the distinction between activities, this is always harmful as it divides the profession which must be united.

With regard to the creation of categories of clients, we know that not all clients have equal information. However, the lawyer's duty of information must be valid towards all clients and without differentiation and there cannot be a distinction between categories of clients for the application of a code of conduct just as there cannot be a different code of conduct for different firms.

The SRA's remark could be related to the Commission Communication dated 5 September 2005 relating to the "monitoring of the report on competition in the professional services industry".

As a result of the report, developed in its first Communication of 17 February 2004, that certain rules applicable in the professional services industry risked restricting competition between service providers to the detriment of consumers (point 7 of the 2005 Communication), the Commission considered it necessary to examine and remove unjustified restrictions (point 8).

According to the Commission, a better regulation of legal services occurs through a better "definition of the public interest" for each of the relevant markets, including the legal services.

Its main conclusion (point 13) is that "occasional users, generally private individuals and married couples, could have need of a more targeted protection" (a more restrictive regulation would therefore be justified). However, "the main users of professional services – businesses and the public sector – could manage without regulatory protection as they would be better placed to choose the providers responding to their needs".

The CCBE produced "CCBE comments on Commission progress report on competition in professional services", which have been unanimously approved by the delegations during the CCBE plenary session of 19 November 2005.

The CCBE wished to challenge the Commission's assertion that businesses and the public sector constituted the main users of legal services in every European member state.

The CCBE opposes the Commission's conclusion on this subject. It noted that the distinction made with a view to defining needs in terms of regulation is based only on the clients' competence to choose a provider, as if that constituted a basis for greater or lesser client protection.

And yet, the regulation of services exists not because of the so-called sophistication of the persons using them, but with a view to protecting the public in an open and democratic society.

In other words, lawyers are subjected to regulation in the public interest.

"In the recent financial scandals which shook the American business world (Enron, Worldcom), the users of professional services could frequently be shown as very sophisticated, but the victims of the crimes committed were the ordinary people such as the shareholders, employees, pensioners, often in their thousands. These victims endured heavy financial losses which ruined their lives. The lawyers in the large commercial matters are not regulated in a way to protect the sophisticated directors of businesses who instruct them (albeit they have an equal need) but in the public interest, which includes people susceptible to a direct or indirect interest in the outcome of the transaction, even if they are not clients themselves."

The CCBE has noted, with regret, that the approach of the Commission did not reflect this same concern.

(See CCBE comments on Commission progress report on competition in professional services)

The CCBE has therefore, in a position taken less than four years ago, rejected the notion of "sophisticated clients".

*** Question 8:**

Finally, since this amendment has been approved, it should be applicable only to English and Welsh law firms practicing in those countries and should not be "exported" when these firms practice in other countries, without comparable regulation.

b) On the amendment to rule 4

The draft consists in accepting the instructions of a new client, without informing the former and therefore without the former's consent, while there exists a risk of conflict between these two clients. It seems to generate more risks for the client, the firm, and the legal profession than it does advantages.

This amendment is in direct contradiction with the interests of the client. Naturally, even the new client will think that, subsequently, it would also be concerned by this rule and that, without its consent, one will accept another client with contrary and conflicting interests to its own.

The principle of trust will eventually disappear through the act of approving this amendment.

Moreover, this draft is based solely on the belief in the effectiveness of "Chinese Walls". And yet, studies undertaken by Anglo-Saxon firms have demonstrated a lack of effectiveness of these rules for multiple reasons.

The term “Chinese Walls” is a reference to procedures adopted by a firm to prevent the sharing of information obtained from a client with other teams in the firm who act for other clients for whom this information could be important and which could, potentially, have conflicting interests.

These “Chinese Walls” have always been the subject of profound scepticism. The idea came, originally, from the Securities and Exchange Commission who exempted, in certain cases, multiservice companies from self-disqualification if they set up a “Chinese Wall” (§ b of SEC Rule 14 e-3).

As a result of this rule, stockbrokers have the right to buy or sell shares from companies which are, in other respects, clients of their own agency, as far as the latter has set up communication-blocking procedures between different services which provide a reasonable guarantee. Professional secrecy and confidentiality of client information will also be respected, according to the SEC.

Technically, this communication block must be a formal ban on accessing the files of another service in the same agency.

Does our profession intend to liken itself to the stockbrokers and does it consider that the trust from which this profession benefits is at such a level that it can be likened to their practices?

Furthermore, the American legal profession has agreed, under the name of “screening solution”, a “Chinese Wall” in the context of lawyer mobility.

In this manner, when a lawyer leaves a firm to join another, the conflicts of the firm he leaves do not follow him. The new firm is protected, if it puts in place this screen formally guaranteeing that the new member will not work on files susceptible to place him and his new firm in conflict situations.

This “Chinese Wall” appears in the form of a contract between the three parties (the lawyer, the firm he leaves, and that which he joins).

Its effectiveness remains to be seen.

First, House of Lords case-law has examined the issue of “Chinese walls and clients’ confidentiality” in Prince Jefri Bolkiah v KPMG (18 December 1998)[2] and condemned these practices.

Second, can “Chinese Walls” be effective since the system of profit-sharing gives more importance to criteria such as productivity, the number of new clients to bring in, or the number of chargeable hours? These criteria lead to competition no longer only between firms but also between associates of the same firm. These lawyers work daily in a context which encourages them to use the organisation of the firm for their personal gain and to put the collective interest of the firm second, including its professional reputation, even if this behaviour is counter-productive in the long-term.

The procedure for controlling the opening of new files and the taking on of new clients is another aspect of the organisation of the work which does not appear compatible with the effectiveness of “Chinese Walls” in these firms.

Lawyers are set up not to refuse work and not to refuse to provide legal services to a client. The official procedures which are provided are sometimes ignored and formal control through the associates and the hierarchy is weak so far as the criteria mentioned above prevail.

Often an associate does not refer to the committee responsible for professional conduct and conflicts of interest when they have a serious doubt. The hierarchical authorities are only informed of the existence of a potential conflict of interest after the event. Often, associates have little interest in what the other associates do.

In fact, amongst the biggest conflicts between lawyers within firms, we find precisely those related to procedures for taking on new clients and, once the client has been taken on, to assigning the file.

Relaxing the rules which prevent conflicts of interest would amount to intensifying the conflicts.

The artificial nature of “Chinese Walls” is demonstrated by young solicitors. Young solicitors learn their trade by working on the files of their seniors. Consequently, barriers are not possible if we want to ensure the optimal transmission of knowledge within a firm of solicitors.

[2] Bolkiah v. KPMG [1998] UKHL 52; [1999] 2 AC 222; [1999] 1 All ER 517; [1999] 2 WLR 215 (16th December, 1998)

Moreover, the mobility of young solicitors who go from firm to firm increases and, with this mobility, the chance of creating conflicts of interest and using knowledge of information against a former client increases too.

After all, while "Chinese Walls" attempt to prevent members of the same firm from communicating between themselves on certain subjects, other commercial and organisational demands encourage the opposite tendency.

There exists certain strong links of friendship between associates measured by the existence of group social activities outside of work. These are the most invisible connections to the client, crossing boundaries of specialisation and ignoring the "Chinese Walls" between different departments of the same firm.

It is therefore not acceptable that two teams separated by a "Chinese Wall" advise clients, even more so without the knowledge and agreement of the client concerned.

This amendment would go, contrary to what is predicted, against the interest of the client and, in the long term, against the interest of the firm which would lose the trust of its clients.

In short, the amendment would go directly against the interest of the profession.

In terms of image, for law firms, the amendment would be harmful.

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In conclusion, the Council of Bars and Law Societies of Europe is of the opinion that if the objective sought by the SRA is to find a balanced solution to protect the interest of clients, firms, and the legal profession in England and Wales and internationally, while ensuring a necessary competitiveness, the approved amendments do not appear to approach the purposes sought and present a serious risk of weakening the rules of professional conduct, guarantee of client trust.

Annex

European and international conflict of interest rules

EUROPEAN AND INTERNATIONAL CONFLICT OF INTEREST RULES

a) The established principles

Globally, the principle is simple even if its application is subtle.

It is generally accepted that a lawyer must not be the adviser, nor the representative or the counsel, of more than one client in the same matter if there is a conflict of their reciprocal interests of if there is a serious risk that such a conflict may arise.

The lawyer is therefore obliged to refrain from dealing with files concerning all the parties and must only act in the sole interest of one or, at times, none of them.

The lawyer must in the same way refrain, apart from the case of divergent interests, when professional secrecy is susceptible to being breached or when the lawyer's independence is affected.

The scope of the principle also applies in time. In this way, it is sometimes anticipated that the lawyer cannot take on a new client if the secrecy or confidentiality of information, previously obtained from a former client, could – directly or indirectly – be disclosed.

Just as, the lawyer must not act if knowledge of facts contained in the file of a former client could lead to favouring the new client. There would be an unjustified advantage for the latter if, during proceedings, its counsel used this previously acquired knowledge.

