

# DOUBLE DEONTOLOGY AND THE CCBE: HARMONIZING THE DOUBLE TROUBLE IN EUROPE

## INTRODUCTION

As isolationism<sup>1</sup> becomes a distant memory, communities increasingly look across national borders for profitable opportunities. Globalization<sup>2</sup> is now a standard business practice instead of a radical idea and is no longer a tool used solely by Fortune 500 companies. Even small sole proprietorships look abroad to maximize profits and increase productivity, and without fail, the further entrepreneurs push the boundaries of their businesses, the more legal questions arise; executives have questions regarding their livelihoods and their personal liability for those global business ventures. As more marketplaces, new workforces, and increased raw materials become available to global markets, it is natural for legal entities to expand their services in kind.

International and transnational businesses<sup>3</sup> face tremendous challenges, and their lawyers face similar, if not more, intricate challenges.<sup>4</sup> “Practice at the transnational level inevitably involves advice on transactions, disputes and other matters that are, or may be, affected by the laws of several national jurisdictions, as well as by the growing body of international law that applies directly to private transactions and legal

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1. HENRY KISSINGER, *DIPLOMACY* 18 (1994). Isolationism is a political ideology holding that national interests are best served by improving economic and political conditions at home rather than interacting with other nations.

2. Globalization is the “denationalization of markets, politics, and legal systems.” Globalization is the restructuring of local economies and cultures to have an international outlook, allowing an easier flow of goods and services across international borders, which is often called the global economy. Research On Globalization, [http://www.positivelyglobal.org/background\\_research5.html](http://www.positivelyglobal.org/background_research5.html) (last visited Sept. 14, 2007).

3. See WordReference.com English Dictionary, <http://www.wordreference.com> (last visited Nov. 13, 2005). An international business is an entity that exists within one country and does business with an entity located in a different country. A transnational business does business over national borders because it exists in more than one country. For example, when Company A from the United States sells a truck to Company B in the United Kingdom, Company A is an international business. When Company A offers consulting services in the United States and in the United Kingdom because it has offices in both countries, Company A is a transnational business.

4. Businesses face cultural, linguistic, and logistical dilemmas when working across borders. However, the intricacy of transnational legal practice—at least from this Note’s perspective—is found in the conflicting ethical rules that every lawyer has an obligation to follow.

relationships.”<sup>5</sup> The formation of such legal relationships within the European Community<sup>6</sup> provides an excellent illustration of potential problems lawyers face in transnational practice, including differences in language, culture, and legal systems, and the governments of different sovereign countries exerting binding influence on lawyers’ actions.<sup>7</sup>

Perhaps the most confusing issue confronting lawyers in transnational practice is the conflicting rules of ethical conduct that dictate practitioners’ conduct whenever they cross a national border. In addition to significant communication and logistical issues, these ethical rules bind lawyers regardless of whether they know or have studied the rules pertinent to every county represented in a given situation. As such, many lawyers feel there is little guidance on how to handle the differences in ethical rules. Specifically, lawyers can potentially face disciplinary action both at home and abroad,<sup>8</sup> creating a serious problem called double deontology.<sup>9</sup>

Attempts by various organizations to curb or reduce double deontology, whether using a single or concerted effort, have yet to resolve the issue.<sup>10</sup> Although deontological conflicts manifest themselves predominantly in the European system, the impact on American lawyers is

5. Sydney M. Cone III, *Cross-Border Legal Practice in International Legal Centers as Viewed from New York*, A.B.A. SEC. INT’L L. & PRAC. PROGRAM 1 (2003) (quoting 1993 Report of ABA Section of Int. Law and Practice submitted to ABA House of Delegates).

6. See generally Consolidated Version of the Treaty Establishing the European Community, Mar. 25, 1957, 298 U.N.T.S. 11, <http://europa.eu/abc/treaties/archives/en/entoc05.htm> [hereinafter the “EC Treaty”] (The European Community is now commonly known as the European Union, but the substantive law outlined in the EC Treaty is still operative in instances which create double deontology. This paper focuses on the EC Treaty as the initial and persistent source of law for the legal profession in Europe. Therefore, this paper references the European Community instead of the European Union, but the effects are the same.). See Consolidated Version of the Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 253, <http://europa.eu/abc/treaties/archives/en/entoc01.htm>.

7. Jonathan Goldsmith, *Cross-Border Practice in the European Union*, A.B.A. SEC. INT’L L. & PRAC. PROGRAM 94 (2003).

8. PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE 94 (Maya Goldstein Bolocan ed., 2002), available at Central European and Eurasian Law Initiative, [http://www.abanet.org/ceeli/publications/conceptpapers/proflegalethics/professional\\_legal\\_ethics\\_concept\\_paper.pdf](http://www.abanet.org/ceeli/publications/conceptpapers/proflegalethics/professional_legal_ethics_concept_paper.pdf) [hereinafter PROF’L LEGAL ETHICS].

9. *Id.*

10. Several notable attempts include the General Agreement on Trade in Services (GATS) which is part of the World Trade Organization, the European Union directives previously discussed, the agreement between the ABA and the Brussels Bars, and the International Bar Association’s (IBA) Statement of General Principles for the Establishment and Regulation of Lawyers. *Id.* at 93. Generally, all these efforts attempt to advise and regulate transnational activity by focusing on the form of practice, the scope of the practice, and the ethics and discipline associated with that practice. *Id.* However, all these efforts fall short because they do not specifically address the legal profession to encompass its deontology difficulties, or they are not binding on all of the necessary parties. By and large, most of these agreements are limited in scope and are applied by only a few nations in their dealings with a few specific nations.

increasing as their clients—American businesses—push for globalization and expand to become transnational. Additionally, as the United States increases its involvement in international trade communities, such as the World Trade Organization, American lawyers are forced to confront different ethical codes.<sup>11</sup> In short, the current European transnational legal system creates potential double deontology problems for both European and American lawyers, yet efforts to resolve these ethical conflicts are ineffective. However, one effort to address the situation stands above the rest as a potential solution. The Council of Bars and Law Societies of Europe<sup>12</sup> published the *Code of Conduct for Lawyers in the European Union*<sup>13</sup> (“CCBE Code”), attempting to harmonize the various European ethical codes and provide guidance to lawyers engaged in transnational practice. Although the CCBE Code has flaws, it represents the best guide toward the eventual solution: the European Parliament taking comprehensive and drastic steps to harmonize the various ethical codes into a single, unified code that eliminates the legal vacuum currently confronting the profession.