In the context of joint practice, within the same firm, the prohibition of taking on a new matter susceptible to a conflict of interests applies to every member of the firm.

The measure also affects the handling of colleagues' employee files with respect to the organisation within which the lawyer practices.

With regard to this principle, the only differences which exist in the international or European regulations concern the presence or absence of exceptions.

Sometimes, there is no exception provided for in the regulation. In this case, whatever the opinion of the client, the lawyer may not act in the above circumstances if there are conflicting interests or interests at risk of coming into conflict. In such a case, the justification for the total lack of exceptions is the fact that the rule not only protects the interests of the client in the short and long term, but also that the rule is established to defend the public interest of society.

On the other hand, in other regulations, there are greater and lesser exceptions. They exist particularly in non-contentious proceedings or when advising. The lawyer may act for two clients insofar as they have a common interest (for example, amicable divorce proceedings) or when two or more parties have common interests and jointly instruct a lawyer for example to draft a contract.

Finally, the client must be informed and, sometimes, in certain regulations, the client must consent in writing to the lawyer continuing to act, if there is a serious risk of conflict or when a conflict of interest arises. This consent must be informed consent.

Conflicts of interest are a classic concern of professional conduct for the majority of the professions (doctors, health professionals, insurers...) and for lawyers in particular. This subject is all the more subtle for lawyers because they work in a system which is permanently adversarial and competitive. Our professional code is there to protect the client and guarantee the client's trust while preserving the lawyer's independence.

However, at the same time, everything seems to be geared towards conflicts of interest: the mobility of lawyers, the structure of their career, the growth of firms, the diversification, the concentration of markets, and the existence of conflicts emerging with former clients as much as with present clients, the complexity of transactions particularly financial transactions which lawyers work on.

Thus it would be proper, in order to consolidate the principle, to mention the foundations.

b) The foundations of the principle

The first foundation of this principle seems to be the necessary trust between the client and the lawyer. There exists asymmetrical knowledge between the lawyer and the client. It is trust which counterbalances this difference in the level of information.

Lawyers benefit, on the one hand, from a personal trust, local, direct with the client, constantly subject to vicissitudes but particularly important for a public that is filled, in this difficult world, with habitual distrust.

But, in other respects, there exists a trust for the whole profession, a total and impersonal trust. This trust arises particularly from the existence of moral rules controlled by the professional authorities. This trust partakes of economy and quality. It is also this trust which permits professional secrets to be entrusted to the lawyer.

A world without trust would be an inhuman world.

And yet, we know that, if trust is gained slowly, it is lost quickly. In 2002, at the time of the financial scandal linked to the Enron affair located in an office in Houston in the United States, the trust invested for 99 years in the multinational accounting firm Arthur Andersen, the 5th of the "Big Five" founded in 1913 by an accounting professor who gave his name to the firm, employing 28,000 people throughout the world, was inexorably withdrawn.

It took less than a year for the firm to disappear completely. Three years later, the judgment which had caused this fiduciary cataclysm would be unanimously overturned by the Supreme Court on the grounds, among others, that the alleged acts were not necessarily illegal.

Time of trust and time of the courts is not the same. The firm did not reappear.

Professor Sweberg (international journal of social sciences – September 2005), lecturer of sociology at Cornell University, maintains that it is possible to prevent certain moral conflicts by forbidding all persons responsible for the defence of public interests from putting themselves in situations of conflict. He illustrated his proposal by analysing, rightly, the behaviours and mechanisms which led to the Enron and Arthur Andersen scandal, distinguishing several stages:

- the practice, by the same firm, of auditing and advising,
- the concentration of chartered accountants in a small number of firms,
- the radical change in the structure of turnover. (In 1980, 60% of their revenue came from audits, 25% of their activity was advice, and 25% of their activity was tax matters. In 1998, fees from audits represented less than 31% of these firms' turnovers, the bulk being made up of personal financial advice "within the context of the companies they audited, which created new types of conflicts of interest".)

In the Arthur Andersen process, there was a genuine symbiosis between the client and the service provider, which made it difficult and then impossible for Andersen to resist Enron, who had become one of its best clients (in 2001, $25,000,000 for audits and $27,000,000 for advice).

Independence no longer existed.

The issue of conflicts of interest must also be related to the lawyer's duty of fairness towards the client and the duty of diligence.

The professional code of conduct, whether associated or not with a professional disciplinary authority, contains explicit undertakings taken by the whole with regard to the clients. This professional moral code takes into account the degrees of asymmetry of power, and trust.

In exchange for the rights which may be given to them by the State, the legal profession is tasked with monitoring the functioning of the legal industry and legal representation of which it is a part. This supervision occurs, particularly, through professional self-regulation.

The risk that conflicts of interest pose is that lawyers prioritise their "allegiances" and thus favour one client at the expense of the others and particularly favour those who would assure a larger income for the firm in the short or long term.

In this way, the rule provides that the firm or the lawyer must cease acting for one of the parties. And yet, the logic of the industry and organisational structure of firms encourages multiple representation.

Three situations are possible when a lawyer starts acting for a client:

- it is known that there is no conflict,
- it is known that there is a conflict,
- and the situations in between, grey areas of potential conflict which increase without relent.

The objective of the amendment proposed by the City of London Law Society is to increase the situations where it is known that there is a conflict, where a conflict is discovered, whilst continuing to act, with the client's consent, in the best interests of clients with conflicting interests.

But to accept the professional conduct debate means, as well, that this innovation does not immediately fall directly under a rigorous and unwavering prohibition. If the professional authorities ask themselves about the appropriateness of amending the rules in force, does there exist for all that a doubt over the legitimacy of the prohibition?

What about the regulations in Europe or elsewhere in the world?

c) The European regulations (as communicated by the CCBE national delegations)

(i) In Germany

Rules and exceptions relating to conflict of interests

Rules:

§ 43a para. 4 of the Federal Lawyers' Act (Bundesrechtsanwaltsordnung) and § 3 of the Rules of Professional Practice (Berufsordnung für Rechtsanwälte) describe the rules of conflict of interest in Germany.

§ 43a of the Federal Lawyers' Act "The basic duties of a Rechtsanwalt" stipulates:

[…]

(4) A Rechtsanwalt may not represent conflicting interests.

[…]

§ 3 Rules of Professional Practice "Conflict of interest, refusal to accept instructions" reads:

(1) The Rechtsanwalt must refrain from acting for a new party if he has advised or represented another party in the same matter, if there is a conflict of interest or if he has been seized with the matter in any other professional way as defined in § 45 and § 46 of the Federal Lawyers' Act.

(2) The prohibition specified in paragraph (1) also applies to all Rechtsanwälte connected with him in joint practice or through shared office premises, regardless of the legal or organisational set-up. Sentence 1 does not apply where, in a particular case, the clients involved in a case presenting a conflict of interest have expressly agreed, following comprehensive information, to be represented by the Rechtsanwalt, and where this is not against the interests of the proper administration of justice. Information shall be provided in writing, as well as the declaration of agreement.

(3) Paragraphs (1) and (2) also apply if the Rechtsanwalt leaves one joint practice or shared office to work in another joint practice or shared office.

(4) If a Rechtsanwalt realises that he acts in violation of paragraphs (1) to (3) he shall inform his clients immediately and must cease to act for all other clients involved in the same matter.

(5) The aforementioned provisions do not affect the duty to observe confidentiality.

*Furthermore **§ 356 of the Criminal Code (Strafgesetzbuch)** foresees that a lawyer will be penalized if she/he works for clients with conflicting interests in the same legal case and therefore violates her/his duties. It also punishes a lawyer if she/he, in consent with the opponent, acts in a way which causes a disadvantage for her/his client.*

Exceptions:

1. Regarding the question whether the clients can give consent, you have to distinguish three cases:

a) The lawyer also wants to work for the opponent.

This is never possible. It would only be possible if the consent was able to abolish the conflict of interests and the violation of the professional regulations. This would be the case if the interests are not opposed any more because of the consent (BGHSt 15, 332).

b) A lawyer leaves one joint practice or shared office to work in another joint practice or shared office.

There is a problem with conflict of interests if the joint office to which the lawyer formerly belonged works / has worked for the opponent. As the partnership takes on cases jointly, it does not matter whether the lawyer who moves to another joint office was involved in the legal issue or not. In principle, the joint office to which the lawyer has moved has to put down the mandates, § 3 para. 4 of the Rules of Professional Practice. But according to § 3 para. 2 of the Rules of Professional Practice, the lawyer is allowed to work for the client if in a particular case, the clients involved in a case presenting a conflict of interest have expressly agreed, following comprehensive information, to be represented by the lawyer, and where this is not against the interests of the proper administration of justice. In such a case, the joint office to which the lawyer moves does not have to put down the mandate.

Regarding this issue, there has been a change: According to the old version of § 3 para. 2 of the Rules of Professional Practice, the prohibition was extended to lawyers who were connected, e. g. in joint practice or through shared office premises. If the other lawyer or her/his joint practice worked or had worked for the opponent in the same legal case, the lawyer was not allowed to act for the other party. That meant that if a lawyer moved from one joint practice to another, the joint practice to which the lawyer moved had to put down the mandate if there was a conflict of interests. There was no possibility for the client to consent. However, the German Constitutional Court decided that this regulation is not compatible to the Constitution ("Sozietätswechslerentscheidung", 1 BvR 238/01 of 3.7.2003). It was of the opinion that this regulation violated Art. 12 of the Constitution (freedom of profession) because the regulation made it more difficult for lawyers to change the joint practice. Therefore, § 3 para. 2 of the Rules of Professional Pratice had been changed.

c) A joint office wants to work for clients with conflicting interests in the same legal issue.

It is discussed whether the clients can give consent. Regarding the wording, § 3 para. 2 of the Rules of Professional Practice would allow that lawyers belonging to a joint practice work for clients whose interests are opponent if the clients give consent and if the proper administration of justice does not stand against. Some commentators are of the opinion that this is unlawful because § 43a para. 4 of the Federal Lawyers' Act does not allow to represent conflicting interests. They think that the decision of the Constitutional Court only refers to lawyers who change the joint practice and that the decision does not apply to lawyers who are already working in the same joint practice (Hartung/Römermann, 4. Auflage 2008, § 3 BORA, Rn. 109 ff.). Other commentators argue that the constitutional court has accepted that § 43a para.4 Federal Lawyers Act also concerns the prohibition to act for conflicting interests within a joint practice (BVerfG NJW 2006, 2469). In this case the Constitutional Court stipulates that it can be reasonably expected from a partner to withdraw from a case if the client has either not given consent – or in the case that consent is given – the proper administration of justice would force the partner to withdraw from a case. Thus the Constitutional Court seems to accept that clients can consent also in the case of a conflict arising within an existing partnership.

In all cases in which the clients can give consent, the duty to observe confidentiality is not affected, § 3 para. 5 of the Rules of Professional Practice.

2. In addition, it is possible that several people who are accused because of the same criminal act are defended by different lawyers of the same joint practice as long as the accused have the same interests. If the accused have interfering interests, this would only be possible if they agree according to § 3 para. 2 of the Rules of Professional Practice.

3. The lawyer is not bound by the rules of conflicts of interests if she/he:

- *gives hints about legal issues in a private coherence and not concerning her/his profession*
- *exercises her/his own interests*

Existence of a notion similar to that of "sophisticated clients":

It is already allowed that a joint practice firm conducts the interests of clients who have contrary interests if they give informed consent in situations as described in Question 3. However German law does not know the term of "sophisticated client" as such. However when judging a possible conflict with the proper administration of justice the lawyer amongst others will have to evaluate the position of the client and his/her ability to give informed consent.

Rules and exceptions relating to confidentiality

Rules:

§§ 43 a, 56 of the Federal Lawyers' Act (Bundesrechtsanwaltsordnung), § 2 of the Rules of Professional Practice (Berufsordnung für Rechtsanwälte), Art. 2 para. 1 with Art. 1 para. 1 of the Constitution (Grundgesetz), Art. 12 of the Constitution, §§ 53, 97, 102, 160 a of the Criminal Procedure Code (Strafprozessordnung), § 203 of the Criminal Code (Strafgesetzbuch), § 383 of the Civil Procedure Code (Zivilprozessordnung), § 17 of the fair trade law (Gesetz gegen den unlauteren Wettbewerb)

Please find the most important rules translated into English:

Federal Lawyers' Act:

§ 43a The basic duties of a Rechtsanwalt

[…]

(2) A Rechtsanwalt has a duty to observe professional secrecy. This duty relates to everything that has become known to the Rechtsanwalt in professional practice. This does not apply to facts that are obvious or which do not need to be kept secret from the point of view of their significance.

[…]

Federal Lawyers' Act:

§ 56 Special obligations towards the Council of the Bar

(1) In regulatory matters and matters concerning appeals a Rechtsanwalt must provide the Council of the Bar or an authorised member of the Council with information and produce his/her files on request or appear before the Council or the authorised member. This does not apply if and in as far as the Rechtsanwalt would thus be in breach of the duty of professional secrecy or if providing a truthful response or submitting his/her files would involve a risk of being prosecuted on grounds of a criminal offence, a breach of administrative rules or a breach of professional ethics and the Rechtsanwalt invokes this as a reason. The Rechtanwalt's attention must be drawn to the right to refuse to supply information.

[…]

Rules of Professional Practice:

§ 2 Confidentiality

(1) The Rechtsanwalt has the right and the duty to observe confidentiality.

(2) The right and the duty to observe confidentiality apply to all information that becomes known to the Rechtsanwalt in the course of his professional activity and also after the Rechtsanwalt has ceased to act for a client.

(3) The duty of confidentiality does not apply if the present Rules of Professional Practice or other legislation provide for exceptions, or if the enforcement of or defence against claims arising from a case, or if the defence of the Rechtsanwalt's own interests require the disclosure of information.

(4) The Rechtsanwalt shall explicitly require his staff and anyone participating in his professional activity to observe the duty of confidentiality (§ 43a(2) Federal Lawyers' Act).

Exceptions:

The duty of Professional Secrecy does not apply to facts that are obvious or which do not need to be kept secret from the point of view of their significance. Having said that, this does not mean that everything which has become public knowledge is automatically free from Professional Secrecy. Taking the example of a press Article: While the fact distributed by the press becomes obvious, the classification of the fact and also the true facts according to the lawyer remain bound by Professional Secrecy. The same goes for a court case: In general everything discussed in a court case is obvious. This does however not apply to court cases which are hardly noticed by the public. As to the second criterion, the significance of facts, the lawyer should always consult the client and opt in dubio for the Professional Secrecy.

In addition, the client can relieve the lawyer from the duty of Professional Secrecy under the precondition that she/he has the necessary ability to judge her/his action. The relief by the client can be explicit or tacit.

According to Art. 100a and 160a of the Criminal Procedure Code, lawyers can be intercepted under very strict conditions. According to Art. 100 a suspects of explicitly listed serious crimes can be intercepted. According to the German Constitutional Court lawyers can only be subject to supervision, if there is very likely that they will act as intermediaries for the passing on of information between the suspect and a third person. In implementing the data retention directive the legislator also created Art. 160 a of the Criminal Procedure Code on the taking of evidence and its use in relation to persons entitled to refuse to give evidence. The article stipulates how evidence can be taken and used in the course of proceedings. In this new legal provision the legislator distinguishes between criminal lawyers and other lawyers. The interception of criminal lawyers is forbidden (except in cases where there is evidence for the criminal lawyer to be a involved in the crime) and collected data cannot be used. Other lawyers can be subject to observation when the interest in criminal persecution prevails over the professional secrecy of the lawyer. BRAK and DAV have heavily criticised this distinction and there are currently several claims pending at the German Constitutional Court concerning the legality of this distinction. Furthermore, if it is necessary to prevent international terrorism, the German Federal Police ("Bundeskriminalamt") has got similar possibilities. It can, for example, eavesdrop a lawyer under the condition that this action is proportionate. But it is not allowed to eavesdrop a criminal defence lawyer.

In addition, the lawyer can be obliged to reveal information for public policy reasons, e.g. if this is allowed by the Rules of Professional Practice or other legislation, including case law, for example:

- *As shown in question 11, the Professional Secrecy does not end when the client dies. But if there are objective reasons for a duty of disclosure, for example when the heirs demand an account, the lawyer has to reveal the secrets.*
- *She/he is allowed to use knowledge which she/he has achieved from different clients, but she/he is not allowed to reveal this knowledge.*
- *The duty of Professional Secrecy does not apply if enforcement of or defence against claims arising from a case or if the defence of the lawyers own interests require the disclosure of information. However, according to the principle of proportionality, the lawyer will only be able to disclose what is necessary to claim e.g. in order to claim his own fees.*
- *If the client's claims against the lawyer are seized, the lawyer has to give information to the creditor, § 840 of the Civil Procedure Code.*

- *If a lawyer has to give an affirmation in lieu of an oath, he also has to reveal her/his claims and the names of her/his clients. But she/he is not allowed to reveal further details about the clients.*
- *If the lawyer gets to know about planning severe criminal actions, she/he has to make a complaint according to §§ 138, 139 para. 3 s. 2 of the Criminal Code. Otherwise, she/he can be punished.*
- *According to the jurisdiction, the lawyer also has to keep secret the matters of third parties. However, she/he can reveal the secret if the different interests are considered properly.*
- *When a lawyer wants to convey claims to another lawyer, he has to reveal secrets of the clients. There is no definite jurisdiction whether this is allowed or not.*
- *If a lawyer collaborates with other lawyers, she/he can reveal the secrets to these lawyers if the client knows that there is a very intense collaboration. If new members enter a lawyer partnership, the lawyer can also reveal the secrets to them. However, if a law office is sold, the lawyer is in principle bent to the duty of Professional Secrecy.*
- *When dealing with the tax authorities concerning their own tax declaration lawyers cannot make reference to Professional Secrecy.*
- *Someone who has a legitimate interest to have a look into a document can do so under certain circumstances, § 810 of the Civil Code (Bürgerliches Gesetzbuch). The opponent may be obliged to hand out a document during a legal proceeding (§§ 422, 428 of the Civil Procedure Code).*
- *According to § 6 para. 2 sentence 2 of the Rules of the Professional Practice, the lawyer can advertise names of clients in brochures only to the extend where this is not against clients' interests and where the client has given his express consent.*

(ii) In Denmark

Rules and exceptions relating to conflict of interests

Rules:

Article 126 of the Administration of Justice Act – the general rule of good conduct and Paragraph 3.2 of our code of conduct (reproduced below).