Part I of this Note defines deontology, explains the circumstances under which double deontology occurs, and provides a brief history of the CCBE Code. Part II discusses European double deontology, and Part III examines the situations in which double deontology arises. Finally, Part IV analyzes various approaches beyond the CCBE Code to deal with the problems arising from double deontology and concludes that the best solution is to utilize a unified and comprehensive ethical guideline.

## I. BACKGROUND—WHAT IS DEONTOLOGY AND THE CCBE?

Deontology is the theory of moral obligation,<sup>14</sup> which allows a person or organization to qualify what is good or bad conduct.<sup>15</sup> Immanuel Kant<sup>16</sup> observed that nothing can be good on face value: “[i]t is impossible to

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11. See World Trade Organization, <http://www.wto.org> (last visited Nov. 13, 2005).

12. See *infra* note 27 and accompanying text.

13. Council of Bars and Law Societies of the European Union, *Code of Conduct for Lawyers in the European Union as Amended 2002* (2002), [http://www.ccbe.org/doc/En/code2002\\_en.pdf](http://www.ccbe.org/doc/En/code2002_en.pdf) [hereinafter “CCBE Code”].

14. Merriam-Webster Online, <http://www.m-w.com/dictionary/deontology> (last visited Nov. 27, 2005).

15. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Cambridge University Press 1998) (1785).

16. Kant is a renowned Prussian philosopher from the 1700s who developed the concept of deontology. See Philosophy Pages, Immanuel Kant, <http://www.philosophypages.com/ph/kant.htm> (last visited Nov. 25, 2005).

conceive of anything in the world or even out of it, which can be taken as good without qualification.”<sup>17</sup> Basically, every action is neutral until some outside force qualifies it under a code or structure, and Kant outlined deontology as the system that establishes what is good and bad. Importantly, no universal deontology exists and thus, every group can have its own.<sup>18</sup> Initially, such a notion is difficult to understand; how nothing can be universally good without qualification. But consider courage and intelligence, for example. Most people agree that courage and intelligence are good. However, these traits can also serve evil ends.<sup>19</sup> For example, a man may have to summon enough courage to kill an innocent and utilize a high degree of intelligence to avoid being caught for the act. Without some context, no trait or action can be good or bad; it exists without such a classification until someone attaches a value to the trait or action. The same holds true for the legal profession. Generally, loyalty to clients is a good trait for a lawyer; however, this loyalty is bad where it forces the lawyer to poorly represent another client due to a conflict of interests.<sup>20</sup>

For lawyers, deontology manifests as ethical rules which dictate what they can and cannot do in the course of obtaining and representing clients, allowing the legal profession to be self-regulating.<sup>21</sup> Ethical codes set standards for the profession, provide guidance for practitioners facing ethical dilemmas, and increase both clients’ and the public’s trust of lawyers and the legal profession.<sup>22</sup> Predominantly, the organizations licensing lawyers to practice in specific jurisdictions create the rules for that jurisdiction, and all lawyers licensed in that jurisdiction must abide by them.<sup>23</sup>

17. KANT, *supra* note 15, at 7.

18. An individual may also have his own deontology. While this could make interacting with other people more awkward, the possibility of every individual having a different deontology is entirely plausible under Kantian ethics. Logically, these deontologies would overlap, as there are relatively few permutations of what constitutes “good” and “bad.”

19. Michael S. Russo, *Deontology and It’s Discontents: A Brief Overview of Kant’s Ethics*, <http://www.molloy.edu/sophia/kant/deontology.htm> (last visited Nov. 20, 2006).

20. Broken down to its very basic premise, this situation describes the conflicts of interest a lawyer faces when taking on multiple clients and the challenges faced in balancing those clients’ potentially competing interests.

21. For example, in the United States this standard is set by each state’s bar association and is based on the American Bar Association’s (“ABA”) Model Rules of Professional Conduct. MODEL RULES OF PROF’L CONDUCT (2004) (“ABA Model Rules”).

22. PROF’L LEGAL ETHICS, *supra* note 8, at 1.

23. *Id.* at 6. For example, the Missouri State Bar is a licensing association that is part of the state’s judicial branch. All lawyers wishing to practice in Missouri must be licensed by this body, and are subject to discipline for violating the ethical standards outlined by the state.

Double deontology describes the situation where someone is obligated to simultaneously follow two different sets of ethical standards, and often, the two standards conflict on some issue.<sup>24</sup> For most people this situation exists primarily within philosophical confines; however, it is a very real problem in the legal profession. Absent any international ethical organization with binding authority to license and guide lawyers, a lawyer who practices outside of his licensed jurisdiction is likely encounter a different ethical code. The lawyer has a duty to follow this new code, as well as the code in his home jurisdiction, and he is subject to discipline under both codes.

While most ethical codes are fundamentally similar, the intricate details and applications often differ, substantially impacting the way in which a lawyer practices his craft. When analyzing these differences, two terms dominate double deontology discussion: “Home State” and “Host State.” The Home State is the licensing jurisdiction to which a lawyer belongs and authorizes the lawyer’s practice.<sup>25</sup> Conversely, the Host State is any other area where a lawyer carries on cross-border legal activities.<sup>26</sup> The catalyst of this issue is cross-border activity, which occurs when a legal practitioner operates in two countries. Understanding the interplay between the ethical codes of the Home and Host State, the basis for their respective legal systems, and when the various ethical codes become binding is central to addressing and resolving double deontology issues.

Realizing the growing inconsistency in ethical codes on the national level, the Council of Bars and Law Societies of Europe<sup>27</sup> adopted the CCBE Code in 1998 to unify the legal profession in Europe and guide practitioners in the expanding transactional practice.<sup>28</sup> The CCBE Code “is

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24. *Id.* at 94.

25. CCBE Code, *supra* note 13, art. 1.6. The CCBE Code refers to Home and Host State, specifically within the context of the European Union and the European Economic Community, using terminology such as “Member State.” However, the definitions work equally well in any discussion, regardless of geographic location.

26. *Id.*

27. The Council of Bars and Law Societies of Europe (“CCBE”) was created in 1960 and is “the officially recognised [sic] representative organisation [sic] for the legal profession in the European Union (EU) and the European Economic Area (EEA).” Council of Bars and Law Societies of Europe, *What is the CCBE?*, [http://www.ccbe.org/en/accueil/accueil\\_en.htm](http://www.ccbe.org/en/accueil/accueil_en.htm) (last visited Oct. 5, 2007) [hereinafter “About the CCBE”].