3.2 Conflict of interests (Code of Conduct for the Danish Bar and Law Society)

3.2.1. A lawyer may not assist a client in situations in which a conflict of interest has arisen or where there is an obvious risk of such a conflict arising.

Such situations always exist when:

1. a lawyer assists clients in the same case if the clients have conflicting interests. However, a lawyer may appear for several parties during a preliminary hearing if no disputes are dealt with during the hearing and if none of the parties is opposed,

2. a lawyer assists a party after previously having assisted the opposing party in the case,

3. a lawyer assists in several cases with connections to each other, if there is a risk that confidential information the lawyer has received in one of the cases can be used in another of the cases. This applies even if the lawyer does not assist the clients at the same time,

4. the lawyer has close family ties to someone who has conflicting interests with the client in the case,

5. the lawyer has a not inconsiderable direct or indirect financial or business connection to a party who has conflicting interests with client in the case,

6. the lawyer has other close connections to a party who has conflicting interests with the client in the case,

7. the lawyer has such business or other connections with the client that there is a risk the lawyer cannot advise the client independent of irrelevant interests,

8. a lawyer agrees with the client or others that he or she is to be paid in the form of shares or other shares of ownership in a company where the result of the case will influence the value of such shares or other shares of ownership. This also applies in other cases where agreement is made on such payment if the arrangement will influence the impartiality and personal integrity of the lawyer in the discharge of his of her duty.

Such situations may also exist when:

9. a lawyer assists a client in a case if he or she has a regular client relationship with the opposing party although not assisting such party in the specific case,

10. a lawyer assists competing companies,

11. a lawyer participates on behalf of several parties in creating or concluding a legal matter about which there is agreement among the parties. A lawyer who on behalf of the parties has participated in creating or concluding a legal matter may not subsequently assist one or the parties on an issue involving the legal matter if it has or might have a bearing for the other party/parties. 3.2.2. A lawyer may not serve as an arbitrator, conciliator or mediator for several parties, if he or she previously assisted any one of the parties singly in circumstances connected to the conflict. After serving as an arbitrator, conciliator or mediator, a lawyer may not assist any one of the parties singly in circumstances connected to the conflict.

3.2.3. When lawyers practice law as members of a joint practice, in corporate form, see section 124 of the Danish Administration of Justice Act, or as members of an office-sharing practice, the rules of paragraph 3.2.1 and paragraph 3.2.2 shall apply to the joint practice, corporation and office-sharing practice as well as to the mutual relationship between its participants, including lawyers engaged as employees.

(2) The rules of paragraph 3.2.1 and paragraph 3.2.2 shall apply correspondingly to other types of cooperation, collaborations and joint practices between lawyers or law firms if in relation to a third party they appear as a joint practice or a law firm.

3.2.4. The consent of the involved parties to the lawyer's assistance in the cases mentioned in paragraphs 3.2.1, 1)-8), 3.2.2 and 3.2.3 shall not have any bearing on the evaluation of whether a conflict of interest exists. In the cases mentioned in paragraph 3.2.1, 9)-11), the significance of such consent is subject to a specific evaluation.

3.2.5. When a conflict of interest or obvious risk of same exists in accordance with paragraph 3.2.1, the lawyer must cease to act with respect to all of the clients involved. If the lawyer in the cases mentioned in 1), 2), 3), 9) and 10) has only received significant information from some of the clients, the lawyer's withdrawal can be limited to the other clients.

(2) The lawyer's withdrawal must be immediate, cf., however, paragraph 3.1.3.1.

3.2.6. If the lawyer's withdrawal from the case in accordance with paragraph 3.2.5 is due to a conflict of interest that has arisen exclusively or primarily due to his or her circumstances, the lawyer may not charge a fee for the work on the case that must also be carried out by the lawyer who takes over the case. The lawyer must repay the client for any payment of fee received for such work.

3.2.7. Law firms comprised by paragraph 3.2.3 must draw up written guidelines for dealing with conflict of interests. The guidelines must be geared to avoiding conflict of interests and to detecting and identifying conflicts that arise at the earliest possible time, and must contain a description of the procedure to be followed when a conflict is identified.

Exceptions:

There are no exceptions to the rules on conflict of interest but it should be noted that paragraph 3.2.1 distinguishes between situations which will always be considered to entail a conflict of interest (example 1-8) and situations which may entail a conflict of interest (example 9-11)

The difference is explained in paragraph 3.2.4 according to which a consent from the client has no impact on the evaluation of whether a conflict of interest exists in the situations mentioned in number 1-8, while the effect of such a consent in situation 9-11 will depend on a concrete evaluation.

Existence of a notion similar to that of "sophisticated clients":

No

Rules and exceptions relating to confidentiality

Rules:

Article 126 of the Administration of Justice Act (general rule on good conduct), Article 170 of the Administration of Justice Act (exemption of lawyers regarding testimony before the courts), Article 152 A-E of the Penal Code (confidentiality) and paragraph 2.3 of the code of conduct (reproduced below).

2.3. Confidentiality (Code of Conduct for the Danish Bar and Law Society)

2.3.1. Trust and confidentiality between the lawyer and his client is a necessary precondition for the lawyer's function.

Discretion is therefore essentially a legal and ethical duty and right for lawyers and shall be respected in the interests not only of the individual but also society at large.

2.3.2. A lawyer shall respect the confidentiality of all information that becomes known to him in the course of his professional activity.

2.3.3. The obligation of confidentiality is not limited in time.

2.3.4. Rescinded.

2.3.5. The lawyer's associates, staff and other persons employed in the law firm shall fulfil the same obligation of confidentiality.

2.3.6. If several lawyers or law firms conduct business in joint offices, 2.3.5 shall likewise apply to such joint offices.

Exceptions:

A client may wave his/her right and a judge may order the lawyer to give the information.

(iii) In Estonia

Rules and exceptions relating to conflict of interests

Rules:

An attorney may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict between the interests of those clients. An attorney shall not provide legal services to a client if there exist circumstances that affect or may affect the attorney's ability to observe the requirements set out to protect the client's interests and act only in the interests of the client (conflict of interest), unless the attorney has notified his client of such circumstances and the client does not desist from demanding provision of legal services by the attorney.

Exceptions:

An attorney may render legal services to several persons in the same matter, provided that there is no conflict of interest. Among other things there is no conflict of interest when all clients agree and require that the attorney shall render legal services to other clients in the same matter. Should there arise any dispute in that matter later on, the attorney shall not render legal services to any of the aforesaid clients. It is also provided that an attorney may continue providing legal service in case an attorney has notified the client of the circumstances of conflict of interest and the client does not desist from demanding provision of legal services by the attorney.

Existence of a notion similar to that of "sophisticated clients":

No

Rules and exceptions relating to confidentiality

Rules:

The relationship between the attorney and his client is founded upon trust. Therefore, all information given or received by the attorney in the course of rendering legal services is confidential.

Exceptions:

Only the client or his successor may in writing exempt the attorney from the confidentiality obligation.

Also, an attorney may not make the documents or other information relative to his professional activity available to any third party, or public offices to which the said documents or information are not addressed, however, presentation or disclosure of the said documents or information to the Board of the Bar Association or to the Court of Honour discussing a disciplinary case against the attorney, shall not be deemed to be a violation of the confidentiality obligation.

In order to prevent a criminal offence in the first degree, an advocate has the right to submit a reasoned written application for exemption from the obligation to maintain a professional secret to the chairman of an administrative court or an administrative judge of the same court appointed by the chairman. A judge shall hear a submitted application immediately and shall issue or refuse to issue a written permission.

(iv) In Finland

Rules and exceptions relating to conflict of interests

Rules:

The Finnish Bar Association has approved a new code of conduct for advocates which came into force the 1st of April this year. New rules concerning conflict of interests are the following:

6. CONFLICT OF INTERESTS

6.1 Conflict of interests in the same matter

An attorney may not accept an assignment in the same matter from two or more clients if there is a conflict or a significant risk of a conflict between the interests or rights of those clients.

An attorney may, however, accept an assignment from two or more clients in matters concerning the drafting of an agreement or mediation, even though the clients may have conflicting interests, provided that all parties request his/her assistance. In such case, the attorney has an obligation to equally observe the interests of all the clients, and he/she is prohibited from assisting any of them in case of a later dispute.

6.2 Conflict of interests based on obligation of loyalty

An attorney may not accept an assignment against a current or former client if acceptance of the assignment breaches the obligation of loyalty towards a new client or a current or former client who is the opposing party, unless the clients give their consent.

The scope of an attorney's obligation of loyalty during an assignment, and the duration of the obligation after termination of the assignment, is determined by, among other things, the nature and scope of the assignments, the importance of the matter to the client, as well as the length of the client relationship and the importance of the client to the attorney.

6.3 Conflict of interest on obligations of secrecy and confidentiality

An attorney may not accept an assignment if facts obtained in another assignment which fall within the scope of the obligation of secrecy or confidentiality could impair the attorney's ability to fully protect the client's interests.

An attorney may, however, accept an assignment if the attorney has obtained consent to use the information covered by the obligations of secrecy and confidentiality from the party protected by the said obligations. Consent may not be requested for the purpose of using the information against the party giving the consent.

6.4 Conflict of interests based on financial or personal interests

An attorney may not accept an assignment if the attorney, or a person close to him/her, or a person working in the same office or office community, has a personal or financial connection to that assignment which may impair the attorney's ability to fully protect his/her client's interests.

Unless the connection is significant, consent by the client authorises the attorney to accept the assignment.

6.5 Conflict of interests in law firms and office communities

The provisions set out in Rules 6.1−6.3 shall apply to the attorney him/herself, as well as to persons working in the same law firm or office community.

The disqualification referred to in Rule 6.4 shall not prevent an impartial attorney practising in the same law firm or office community from handling the assignment.

6.6 Obtaining consent

Prior to obtaining the consent referred to in Rules 6.2, 6.3 and 6.4, the attorney shall explain to the client in detail the circumstances constituting disqualification, in order for the client to be able to sufficiently consider whether to give consent. An attorney may not request consent from a client who may be considered unable to comprehend the implication of such consent.

Consent must be obtained without violation of the attorney's obligations of secrecy and confidentiality.

6.7 Change of office

Conflict of interests in a new office

When an attorney or other lawyer has relocated to a new office, the attorneys in the new office shall take into account in their disqualification assessment the assignments previously conducted by the said attorney or lawyer, as well as information relating to such assignments that falls within the scope of the obligations of secrecy and confidentiality which the said attorney or lawyer has otherwise performed.

Conflict of interests of a relocated attorney

An attorney who has relocated to a new office may not personally handle an assignment in that new office if

1. the previous law firm of such attorney represents the opposing party of a client of the new office; and

2. the assignment from the opposing party was given to the previous law firm prior to the attorney's relocation to the new office.

The conditions mentioned above do not prevent an impartial attorney in the new office from handling the assignment.

Conflict of interests in the previous office

Notwithstanding the relocation of an attorney to a new office, in their disqualification assessment attorneys of

the previous office shall take into consideration the assignments handled by the relocated attorney at the said previous office.

6.8 Information of circumstances affecting the assessment of conflict of interests

If an attorney deems him/herself to be impartial, but is aware of circumstances which may give rise to justifiable doubts about his/her impartiality, the attorney shall inform the client of these circumstances.

The said obligation to inform must be fulfilled without violating the attorney's obligations of secrecy and confidentiality

Exceptions:

There are no exceptions

Existence of a notion similar to that of "sophisticated clients":

No, except in the point 6.6.

Rules and exceptions relating to confidentiality

Rules:

Advocates´ act section 5 c states:

"An advocate or his assistant shall not, without due permission, disclose the secrets of an individual or family or business or professional secrets which have come to his knowledge in the course of his professional activity.

Breach of the obligation of confidentiality provided for under paragraph 1 above shall be punishable in accordance with chapter 38, section 1 or 2, of the Penal Code, unless the law otherwise provides for more severe punishment for the act."

Code of conduct point 3.4 states the following:

"An advocate shall not, without due permission, disclose the secrets of an individual or a family, nor disclose any business or professional secrets which have come to the advocate´s knowledge in the course of his/her professional activity (obligation of secrecy).

Furthermore, an advocate may not, without permission, disclose any other information about the client and the client's circumstances which the advocate has learned in the course of his/her professional activity (obligation of confidentiality)."

Exceptions :

The exceptions are either client's permission or in certain situations a court's order.

(v) In Italy

Rules and exceptions relating to conflict of interests

Rules:

Article 37 of the Italian Code of Conduct states that lawyers shall abstain from providing legal services in a given case when this would create a conflict with the interest of a client or interferes with the performance of another mandate, even if not of a professional nature.

Exceptions:

There are no exceptions to this rule.

Existence of a notion similar to that of "sophisticated clients":

No. Indeed, Italian law recognises the principle of the unity of the legal profession.

Rules and exceptions relating to confidentiality

Rules:

Confidentiality is protected by deontological rules and criminal rules.

Exceptions:

Lawyers are authorised to reveal confidential information, subject to the principles of proportionality and necessity, only i) if it necessary for the defence, ii) if it is necessary to avoid the commission of a serious crime, iii) if it is necessary in order to prove facts in a litigation between the lawyer and his/her client and iv) if a proceeding has been commenced on the modalities followed by a lawyer to defend a client.

(vi) In Luxembourg

Rules and exceptions relating to conflict of interests

Rules:

Les règles applicables en matière de conflits d'intérêts et de confidentialité sont énoncées par le règlement intérieur de l'Ordre des Avocats du Barreau de Luxembourg (ci-après RIO).

Le RIO dispose que l'avocat ne doit être ni le conseil ni le représentant ou le défenseur de plus d'un mandant dans une même affaire s'il y a conflit entre les intérêts des mandants ou un risque sérieux d'un tel conflit.

Il s'abstiendra de conseiller, de représenter ou de défendre des parties opposées lorsqu'il les aura précédemment conseillées dans le cadre de la même affaire.

En cas de survenance d'un conflit d'intérêts entre plusieurs mandants dans une même affaire, l'avocat doit déposer tous les mandats.

L'avocat chargé habituellement des intérêts d'un mandant ne peut, en principe, accepter de cause contre celui-ci.

Il ne peut accepter l'affaire d'un mandant si le secret des informations données par un autre mandant risque d'être violé ou lorsque la connaissance par l'avocat des affaires de ce dernier serait préjudiciable à celui-ci.

Les avocats exerçants dans le même cabinet sont considérés comme une entité unique tenue de respecter les dispositions précédentes.

Exceptions:

Le RIO ne prévoit aucune exception.

Existence of a notion similar to that of "sophisticated clients":

La notion de « sophisticated clients » ou clients avertis n'est pas connue en droit luxembourgeois dans le contexte des conflits d'intérêts.

Rules and exceptions relating to confidentiality

Rules:

Le RIO traite de la confidentialité des informations du client dans le cadre de l'obligation pour l'avocat de s'abstenir d'accepter un mandat donnant lieu à un conflit d'intérêts ou pouvant donner lieu à un conflit d'intérêts. L'avocat qui est destinataire ou dépositaire de secrets de son mandant s'expose à des sanctions pénales s'il viole ces secrets.

Le RIO énonce que dans l'exercice de ses activités juridiques de consultation, négociation et de rédaction d'actes l'avocat exerce son mandat dans le respect du secret professionnel auquel il est astreint.

Le RIO précise par ailleurs que l'avocat ne peut accepter l'affaire d'un mandant si le secret des informations données par un autre mandant risque d'être violé ou lorsque la connaissance par l'avocat des affaires de ce dernier serait préjudiciable à celui-ci.

Exceptions:

Il n'y a pas d'exception à la règle. La mise en place de « chinese walls » n'est pas permise alors que le RIO dispose que pour l'application des règles relatives au secret des informations du mandant les avocats exerçant dans le même cabinet sont considérés comme une entité unique.

(vii) In Romania

Rules and exceptions relating to conflict of interests

Rules:

Article 44 de la Loi sur la profession d'avocat ;

« L'avocat ne peut assister ou representer les parties ayant des interets contraire dans la meme cause ou dans des causes connexes et ne peut pas plaider contre la partie l'ayant auparavant consulte sur les aspects litigieux de l'espèce.

Exceptions:

Il n'y a pas d'exception.

Existence of a notion similar to that of "sophisticated clients":

Non

Rules and exceptions relating to confidentiality

Rules:

Art. 44 de la Loi : « L'avocat ne peut être entendu en tant que témoin ni fournir des informations a une autorité ou personne sur la cause qui lui a été confiée, qu'a la condition d'avoir la permission préalable, expresse et donnée par écrit de tous ses clients intéressées dans la cause.