28. See Council for Bars and Law Societies of Europe, *History of the CCBE*, [http://www.ccbe.org/doc/histoire/en/chap\\_02\\_en.htm](http://www.ccbe.org/doc/histoire/en/chap_02_en.htm) (last visited Oct. 5, 2007) [hereinafter “CCBE History”]. The CCBE Code is based off the Declaration of Perugia, which observed four incongruities in the European legal system and attempted to harmonize the system’s fundamental principles. The CCBE eventually found the Declaration of Perugia insufficient to confront the problem presented by double deontology because it did not provide enough guidance to lawyers involved in cross-border activities. CCBE History, § 2.1. *The Declaration of Perugia on the Principles of Professional Conduct of the*

a framework of principles of professional conduct” that individual lawyers can use to structure their transnational practices.<sup>29</sup> The CCBE intended that the Code be domestically binding, as well as governing all cross-border activities in the European Community; however, the CCBE Code is not binding unless the “rules are adopted as enforceable rules by [the] particular Bar [of both the Home and Host States].”<sup>30</sup>

## II. THE ISSUE: EUROPEAN DOUBLE DEONTOLOGY

European lawyers face increased difficulties as compared to their American counterparts.<sup>31</sup> First, Europe has multiple legal traditions dictating different formulations of a lawyer’s role.<sup>32</sup> Second, Europe has various levels of licensing for the legal profession fragmenting the roles lawyers play in society.<sup>33</sup> Third, the European Community creates statutory complications providing increased instances of double deontology.<sup>34</sup>

### A. *Legal Traditions Impacting Double Deontology*

In Europe, two legal traditions exist which fundamentally differ on the position of a lawyer’s professional role within the legal system.<sup>35</sup> English or Roman (or some combination thereof).<sup>36</sup> First, the English tradition

*Bars and Law Societies of the European Community* (1977), [http://www.ccbe.org/doc/En/perugia\\_en.pdf](http://www.ccbe.org/doc/En/perugia_en.pdf).

29. CCBE History, *supra* note 28, § 2.2.

30. *Id.*

31. Double deontology is rarely a problem in the United States because a lawyer must be licensed in every state in which he practices. See American Bar Association, “Bar Admission,” <http://www.abanet.org/legaled/baradmissions/bar.html>. Furthermore, the combination of several factors limit the possibilities for double deontology problems: the American system highly regulates reciprocal bar admissions; American ethical codes stem from one source and base themselves on the same rule of law (the ABA Model Rules are the basis for most states’ codes, making the bulk of ethical standards similar from state-to-state, and every state has the same legal tradition and observance of a common law system), and American lawyers have a unitary character in that they can perform many functions under one license. For example, a lawyer licensed in a state can, among other things, litigate a case, help sell a business, mediate disputes, and give other legal advice within the licensing state. PROF’L LEGAL ETHICS, *supra* note 8, at 2–9; see also American Bar Association, *Center for Professional Responsibility*, [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html) (last visited Feb. 8, 2006).

32. Hans-Jürgen Hellwig, *The Legal Profession in Europe: Achievements, Challenges and Chances*, 4 GER. L.J. 263, 266 (2003), available at [http://www.germanlawjournal.com/pdf/Vol04No03/PDF\\_Vol\\_04\\_No\\_03\\_263-276\\_Legal\\_Culture\\_Hellwig.pdf](http://www.germanlawjournal.com/pdf/Vol04No03/PDF_Vol_04_No_03_263-276_Legal_Culture_Hellwig.pdf).

33. PROF’L LEGAL ETHICS, *supra* note 8, at 2–3.

34. Goldsmith, *supra* note 7, § 2.

35. Hellwig, *supra* note 32.

36. *Id.*

distinguishes between barristers, who litigate and are recognized as officers of the court,<sup>37</sup> and solicitors, who provide individuals with legal advice or other services, with<sup>38</sup> each distinction following its own ethical code.<sup>39</sup> Essentially, lawyers are either barristers, whose primary obligation is to the court and the administration of justice,<sup>40</sup> or solicitors, who act as personal service providers and are able to render legal advice, owing primary allegiance to their clients.<sup>41</sup>

In contrast, a large number of European states adhere to the Roman tradition of the legal profession, where a lawyer's duties stem directly from professional rules and "the lawyer's position as a function in the administration of justice."<sup>42</sup> Under this tradition, lawyers work as tools of the system and attempt to provide justice while performing transactional work for individual clients.<sup>43</sup> Therefore, these lawyers perform the functions of the barristers under the English tradition,<sup>44</sup> but also perform many of the services reserved for solicitors under the English tradition. Unfortunately, great variation exists regarding which services lawyers can and cannot perform among the various legal systems modeled after the Roman tradition.<sup>45</sup>

Clearly, a lawyer practicing in several countries or representing a foreign interest in a national court could easily confuse which services they can ethically provide under their role in the judicial process of the

37. "Barristers are specialist legal advisors and court room advocates." The Bar Council, "What Barristers Do," <http://www.barcouncil.org.uk/about/whatbarristersdo/> (last visited Jan. 27, 2007). They use this specialized knowledge and courtroom experience to serve both the needs of clients and the legal system. *Id.*

38. Solicitors do much of the work American lawyers do outside of the courtroom such as providing expert guidance, estate planning, family law matters, advice in business transactions, and generally advising people of their rights under the law. The Law Society, *The Role of Solicitors in England and Wales*, <http://www.lawsociety.org.uk/aboutlawsociety/whatwedo/roleengwal.law> (last visited Oct. 5, 2007) (click "areas of law" hyperlink).

39. Barristers subscribe to the conduct outlined in *The Code of Conduct of the Bar of England and Wales*, while solicitors use the *Guide to Professional Conduct of Solicitors*. See generally *The Code of Conduct of the Bar of England and Wales* (1999) ("Barrister's Code"); *The Code of Conduct of Solicitors* (1999) ("Solicitor's Code").

40. Barrister's Code, *supra* note 39, pt. 3 § 302, provides:

A barrister has an overriding duty to the Court to act with independence in the interests of justice; he must assist the court in the administration of justice and must not deceive or knowingly or recklessly mislead the court.

41. Solicitor's Code, *supra* note 39, at R. 1.02 ¶¶ 4, 6. A solicitor's ethical duties come from the common law and serve to "assist both the public and the profession." In the event of conflicts, public interest decides the precedence of the rule applied. *Id.*

42. Hellwig, *supra* note 32.

43. *Id.*

44. Barrister's Code, *supra* note 40 and accompanying text.

45. Hellwig, *supra* note 32.

Host State. For example, a Welsh barrister could represent an English business in Spain and perform the duties of both a barrister and a solicitor while acting as an advocate of justice, but in his Home State such activities would not be allowed. As the lawyer attempts to simultaneously apply both the English barrister's code and the Spanish code, as both states require, double deontology issues could easily arise, affecting how he performs his duty and possibly incurring punishment under one or both codes.