Si l'avocat a été entendu comme témoin, il ne peut plus dérouler aucune activité professionnelle dans la cause.

Exceptions:

Pas d'exception.

(viii) In Sweden

Rules and exceptions relating to conflict of interests

Rules:

3.2 Conflicts of interest (Code of Conduct for Members of the Swedish Bar Association-rough translation)

3.2.1 A Member may not accept an engagement if there is a conflict of interest or a significant risk of a conflict of interest. A conflict of interest exists if:

1. *the Member assists or has previously assisted the opposing party in the same matter,*
2. *the Member is assisting another client in the same matter and the clients have conflicting interests,*
3. *the Member is assisting another client in a closely associated matter and the clients have conflicting interests,*
4. *there is a risk that knowledge covered by the Member's duty of confidentiality may be of importance in the matter,*
5. *the Member himself or herself or a close relative has an interest in connection with the matter that is contrary to the client's, or*
6. *any other circumstance preventing the Member from acting in the best interests of the client. (…)*

3.2.2 There may be a conflict of interest if the Member is assisting or has previously assisted the opposing party in another matter.

(…)

3.2.3 When considering whether there is a conflict of interest in relation to clients or opposing parties in their capacity as legal entities and subject to the individual circumstances, the client or opposing party may be deemed to be all or part of the group of companies or interest group in which the legal entity is included. The provisions applicable to interest groups may also apply to an individual in his or her capacity as owner of a legal entity. On the other hand, upon such an analysis, the client or opposing party may be considered to constitute merely a part of that legal entity, if that legal entity has an extensive operation.

(…)

3.3 Duty of disclosure and consent

3.3.1 A Member who is considering taking on an engagement is obliged, without delay, to consider whether there is a conflict of interest that precludes the Member from accepting the engagement. If the Member finds that there is no obstacle to taking on the engagement but nevertheless circumstances exist which may lead the client to a different judgment, the Member must immediately notify the client thereof. If such information cannot be provided without breaching the Member's duty of confidentiality, the Member must refuse the engagement.

(…)

3.3.2 If express consent can be obtained without a breach of the Member's duty of confidentiality, the Member may, in exceptional cases, and after having obtained such consent, take on an engagement even if a conflict of interest under 3.2.1, points 3 or 4 or 3.2.2 above is deemed to exist, provided that the circumstances are not such that there is reason to doubt the Member's ability to fully safeguard the client's interests.

(…)

3.4 Duty to cease acting

3.4.1 A Member who after having taken on an engagement becomes aware of the existence of a circumstance that would have obliged him or her to refuse the engagement had he or she been aware of the circumstance when taking on the engagement must cease to act. The duty of disclosure under 3.3 above applies when a circumstance that gives rise to a conflict of interest does not arise or is not discovered until after the engagement has been taken on.

(…)

3.4.2 A Member is also obliged to cease acting if:

1. *the Member is prevented from carrying out his engagement owing to a statutory bar or similar circumstances,*
2. *the client asks the Member to act criminally or in breach of professional ethics and despite warning persists in his or her request,*
3. *the client suppresses or tampers with evidence or acts deceitfully and cannot be induced to rectify, or*
4. *the Member, in order to avoid violation of anti-money laundering legislation, reports a client to the police.*

(…)

3.5 Conflicts of interest of colleagues

For the purposes of 3.2 and 3.4, a conflict of interest for someone else in the firm or in a shared office where a Member practices normally constitutes a conflict of interest for the Member as well. There is an exception if a conflict of interest occurs due to the entry into the firm of a colleague and the conflict of interest of that colleague arises from an engagement of a former colleague. Another exception occurs when the colleague's conflict of interest is of the nature stated in 3.2.1, point 5, and circumstances are not such that point 6 is applicable.

(…)

Existence of a notion similar to that of "sophisticated clients":

No (…) from which it can be concluded that the notion as such is well known, but not accepted in sense of conflict of interests.

Rules and exceptions relating to confidentiality

Rules:

Chapter 8, Section 4, para. 1 second sentence states "A Member of the Bar is under a duty to treat information he or she receives in pursuance of his profession with confidentiality when the Code of Conduct so requires.

Section 34 of the Charter of the Swedish Bar Association: "Where professional ethics so require, a member must not divulge information he or she learns in the conduct of his or her practice."

Rule 2.2 of the Code of Conduct for members of the Swedish Bar Association (rough translation):

2.2 Duties of confidentiality and discretion

2.2.1 A Member has a duty of confidentiality in respect of matters disclosed to the Member within the framework of his or her legal practice or which are brought to his or her attention in the course of such work. Exception from the duty of confidentiality is contingent upon the client's consent or a legal obligation to disclose the relevant information. In addition, an exception from the duty of confidentiality will apply if disclosure is required for the Member to oppose complaints made by the client or to assert a claim for compensation in connection with an engagement. (…)

2.2.2 A Member has a duty to exercise discretion when dealing with client matters. A Member must not, without good reason, enquire about cases handled by the law firm where the Member is an employee if the Member is not himself/herself involved in such cases. (…)

2.2.3 The employees of a Member are obliged to observe the same duties of confidentiality and discretion applicable to the Member.

Exceptions:

The advocate is obliged to disclose his file to the client (excepting personal notes of the advocate). There is no concept of letters being privileged merely because they are exchanged between lawyers.

Privileged information cannot be made subject to disclosure except where disclosure is required for prosecution of certain serious crimes. A defender in prosecution may not be ordered to disclose documents even in such cases. The duty to testify and the duty to disclose documents are congruent.

(ix) In Switzerland

Rules and exceptions relating to conflict of interests

Rules:

Il s'agit de l'article 12 lettre c de la Loi fédérale sur la libre circulation des avocats (Loi sur les avocats, LLCA) du 23 juin 2000 dont la teneur est la suivante :

"L'avocat évite tous conflits entre les intérêts de son client et ceux des personnes avec lesquelles il est en relation sur le plan professionnel ou privé."

Cette règle est rappelée par l'article 12 du Code suisse de déontologie dont la teneur est la suivante:

"L'avocat ne représente, ni conseille, ni défend, dans la même affaire, plus d'un client s'il existe un conflit ou un risque de conflit d'intérêts entre ces clients.

Il met fin aux mandats de tous les clients concernés, s'il surgit un conflit d'intérêts, un risque de violation du secret professionnel ou si son indépendance est menacée."

En complément du droit professionnel, on peut rattacher l'interdiction des conflits d'intérêts à l'obligation de fidélité et au devoir de diligence de l'avocat prévus par l'article 398 al. 2 du Code des obligations. Défendre ou conseiller deux parties aux intérêts contradictoires empêche en effet l'avocat soumis à la LLCA de respecter pleinement ses obligations de fidélité et de diligence. En cas de violation, la responsabilité contractuelle de son auteur est engagée.

Exceptions:

En matière contentieuse, il n'y a pas d'exception, l'avocat ne pouvant représenter des intérêts contradictoires.

En procédure gracieuse, l'avocat doit pouvoir intervenir pour deux requérants, dans la mesure où leurs intérêts se rejoignent. C'est en particulier le cas en droit matrimonial, pour l'établissement d'une convention de séparation et une procédure de divorce à l'amiable. L'avocat doit toutefois renoncer à son mandat commun dès que l'une des parties opte pour la voie contentieuse.

Le conseil en faveur de deux ou plusieurs parties est admis lorsque leurs intérêts sont convergents. L'avocat pourra ainsi s'atteler à la rédaction d'un contrat d'entreprise pour le maître de l'ouvrage et l'entrepreneur. En revanche, l'avocat ne doit pas accepter un mandat conjoint lorsqu'il représente ou conseille déjà l'une des deux parties dans le dossier, faute de neutralité.

Existence of a notion similar to that of "sophisticated clients":

Non

Rules and exceptions relating to confidentiality

Rules:

Selon l'article 13 LLCA, l'avocat est soumis au secret professionnel pour toutes les affaires qui lui sont confiées par ses clients dans l'exercice de sa profession ; cette obligation n'est pas limitée dans le temps et est applicable à l'égard des tiers. Le fait de délier l'avocat du secret professionnel n'oblige pas celui-ci à divulguer des faits qui lui ont été confiés.

Quant à la confidentialité des communications entre confrères, l'article 26 du Code suisse de déontologie a la teneur suivante :

"Le caractère confidentiel d'une communication adressée à un confrère doit être clairement exprimé dans cette dernière.

Il ne peut être fait état, en procédure, de documents ou du contenu de propositions transactionnelles ou de discussions confidentielles."

Exceptions:

Il n'y en a pas.

(x) In Czech Republic

Rules and exceptions relating to conflict of interests

Rules:

There are sections 19 and 20 (1) of the Act No. 85/1996 Coll. on the Legal Profession, as amended, which state rules on conflict of interests in the Czech Republic:

Section 19

(1) A lawyer shall be obliged to refuse to provide legal services if

a) he has provided his legal services in the same or a related case to someone else whose interests are contrary to the interests of the person requesting the provision of legal services,

b) a person whose interests are contrary to the person requesting legal services has been provided legal services in the same or a related case by a lawyer with whom the lawyer practices law jointly (s. 11 (1)), or, in the case of an employed lawyer, by a lawyer who is his employer, or by a lawyer who is an employee of the same employer,

c) he possesses information on another or earlier client which may bear unlawful benefits for the person applying for the provision of legal services,

d) he, or a person close to him, has participated in the proceedings[8)], or

e) the interests of the person requesting legal services are contrary to the interests of the lawyer or a person close to the lawyer.

(2) Participation in the proceedings under (1) d) shall not mean the provision of legal services by the lawyer or persons under s. 2 (2).*

[8)] S. 116 of the Civil Code.

** i.e. notaries, licensed executors, patent attorneys or tax advisors, or other persons authorized by special legislation to provide legal services, or employees of legal or natural persons, members of a cooperative or members of the armed forces who are entitled to provide legal services to persons with whom they are in an employment or service relationship or for whom they work, if the provision of legal services is a part of their duties resulting from such relationship*

Section 20

(1) A lawyer shall be obliged to withdraw from the contract to provide legal services, or to apply for the cancellation of his appointment, or to request the Bar to appoint another lawyer (s. 18 (2)), if he subsequently discovers facts stated under s. 19.

There is also section 7 paragraphs 2 and 3 of the Czech Code of Conduct[3] which states:

Article 7

(2) The lawyer may provide a legal service to more than one person whose interests are not contrary to the same case only with the consent of all these persons except when assigned by a court or appointed by the Bar to do so.

(3) The lawyer shall refuse to provide a legal service in the same case to more than one person also if there is a clear threat that a dispute shall arise in their interests during the settlement of the case.

Exceptions:

Exceptions to the above mentioned rule don´t exist in the Czech law.

Existence of a notion similar to that of "sophisticated clients":

No, it doesn´t exist.

Rules and exceptions relating to confidentiality

Rules:

There is section 21 of the Act No. 85/1996 Coll. on the Legal Profession, as amended, which states rules on confidentiality in the Czech Republic:

Section 21

(1) A lawyer shall be obliged to preserve professional secrecy regarding any facts known to him in connection with his provision of legal services.

(2) A lawyer' s duty of professional secrecy (non-disclosure) may be waived only by his client, and, after the client's death or termination of existence, his successor; should there be more than one legal successor the consent of all legal successors shall be necessary to waive the duty of professional secrecy (non-disclosure). Waiver by the client or his legal successor(s) of a lawyer's duty of professional secrecy (non-disclosure) must be in writing and must be addressed to the lawyer; it may be possible for a waiver to be made orally to be recorded in the transcript at the court hearing. A lawyer shall be obliged to observe the duty of professional secrecy (non-disclosure) even after the waiver if the circumstances appear to suggest that the waiver was made under coercion or duress.

(3) A lawyer shall not owe the duty of professional secrecy (non-disclosure) against a person he authorises to pursue individual actions within legal services if this person himself is obliged to observe the duty of professional secrecy (non-disclosure).

(4) A lawyer shall not be bound by the duty of professional secrecy (non-disclosure) to the extent necessary for proceedings before courts or other bodies if the cause is a dispute between the lawyer and his client or client's legal successor; the duty of professional secrecy (non-disclosure) shall not be binding on the lawyer in proceedings under s. 55, in proceedings against a decision of the Bar, or in proceedings concerning a cassation complaint against the judicial decision on that petition under special legislation[8a)], and proceedings concerning issues under s. 55b, to the extent necessary to protect the lawyer's rights or legally protected interests.

(5) The duty of a lawyer of professional secrecy (non-disclosure) shall not be to the prejudice of his duties as a taxpayer, stipulated by special legislation on the administration of taxes and charges[9)]; even in such cases the lawyer shall be obliged not to disclose the nature of a case where he has provided or provides legal services.

(6) A lawyer may not rely on the duty of professional secrecy (non-disclosure) in disciplinary proceedings or against another lawyer designated by the Chair of the Supervisory Council to prepare

3 The Resolution of the Board of Directors of the Czech Bar Association No. 1/1997 of the Journal of the Bar which determines the Rules of Professional Conduct and the Rules of Competition of Lawyers of the Czech Republic (Code of Conduct), as amended

investigation of whether a disciplinary breach has been committed (s. 33 (3)). A lawyer may not rely on the duty of professional secrecy (non-disclosure) when he fulfils duties under special legislation against the legalization of the proceeds of crime[9a)], or against a Bar representative performing acts under subsection (10).

(7) The duty of professional secrecy (non-disclosure) shall not be to the prejudice of the statutory duty to prevent the committing of a crime[10)].

(8) The duty of professional secrecy (non-disclosure) shall exist after the termination of a respective lawyer's Bar membership and striking his name off the Register of Lawyers.

(9) The duty of professional secrecy (non-disclosure), to the extent stipulated under (1) to (8), shall apply to

a) employees of a lawyer or Company, as well as other persons sharing with the lawyer or the Company the provision of legal services, and

b) members of the bodies of the Bar and their employees, and all persons participating in disciplinary proceedings, including lawyers designated by the Supervisory Council Chair to prepare investigation of whether a disciplinary breach has been committed (s. 33 (3)).

(10) Members of the bodies of the Bar, their employees, and lawyers designated by the Supervisory Council Chair to prepare investigation of whether a disciplinary breach has been committed shall not be bound by the duty of professional secrecy (non-disclosure) under (9) to the extent necessary for proceedings before courts in cases stated under (4) after the semicolon. Members of the bodies of the Bar and their employees shall not be bound by the duty of professional secrecy (non-disclosure) to the extent necessary to fulfil their duty to inform under s. 10 (2) to (4) – suspension of legal practise under the Act herein of an advocate in relation to his "home country body", s. 35d – informing the competent body of a foreign state of the commencement and result of disciplinary proceeding against the lawyer, and s. 35r (1), (2) and (4) – informing the competent home-country body of disciplinary proceedings against a European lawyer.

[8a)] Act No. 150/2002 Sb., Rules of Administrative Justice, as amended.

[9)] Act No. 337/1992 Sb., on Administration of Taxes and Charges,, as amended.

[9a)] Act No. 61/1996 Sb., on Some Measures Against the Legalization of Proceeds of Crime and to Alter and Amend Related Legislation, as amended.

[10)] S. 167 of Act No. 140/1961 Sb., the Criminal Act, as amended.

d) The other rules (ABA, CBA, Japan Bar)

(i) The rules of the American Bar Association (ABA) are provided for in the "Model Rules of Professional Conduct".

Rules relating to conflicts of interest provided for by the "Model Rules of Professional Conduct"

Client-Lawyer Relationship

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:

(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: Current Clients: 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 **(as modified by a Recommendation of 16 February 2009)**

(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

(1) the prohibition is based upon 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; or

(2) the prohibition is based upon Rule 1.9(a), or (b) and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(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.

Rules relating to confidentiality provided for by the "Model Rules of Professional Conduct"

Client-Lawyer Relationship

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) 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 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

(6) to comply with other law or a court order.

(ii) The rules of the Canadian Bar Association (CBA) are provided for in the "CBA Code of Professional Conduct". The rules relating to conflicts of interest and confidentiality have been modified in February 2009 following the work of a CBA Task Force on conflicts of interest.

Rules relating to conflicts of interests provided for in the "CBA Code of Professional Conduct"

Chapter V — Impartiality and Conflict of Interest Between

Clients (AS AMENDED BY annex 2 adopted BY THE COUNCIL OF THE CANADIAN BAR ASSOCIATION IN FEBRUARY 2009.)

RULE

1. The lawyer shall not advise or represent both sides of a dispute and, except after adequate disclosure to and with the consent of the clients or prospective clients, preferably after receiving independent legal

advice, shall not act or continue to act in a matter when there is a conflicting interest.

2. The lawyer may act in a matter which is adverse to the interests of a current client provided that:

(a) the matter is unrelated to any matter in which the lawyer is acting for the current client; and

(b) no conflicting interest is present.

Rules relating to confidentiality provided for in the "CBA Code of Professional Conduct"

Chapter IV – CONFIDENTIAL INFORMATION (AS AMENDED BY annex 1 adopted BY THE COUNCIL OF THE CANADIAN BAR ASSOCIATION IN FEBRUARY 2009)

RULE

Maintaining Information in Confidence

1. The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge any such information

except as expressly or impliedly authorized by the client, required by law or otherwise required by this Code.

Public Safety Exception

2. Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that would substantially interfere with health or well-being, the lawyer shall disclose confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

3. The lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court or tribunal facility shall inform the person having responsibility for security at the facility and give particulars, being careful not to disclose confidential information except as required by paragraph 2 of this Rule. Where possible the lawyer should suggest solutions to the anticipated problem such as:

(a) the need for further security;

(b) that judgment be reserved;

(c) such other measure as may seem advisable.