### *B. Fragmentation Impacting Double Deontology*

Another factor contributing to double deontology is that different organizations license European lawyers to perform specific services in certain jurisdictions. Unlike the American state-based licensing system, local and regional European courts issue licenses recognized by national governments or groups of governments.<sup>46</sup> Further compounding the problem is that lawyers need different licenses to perform specific legal duties within the region, such as “notaries, magistrates, judges, advocates, civil servants and prosecutors.”<sup>47</sup> This layered approach provides little overlap because each position has its own educational track.<sup>48</sup> As such, each position maintains a unique code of conduct and regulatory agencies. Thus, a lawyer can hold licenses to practice in specific areas of law in several regions that all have different ethical codes. Normally, this situation would not present a problem unless an individual pursued multiple positions;<sup>49</sup> however, where a lawyer engages in cross-border activities, the previously-distinct boundaries blur under a completely new set of definitions in the Host State.<sup>50</sup>

### *C. Substantive Law Impacting Double Deontology*

The aforementioned factors pose a minimal risk for double deontology problems by themselves. In fact, if different legal traditions and fragmented licensing systems were the only sources of European double deontology problems, then solutions similar to the protections of the American system would suffice, wherein a lawyer merely holds several

46. PROF'L LEGAL ETHICS, *supra* note 8, at 2–3.

47. *Id.*

48. *Id.*

49. *Id.*

50. See *supra* notes 39–49 and accompanying text (defining what a lawyer is and what he can do in different countries).



licenses and follows the rules of whatever jurisdiction within which he currently is practicing. Unfortunately, unlike the American system, European legislation,<sup>51</sup> and the structure of the Treaty Establishing the European Community (the “EC Treaty”),<sup>52</sup> compromise the European licensing bodies and any restrictions placed on lawyers.

The EC Treaty outlines four principle freedoms, two of which are vital to lawyers engaging in transnational practice; however, these freedoms also sow the seeds for double deontology.<sup>53</sup> The two principles—freedom of movement of people and services to allow for cross-border activities, and the right to provide services and to establish permanent offices—provide lawyers the possibility to practice in every Member State of the European Community without seeking additional training or licensing.<sup>54</sup> Within this framework, substantive European Community law<sup>55</sup> for lawyers addresses three areas: services, establishment, and mutual recognition.<sup>56</sup> However, the law governing lawyers is inadequate because it does not address all potential cross-border activities in which a lawyer

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51. See *infra* notes 64, 66, 71 and accompanying text.

52. EC Treaty, *supra* note 6 and accompanying text.

53. EC Treaty, *supra* note 6, art. 3 (“For the purposes set out in Article 2, the activities of the Community shall include . . . an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services, and capital; measures concerning the entry and movement of persons [in the internal market.]” Logically, the free movement of persons and services would be most interesting to lawyers.

54. *Id.* arts. 43, 50.

Article 43 outlines the freedom of establishment as provided:

Freedom of establishment shall include the right to take up and pursue activities as self employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

Article 50 outlines the Freedom of Services as provided:

Services shall be considered to be ‘services’ within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

“Services” shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions.

Without prejudice to the provisions of the chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

55. Substantive law includes directives passed by the European Parliament and treaties ratified by Member States.

56. Goldsmith, *supra* note 7, § 2.

may engage, creating a vacuum of law wherein double deontology problems become a distinct possibility.<sup>57</sup> Even where the law recognizes cross-border activity, directives often call for “simultaneous application of both home and host country rules,” which create the possibility of double deontology issues.<sup>58</sup> In essence, the combination of the aforementioned factors and the structure and goals of the European Community creates opportunities for double deontology.

### 1. *Definitions Used in Statutory Language*

Several key terms dominate the substantive law governing transnational legal practice and double deontology issues:

Services are “temporary provision[s] of legal work across boundaries, where there is no permanent establishment of an office in other Member State[s]. . . .”<sup>59</sup> The right to provide services permits lawyers to conduct business outside of their Home State on either a temporary or sporadic basis.<sup>60</sup>

Establishment is the “permanent transfer of the lawyer to another Member State to undertake legal work there.”<sup>61</sup> Essentially, the right of establishment authorizes lawyers to setup offices in countries outside of their Home State on a permanent basis.<sup>62</sup>

Mutual Recognition is “the admission to the bar (or the acquisition of the title) in the other Member State without necessarily moving to that State, through a process of recognising [sic] the lawyer’s home qualifications.”<sup>63</sup> The Mutual Recognition of Diplomas Directive allows for recognition of a lawyer’s education and training in every Member State without rigorous inquiry.<sup>64</sup> The treatment of lawyers is different, however, outside of their Home State, depending on whether they exercise their freedom of services or their right of establishment.<sup>65</sup>

57. Laurel S. Terry, *An Introduction to the European Community’s Legal Ethics Code Part II: Applying the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 345, 356 (1993) [hereinafter *Applying the CCBE Code*].

58. Hellwig, *supra* note 32, at 266.

59. Goldsmith, *supra* note 7, § 2.

60. Terry, *supra* note 57, at 359.

61. Goldsmith, *supra* note 7, § 2.

62. Terry, *supra* note 57, at 359.

63. Goldsmith, *supra* note 7, § 2.

64. *See generally* Council Directive 89/48, 1989 O.J. (L 19) 16 (EC) (“Mutual Recognition Directive”). This directive acts as a European-wide reciprocal bar admission, allowing a lawyer to gain access to almost any European court once he obtains a license in any one court.

65. Terry, *supra* note 57, at 359.

## 2. *Lawyer Services Directive*

To enable the free movement of legal services, the European Parliament enacted Council Directive 77/249, the Lawyer Services Directive, which grants lawyers freedom to provide services throughout the European Community.<sup>66</sup>

[The directive states that] [a]ctivities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State. . . . A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.<sup>67</sup>

Basically, the Lawyer Services Directive permits lawyers to provide services in any of the European Community's Member States while using the professional title from their Host State.<sup>68</sup>

On its face, the Directive instructs lawyers engaging in cross-border activities to apply the ethical code of the Host State. However, if this code conflicts with the lawyer's Home State code of ethics, the question becomes how can the lawyer apply it "without prejudice to his obligations" to his Home State's ethical code? Moreover, the same directive later states that "a lawyer . . . shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes" when not involved in "activities relating to the representation of a client in legal proceedings or before public authorities."<sup>69</sup> These two contradictory directives require lawyers to simultaneously apply the ethical codes of both the Home and Host States, because a client who requires representation in a courtroom will necessarily need legal services outside of the courtroom, including preparation of the case. Therefore, these directives are ineffective and provide lawyers no guidance when double deontology problems arise and subsequently encourage the Host State to discipline the lawyer.<sup>70</sup>

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66. Council Directive 77/249, 1977 O.J. (L 78) 17 (EC) [hereinafter "Lawyer Services Directive"].