Disclosure Where Lawyer's Conduct in Issue

4. The lawyer should be wary of bold and confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

(iii) The rules of the Japan Federation of Bar Associations (JFBA) are provided for in the "Basic rules on the duties of practicing attorneys" (as enacted on 10 November 2004)

Rules relating to conflicts of interest provided for by the JFBA "Basic rules on the duties of practicing attorneys"

Chapter III. Rules in Relation to Clients

Section 2 : Rules on Matters Which May Not Be Handled

Article 27. (Matters Which May Not Be Handled)

An attorney shall not undertake any of the following matters, except where the client of a matter described in item 3 consents to the undertaking:

(1) A matter in which the attorney assisted the opposite party in the consultation requested, or accepted a

mandate from the opposite party.

(2) A matter in which the attorney was consulted by the opposite party and the extent and form of the consultation was considered to be based upon a fiduciary relationship.

(3) A matter for which consultation is by a party which is the opposite party of another matter in which the attorney is engaged.

(4) A matter which the attorney handled in the past as a public servant.

(5) A matter in which the attorney is involved as a person who conducts arbitration, mediation, settlement or arrangement or other forms of alternative dispute resolution proceedings.

Article 28. (Matters Which May Not Be Handled)

In addition to the provisions of the preceding Article, an attorney shall not undertake any of the following matters, except where (i) the client of a matter described in items 1 or 4 consents to the undertaking, (ii) the client and the opposite party of a matter described in item 2 consent to the undertaking, or (iii) the client and the other client of a matter described in item 3 consent to the undertaking.

(1) A matter in which the opposite party is a spouse, lineal relation, sibling or cohabiting relative.

(2) A matter in which the opposite party is a client of the attorney in another case or the attorney has agreed to provide continuous legal advice.

(3) A matter where the interests of the client conflict with those of another client.

(4) A matter where the interests of the client conflict with economic interests of the attorney.

Section 3 Rules on Accepting Cases

Article 32. (Possibility of Adverse Effect)

If an attorney has more than two clients who are parties to the same matter and there is a possibility of a conflict of interests between them, the attorney shall notify each of such clients that the attorney may withdraw from the representation and there may be other adverse effects on their interests.

Section 4 Rules on Handling Cases

Article 42 (Measures after Start of Work)

If an attorney represents two or more clients in relation to a matter which may involve a potential conflict of interests between the clients and if such conflict actually emerges after work is started, the attorney shall promptly notify each of the clients about the situation and resign or take other appropriate steps according to the case.

Chapter VIII Rules on Legal Profession Corporations

Article 63 (Matters Which May Not Be Handled)

A staff attorney (including any former staff attorney in cases 1 and 2) shall not undertake any of the following matters, except where the client of the legal profession corporation of a matter described in item 4 consents to the undertaking:

(1) A matter in which his or her legal profession corporation assisted the opposite party in the consultation requested, or accepted a mandate from the opposite party, and in which he or she was involved while a staff attorney.

(2) A matter in which his or her legal profession corporation was consulted by the opposite party and the extent and form of the consultation was considered to be based upon a fiduciary relationship, and in which he or she was involved while a staff attorney.

(3) A matter in which his or her legal profession corporation is engaged by the opposite party.

(4) A matter for which consultation is by a party which is the opposite party of another matter in which the legal profession corporation is engaged (limited to cases in which such staff attorney himself or herself is involved).

Article 65 (Matters Which May Not Be Handled By Legal Profession Corporation)

A legal profession corporation shall not undertake any of the following matters, except where (i) the client of a matter described in item 3 consents to the undertaking or (ii) the number of partners unable to handle a matter described in item 5 is less than half the total number of partners of that legal profession corporation and there is a reason that the legal profession corporation can maintain impartiality of operations:

(1) A matter in which the legal profession corporation assisted the opposite party in the consultation requested, or accepted a mandate from the opposite party.

(2) A matter in which the legal profession corporation was consulted by the opposite party and the extent and form of the consultation was considered to be based upon a fiduciary relationship.

(3) A matter in which the legal profession corporation is consulted by the opposite party of another matter in which the legal profession corporation is engaged.

(4) A matter in which any staff attorney or gaikokuho-jimu-bengoshi[4] employed by the legal profession corporation is engaged by the opposite party.

(5) A matter which a staff attorney may not undertake pursuant to the provisions of Article 27, Article 28, Article 63(1) or 63(2).

Article 66 (Matters Which May Not Be Handled By Legal Profession Corporation)

In addition to the provisions of the preceding Article, a legal profession corporation shall not undertake any of the following matters, except where (i) the client and the opposite party of a matter described in item 1 consent to the undertaking, (ii) the client and the other client of a matter described in item 2 consent to the undertaking, or (iii) the client of a matter described in item 3 consents to the undertaking.

(1) A matter in which the opposite party is a client of the legal profession corporation in another case or the legal profession corporation has agreed to provide continuous legal advice.

(2) A matter where the interests of the client conflict with those of another client.

(3) A matter where the interests of the client conflict with economic interests of the legal profession corporation.

Rules relating to confidentiality provided for by the JFBA "Basic rules on the duties of practicing attorneys"

Chapter III. Rules in Relation to Clients

Section 1 General Rules

Article 23. (Maintenance of Confidentiality)

An attorney shall not disclose or utilize, without due reason, confidential information of a client which is obtained in the course of his or her practice.

Chapter VII Rules on Joint Offices

Article 56 (Confidentiality)

A member attorney shall not divulge or use confidential information regarding the clients of other member attorneys obtained through the performance of his or her duties without justifiable cause. This also

4 " Gaikokuho-Jimu-Bengoshi": "Gaiben", Registered Foreign Lawyers: http://www.moj.go.jp/ENGLISH/information/gjb-01.html

applies after the attorney is no longer a member attorney.

Chapter VIII Rules on Legal Profession Corporations

Article 62 (Confidentiality)

A staff attorney shall not divulge or use confidential information regarding the clients of the legal profession corporation, other staff attorneys or gaikokuho-jimu-bengoshi employed by the corporation obtained through the performance of their duties without justifiable cause. This also applies after an attorney is no longer a staff attorney.

e) The Charter of Core Principles for the European lawyer and the Code of Conduct for European lawyers

- **The Charter of Core Principles of the European lawyer provides for the following core principles in particular:**

(c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer;

- Comments on such principle state the following:

For the proper exercise of his or her profession, the lawyer must avoid conflicts of interest. So a lawyer may not act for two clients in the same matter if there is a conflict, or a risk of conflict, between the interests of those clients. Equally a lawyer must refrain from acting for a new client if the lawyer is in possession of confidential information obtained from another current or former client. Nor must a lawyer take on a client if there is a conflict of interest between the client and the lawyer. If a conflict of interest arises in the course of acting for a client, the lawyer must cease to act. It can be seen that this principle is closely linked to principles (b) (confidentiality), (a) (independence) and (e)(loyalty).

- **The Code of Conduct for European Lawyers provides:**

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 or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.

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

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

f) CJEC case-law

Two judgments can be quoted:

- CJEC, Judgment of 18 May 1982, AM & S / Commission (REC. 1982, page I 1575): confidentiality

"That confidentiality serves the requirements, the importance of which is recognized in all of the member states, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it".

"Whilst in some of the Member States the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law, in other member states the same protection is justified by the more specific requirement (which, moreover, is also recognised in the first-mentioned states) that the rights of the defence must be respected".

"As regards the second condition, it should be stated that the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose. Such a conception reflects the legal traditions common to the member states and is also to be found in legal order of the community".

- The findings of Advocate General Léger under the judgment of 19 February 2002, WOUTERS (REC. 2002, page I 1577):

"With a view to permitting lawyers to fulfil their mission of “public service” in the sense that we have defined, the state authorities have accorded them a set of professional prerogatives and duties. Among them, three attributes are a matter of the very core of the legal profession in all member states. It is a matter of duties which appeal to the independence of the lawyer, respect for confidentiality, and the necessity of avoiding conflicts of interest. Independence demands that the lawyer can practice his activities of advice, assistance, and representation in the *exclusive* interest of the client. It manifests itself with regard to the public authorities, other operators, and third parties, under whose influence the lawyer must never fall. It also manifests itself with regard to the client who must not become the lawyer’s employer. Independence constitutes an essential guarantee for the public and for the courts, in such a way that the lawyer has a duty to not act in matters or collaborations which risk comprising it...”

“Finally, the lawyer has – towards the client – a duty of fairness which obliges the lawyer to avoid conflicts of interest. This obligation forbids the lawyer to advise, assist, or represent parties whose interests conflict or whose interests have conflicted in the past. Furthermore, the lawyer cannot use to the advantage of one client information which concerns or belongs to another client.”