67. *Id.* art. 4(1), (2).

68. *Id.* arts. 2, 3.

69. *Id.* art. 4(1), (4).

70. *Id.* art. 7(2) ("In the event of non-compliance with the obligations referred to in Article 4 and in force in the host Member State, the competent authority of the latter shall determine in accordance with its own rules and procedures the consequences of non-compliance.").

### 3. *Establishment Directive*

In conjunction with the Lawyer Services Directive, Council Directive 98/5 formalized the freedoms the EC Treaty grants lawyers by facilitating the practice of law “on a permanent basis in a Member State other than that in which the qualification was obtained.”<sup>71</sup> This directive allows a lawyer to permanently establish a practice in a Host State under his Home State title,<sup>72</sup> simply upon registration in the Host State.<sup>73</sup> The directive authorizes lawyers to carry out normal legal activities in the Host State, with a few exceptions.<sup>74</sup> Importantly, “[i]rrespective of the rules of professional conduct to which [the lawyer] is subject in his home Member State, a lawyer practising [sic] under their home-country professional title shall be subject to the same rules of professional conduct as lawyers practicing under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory.”<sup>75</sup> While this statement seems fairly straightforward, it completely fails to address what happens when the lawyer pursues cross-border activities.

For example, if a German lawyer establishes himself in France and engages in transnational practice with German companies, doing business in both Germany and France, then the lawyer is subject to the ethical codes of both countries. If the lawyer follows the code of the Host State, where he is established, the lawyer still runs the risk of losing his license in both nations. If his Home State disciplines the lawyer or revokes his license, the lawyer automatically loses the right to practice in the Host State under his Home-Country title.<sup>76</sup> Once again, substantive European Community law creates a double deontology problem and fails to provide any guidance to lawyers, who are subject to discipline from both states.

### D. *Types of Legal Practices in Europe*

When discussing double deontology, it is extremely helpful to explore the types of transnational or cross-border practices in which a lawyer can engage, and which of these raise double deontology issues. Lawyers

71. Council Directive 98/5, 1998 O.J. (L 77) 36 (EC) [hereinafter “Establishment Directive”].

72. *Id.* art. 2.

73. *Id.* art. 3.

74. *Id.* art. 5 (The Host State reserves the right to exclude the lawyer from preparing deeds or from administering estates. In addition, the Host State may require the lawyer to appear in court with another lawyer licensed in the Host State.).

75. *Id.* art. 6(1).

76. *Id.* art. 7(5).

engage in four main types of cross-border practice and could simultaneously engage in all four types with different clients.<sup>77</sup>

The first type of practice avoids cross-border activity because the lawyer does not practice in any state except his Home State. Although the antithesis of any practice that might create double deontology issues, it is a valid legal practice and overwhelmingly the most common.<sup>78</sup> No double deontology problem arises in this context because the lawyer's practice is governed solely by one deontology—the code of ethics of the lawyer's Home State. Although multiple ethical codes may exist within that state, based on specific licensing for certain courts and/or functions, the lawyer usually only deals with area at a time.<sup>79</sup>

The second type of cross-border practice occurs where a lawyer provides services on only a temporary or sporadic basis in the Host State, but does not become licensed in the Host State.<sup>80</sup> Pursuant to European Community law, such a lawyer should look to the Lawyer Services Directive for guidance as to proper conduct and application of the ethical rules, which allows him to use his Home State title in the Host State without becoming established in the Host State. He must apply the Host State rules as well as his Home State rules.<sup>81</sup> However, the Directive offers no explanation of how one is to accomplish this task where the rules conflict.<sup>82</sup> In addition, there is no other directive or substantive law to guide lawyers in balancing or applying conflicting Home and Host State rules in situations where the Directive requires simultaneous application.<sup>83</sup>

A third type of cross-border practice occurs where a lawyer becomes established in the Host State, but either maintains ties to his Home State or uses both titles of office.<sup>84</sup> This practice falls squarely within the right of establishment set forth in the EC Treaty.<sup>85</sup> That the lawyer maintains ties to either his Home State or the title granted by the Home State

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77. Terry, *supra* note 57, at 360–61.

78. This paper assumes that most lawyers practice within their home jurisdiction their entire careers and the author has not found any authority to the contrary.

79. As previously discussed, there can be multiple licensing organizations in one country. Different legal services require different licenses, which are accompanied by unique ethical codes. Therefore, the lawyer would only encounter a double deontology problem if he held multiple degrees in professions having conflicting ethical codes, which is unlikely since the codes and degrees originated under the same cultural and legal traditions.

80. Terry, *supra* note 57, at 360. This falls directly under the EC Treaty. *See* EC Treaty, *supra* note 6.

81. Terry, *supra* note 57, at 362–63.

82. *See supra* notes 66–70 and accompanying text.

83. Terry, *supra* note 57, at 370.

84. *Id.* at 360–61.

85. EC Treaty, *supra* note 6.

distinguishes this type of practice from the first type. Even though a lawyer may be established in Germany, if he establishes himself in France, only uses the French legal titles, and only provides services within France, then there is clearly no cross-border activity. If that same lawyer continues to use his German title, however, he is subject to both the French and German ethical codes of conduct.<sup>86</sup>

The fourth type of legal practice involving cross-border activities is a combination of the second and third types. Essentially, a lawyer renders services in the Host State on a more than temporary or sporadic basis, but does not establish himself in the Host State or use the title of the Host State lawyer.<sup>87</sup> This is by far the broadest category, and thus, the category most likely to create a double deontology problem. For example, a lawyer who establishes himself in Spain (Home State) but provides legal services in Switzerland (Host State) every summer while at his vacation home. Such a situation raises the difficult question of whether the lawyer is merely providing services or is periodically established, and no substantive law or ethical code offers an answer. Clearly, both the Spanish and Swiss ethical codes apply, sometimes simultaneously.<sup>88</sup>

### III. CASE STUDY: HOW DOES DOUBLE DEONTOLOGY WORK?

The best way to examine double deontology problems is to study a specific situation where a lawyer must choose between conflicting ethical codes with little-to-no guidance. This section presents a brief outline of the conflict of interest rules from several countries, and then demonstrates how double deontology problems arise when the guidelines are applied in transnational practice. Rules governing conflict of interest provide a good example because every code of legal ethics addresses conflict of interest using the same core principles, but the application of those principles is vastly diverse.

The underlying principles guiding conflict of interest rules stem from the duties of loyalty and the effective representation a lawyer owes to his

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86. Terry, *supra* note 57, at 370.

87. *Id.* at 361.

88. If the Spanish lawyer is practicing in Spain using his Spanish title, then he falls into the first type of practice and only the ethical code of Spain applies. This is straightforward, unless the Swiss bar characterizes him as “established” in Switzerland. In such a situation, both bar associations are able to exercise control over his actions—or at least discipline him. However, when he is in Switzerland he is subject to the ethical codes of both Spain and Switzerland, irrespective of which title he uses. This type of practice is not addressed by substantive European law, as there is no recognized “periodic establishment.”

clients.<sup>89</sup> Logically, a lawyer who divides his loyalties between competing client interests cannot represent both clients to his utmost ability.<sup>90</sup> The preservation of these principles reinforces the client's trust in lawyers and ensures effective representation by "insuring the independence of the lawyer's professional judgment."<sup>91</sup> Contrasting applications pursuant to different codes achieve both goals while reflecting the inherently different views of a lawyer's role and cultural traditions associated with each system.<sup>92</sup>

England: The English code of ethics exemplifies a broad concept of "conflict of interest," including "conflicts between interests of a purely economic nature or the protection of confidential client information."<sup>93</sup> However, clients can give informed consent to a lawyer's representation where the client's interests could come into a conflict with the interests of another client represented by the same lawyer, effectively allowing lawyers to sidestep conflicts of interest and represent both clients.<sup>94</sup>

Germany: In Germany, a conflict of interest exists only where a lawyer acts for both of the parties involved in a current dispute, which is a very restricted formulation.<sup>95</sup> When such a situation arises, the lawyer must cease representing both parties and neither client may consent to the representation.<sup>96</sup> The German legislature—the *Satzungsversammlung* (Regulations Assembly)<sup>97</sup>—imposes statutory regulations governing the

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89. PROF'L LEGAL ETHICS, *supra* note 8, at 36.

90. A lawyer's devotion to his clients' interests, within the scope of the law and his ethical responsibilities, arises from the ancient concept that one servant cannot serve two masters. *Id.* at 36. As applied to the attorney-client relationship, the lawyer is the servant and can serve as many clients as he can simultaneously and capably represent, but he cannot serve multiple clients whose interests conflict. *Id.*

91. *Id.*

92. *Id.*

93. Hellwig, *supra* note 32, at 266–67.

94. See Barrister's Code, *supra* note 39, ¶¶ 603, 608 and 703. See also Solicitor's Practice Rules R. 16(D) (1990) (The Solicitors' Code prohibits a lawyer or firm from acting on behalf of multiple clients whose interests are in conflict subject to a limited number of exceptions, which requires all affected clients to give their informed consent and that the representation be reasonable under the circumstances).

95. The legal profession in Germany is regulated by statute, including the guidelines on avoiding conflicts of interest. See Dierk Mattik, Secretary General, German Bar Association, *Regulation of the Lawyer Profession and the Duties and Functions of the Lawyer Organisations in Germany* § 1 (July 14, 2004), available at <http://www.anwaltverein.de/regulation.rtf> [hereinafter "German Lawyer Regulations"].

96. Hellwig, *supra* note 32, at 267.

97. German Lawyer Regulations, *supra* note 95, at 2 (The Regulations Assembly helps formalize regulations for the legal profession that are created by statute. This body is legislative in nature and its primary responsibility is to "specifically formulate the statutory rules in accordance with the guidelines prescribed by the legislature as discernible from the law.").

conduct of German lawyers,<sup>98</sup> and thus the legislature has authority to change the regulations at any time, further complicating ethical standards.

France: Although the French code of ethics operates in a similar way to the German code regarding conflicts of interest, it draws a distinction between current and past cases or clients.<sup>99</sup> If the cases are not concurrent, the lawyer can serve both clients except where “the lawyer’s knowledge obtained because of his activities for the earlier client benefits the current client in an unjustifiable way.”<sup>100</sup> However, French law does not impute such a conflict to an entire firm, leaving other lawyers in the firm free to represent the client without involving the lawyer who possesses the knowledge creating the conflict.<sup>101</sup>

Faced with the wide array<sup>102</sup> of different formulations of what constitutes a conflict of interest and the aforementioned factors, a European lawyer may encounter a complex double deontology problem<sup>103</sup> where he could be disciplined irrespective of his actions. For example, a German *Rechtsanwalt*<sup>104</sup> could be working with a French *Avocat*<sup>105</sup> to represent a French baker’s interests in England. The German lawyer provides services to the French company during the summer because his vacation home is located in the same French village as the company. Based on his reputation, the company asks him to travel on its behalf. Apparently, an English crumpet factory has been using the French baker’s secret receipt for croissant dough. In addition, the German lawyer has a substantial monetary investment in the crumpet factory and has previously provided it with legal services because it is managed by his good friend. Under those facts, the German lawyer has a connection to the opposing party and a double deontology problem exists because the conflict of interest rules in the three countries are not the same.

98. German Lawyer Regulations, *supra* note 95 and accompanying text.

99. Hellwig, *supra* note 32, at 267.

100. *Id.* See generally Paris Lawyer, <http://www.avocat-paris.org> (last visited Oct. 5, 2007).

101. Hellwig, *supra* note 32, at 267.

102. Only three nations are included in this analysis for brevity and clarity. In fact, most nations have distinct formulations of what constitutes a conflict of interest, as well as distinct solutions to other professional issues. Clearly, the more countries (and their respective ethical codes) that are Host States in a specific instance of cross-border practice, the more complicated the double deontology problem becomes.

103. The problem is referred to as one of “double deontology” even when three or more ethical codes come into conflict. There is no such things as triple or quadruple deontology.

104. Lawyer Services Directive, *supra* note 66, art. 1 (The title for a German lawyer).

105. *Id.* (the title for a French lawyer).



The English code considers this representation a conflict of interest because it involves economic interests, but permits one client to release the German lawyer so he can act on the other's behalf.<sup>106</sup> However, the French code forces the lawyer to determine whether the factory is a former client, and if so, whether his information about the factory benefits the French baker in an unjustified way. Even if it does, his French co-counsel may continue with the representation.<sup>107</sup> Concurrently, the lawyer must apply the German code, which would not classify this situation as a conflict of interest under its narrow formulation.<sup>108</sup> Regardless of the lawyer's decision, he faces potential disciplinary proceedings and criminal sanctions under each ethical code.<sup>109</sup> Unfortunately, the German *Rechtsanwalt* will probably withdraw from the case to avoid any punishment, leaving his clients without their preferred representation and detracting from the lawyer's opportunity to make a living, in potentially a very profitable case.

It is this exact situation the CCBE Code of Conduct seeks to prevent. If the CCBE Code were enacted and enforceable, the German lawyer would be forced to "serve the interests of justice" as well as represent his client (providing advice) in court.<sup>110</sup> Further review of the Code reveals that he should comply with the English ethical code because he is practicing in England and thus, it is the Host State.<sup>111</sup> As such, he would be aware of and could apply the English code because it would be on file with the Secretariat of the CCBE.<sup>112</sup>

Under the CCBE Code, the German lawyer faces other problems. First, the Code offers no guidance on whether to apply the Barrister's Code or the Solicitor's Code, since his German training and education makes no such distinction. Further, the CCBE Code addresses conflicts of interest<sup>113</sup> using a different standard than that set forth in the English code.<sup>114</sup> Finally,

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106. See *supra* note 94 and accompanying text.

107. Hellwig, *supra* note 32, at 267. See also *supra* notes 99–101 and accompanying text.

108. See *supra* note 95 and accompanying text.

109. Hellwig, *supra* note 32, at 268. Punishment includes monetary fines, imprisonment, and suspension of practicing privileges.

110. CCBE Code, *supra* note 13, § 1.1

111. *Id.* § 2.4. Under the laws of the European Union and the European Economic Area a lawyer from another Member State may be bound to comply with the rules of the Bar or Law Society of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.

112. *Id.* "Member organisations [sic] of CCBE are obliged to deposit their codes of conduct at the Secretariat of CCBE so that any lawyer can get hold of the copy of the current code from the Secretariat."

113. *Id.* § 3.2

114. *Id.* § 3.2.2 "A lawyer must cease to act for both client [sic] when a conflict of interests arises

the German lawyer is unsure whether the Code requires him to incorporate substantive European Community laws or if it was intended to be a stand-alone document.<sup>115</sup> Confused and frustrated, the lawyer resigns himself to either dropping the case entirely, in degradation of his livelihood, or facing potential discipline from at least one Member State's bar association.

#### IV. ANALYSIS: DEALING WITH DOUBLE DEONTOLOGY

In situations where a double deontology problem exists, a lawyer faces the daunting task of determining which ethical standard to apply, taking into account the potential disciplinary action from every licensing body with an interest in his conduct. There are four standards a lawyer in such a situation could use: (1) his own moral standard; (2) the standard in the ethical code of the nation whose discipline he is definitely subject to (Home State); (3) the code of the state in which he is rendering services (Host State); or (4) some third party's code of conduct.<sup>116</sup> In making this choice, the conflicted lawyer must perform a three-part inquiry: (1) which law should he initially consult to determine which rule to use; (2) which set of rules does this initial source recommend; and (3) how to apply the substantive provisions of the ethical code to determine what he may or may not do pursuant to the substantive content of those rules.<sup>117</sup>

The second part of the inquiry builds entirely on the first because it is merely the act of the lawyer reading and comprehending the guidance set forth by the source of law consulted under the first step, which is invariably a declaration of the proper ethical code for the lawyer to follow.<sup>118</sup> Further, the third part is relatively self-explanatory and easy to follow because the lawyer must merely apply the substantive provisions of the ethical code identified in the second step to a particular set of facts or circumstances. Therefore, the first step—choosing which law to consult in determining the applicable ethical code—is the crux of resolving any

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between those clients and also whenever there is a risk of a breach of confidence or where his independence may be impaired." Unlike the English code, there is no mention of pure economic interests (which are arguably included depending on personal interpretation), nor does it permit the informed consent of the parties to cure the conflict.

115. A concern exists as to whether the phrase "Under the laws of the European Union . . ." intends that the substantive European Community law be incorporated, or whether this is merely a recognition that such laws exist. If this phrase was intended to incorporate the substantive laws, the Lawyer Services Directive's ambiguity regarding application of Home and Host state codes, which is contained within substantive European Community law, would add another level of contradiction to the CCBE Code. See *supra* note 13 and Lawyer Services Directive, *supra* note 66.

116. Terry, *supra* note 57, at 347 (explicitly mentioning options 2 and 3; alluding to option 4).

117. *Id.* at 348–49.

118. *Id.* at 349.

double deontology problem. In fact, if a straightforward and enforceable guideline existed and directed lawyers to apply a particular code of ethics in their cross-border practices, double deontology problems would cease to arise. Several such efforts have been made, unfortunately, no such guideline yet exists.<sup>119</sup>

Although individual lawyers are the ones directly affected by double deontology problems, since they must choose a code of ethics to follow and face potential discipline as a result, such problems are truly international in scope and should be addressed by an international body. While every lawyer can make an educated decision based on his unique cross-border practice, guidelines are necessary to both shield lawyers from potential discipline and bring a sense of certainty to cross-border practice. Otherwise, lawyers may provide inadequate transnational services or cease such practice altogether, subjecting international businesses to unnecessary litigation and limiting the rule of law in globalization. In addressing these concerns, there are five possible responses to double deontology problems.<sup>120</sup> Although one stands out from the rest as the best response, each deserves a closer inspection.

#### *A. Ignore the Problem*

By far the easiest and, by definition, hands-off solution is to simply ignore potential deontology problems *ex ante*, and deal with disciplinary proceedings on a case-by-case basis.<sup>121</sup> The American Bar Association (“ABA”) Model Rules takes this approach. These rules recognize that such a conflict may arise, but fail to specify a resolution for lawyers subject to the conflicting rules of multiple states to resolve the conflict in the transnational context.<sup>122</sup> Essentially, the lawyer in this context is left to make the decision on his own and the licensing body presumes the lawyer will make the best decision.

Several problems arise from this response. First, recognizing a problem and choosing not to deal with it leaves a vacuum in the application of law, providing ethical, hard-working lawyers with no guidance in a confusing lose-lose situation. Second, allowing lawyers to make their own decisions and reviewing them only after a violation has occurred is more tedious for

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119. See *supra* note 10 and accompanying text.

120. PROF'L LEGAL ETHICS, *supra* note 8, at 94. (The contributors to this book create a framework into which virtually all current efforts fall.).

121. *Id.*

122. ABA Model Rules, *supra* note 21, at R. 8.5, cmt. 7.

a lawyer because he has no guidance while performing the three-part inquiry, all the while contemplating which jurisdiction will inevitably discipline his choice. However, as previously noted, this solution creates uncertainty because it merely addresses the specific case presented and fails to establish how lawyers are to resolve future double deontology problems.<sup>123</sup>

### *B. Home State Assistance Approach*

Another response to double deontology problems allows the lawyer to make his own decision, but allows the Home State to make submissions in the lawyer's disciplinary proceeding to bolster his defense.<sup>124</sup> A lawyer still faces conflicting rules and must use his judgment to navigate the situation, but will have some recourse if the Host State seeks to discipline him for adhering to rules required by his Home State.<sup>125</sup> After charging a lawyer with violating its ethical code, the Host State must provide all relevant information to the lawyer's Home State and allow the Home State to comment and make any submissions necessary for that lawyer's defense.<sup>126</sup>

The ABA-Brussels Bar Agreement<sup>127</sup> is an excellent example of this approach. The agreement requires American lawyers working in Brussels to abide by the ethical rules applied in Brussels. If an American lawyer violates these rules, the Brussels Bar and the ABA work in concert to develop an appropriate punishment.<sup>128</sup> As such, the American lawyer is disciplined under the Brussels rules (Host State), but the ABA (Home State) may review all the documents in the case and plead on behalf of the lawyer who has been accused.<sup>129</sup>

The Home Assistance approach still fails to guide all lawyers because its scope is limited and necessarily affects only those countries and situations specified by any given agreement. Further, the practical effect of this technique provides minimal enforcement structure, because many

123. *Id.* at cmt. 6 (“The choice of law provision is not intended to apply to transnational practice. Choice of law in this content should be the subject of agreements between jurisdictions or of appropriate international law.”).

124. PROF'L LEGAL ETHICS, *supra* note 8, at 94.

125. Establishment Directive, *supra* note 71, art. 7(2); (3).

126. PROF'L LEGAL ETHICS, *supra* note 8, at 94; Establishment Directive, *supra* note 71, art. 7(2); (3).

127. Agreement Between the American Bar Association and the French Language Order of the Brussels Bar and the Dutch Language Order of the Brussels Bar, Aug. 6, 1994, U.S.—Bel.

128. *Id.*

129. *Id.*

national bar associations are voluntary organizations.<sup>130</sup> Because a lawyer can practice without becoming a member of his national bar association, enforcement policies set forth in agreements by that association may not apply. Admittedly, most lawyers want guidance from a code, especially when facing difficult decisions abroad. Even so, the agreements may not be truly binding on all such lawyers.<sup>131</sup> The most obvious problem with this technique is that it only assists lawyers at the disciplinary stage and does not harmonize all cross-border practices. Most lawyers would prefer to avoid professional discipline entirely so as to never have a need to avail themselves to the assistance of their Home State.

### C. Conflicts of Law Approach

The theory behind the Conflicts of Law response to double deontology problems is that every state creates regulations which consider the weight and application of foreign<sup>132</sup> elements in a case. For example, each licensing body develops a listing of how ethical rules apply to the situations in which a particular court may exercise its jurisdiction and which rule takes precedence when a conflict arises. The response resolves double deontology problems where one or both jurisdictions involved has previously specified the ethical code that applies when there is conflict.<sup>133</sup> Notably, the parties involved (i.e., the Home State and Host State) need not make this decision because a third party may exercise this right.<sup>134</sup>

But “each state has its own methods and rules for determining whether particular issues in a suit involving foreign elements should be determined by its own local law rules or by those of another state,”<sup>135</sup> and few international bodies enjoy being told what to do or that their codes/laws do not apply. The double deontology problem occurs where multiple countries having conflicting methods and rules all become concerned with the actions of a lawyer engaged in cross-border practice.<sup>136</sup> The problem is

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130. See, e.g., Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 *FORDHAM INT'L L.J.* 1382, 1426–27 (1998) [hereinafter *Hybrid Model*].

131. *Id.* at 1427.

132. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971). As used in this instance, the word “foreign” denotes an element of a case involving occurrences outside of that jurisdiction, not another nation state. Nonetheless, this definition fits within this paper’s scope.

133. PROF'L LEGAL ETHICS, *supra* note 8, at 95.

134. CCBE Code, *supra* note 13 (The CCBE Code is an example of a third party creating Conflicts of Law rules in order to minimize double deontology problems).

135. PROF'L LEGAL ETHICS, *supra* note 8, at 95.

136. This assumes that the lawyer engaged in cross-border activities. Otherwise, there can be no double deontology.

that each state wants its own rules to apply, which further complicates an already confusing situation. In addition, if the ethical codes of the Home and Host States conflict, there is a high likelihood that their Conflicts of Law choices will also conflict. Therefore, implementing the Conflicts of Laws response to the double deontology problem creates additional conflict in multi-layered situation caused by each party insisting that both its ethical *and* conflicts of law rules constitute the appropriate method of resolution.

When a third party chooses the applicable ethical code<sup>137</sup> it sets the stage for major problems related to enforcement. While a third party may provide guidance that is rational and easy to apply, it is entirely possible that no one will follow that guidance. Since there is currently no third party with the authority to make its rules binding on the Member States of the European Community,<sup>138</sup> a state could simply ignore the guidelines of the third party and apply its own code without facing potential punishment by the third party.

#### *D. Positive List Approach*

Under the Positive List approach, a lawyer obeys the Host State's ethical code with the exception of certain rules specified in advance.<sup>139</sup>

137. CCBE Code, *supra* note 13, at R. 1.5, 2.4. Rules 1.5 and 2.4 provide, although somewhat ambiguously, that the Host State's ethical code applies. While there is some disagreement about whether these rules provide a concrete standard to always apply the Host State's code, that application will suffice for purposes of this example.

Rule 1.5 provides:

Without prejudice to the pursuit of a progressive harmonization of rules of deontology or professional practice which apply only internally within a Member State, the following rules shall apply to the cross-border activities of the lawyer within the European Union and the European Economic Area. Cross-border activities shall mean

... all professional contacts with lawyers of Member States other than his own; and

... the professional activities of the lawyer in a Member State other than his own, whether or not the lawyer is physically present in that Member State.

Rule 2.4:

Under the laws of the European Union and the European Economic Area a lawyer from another Member State may be bound to comply with the rules of the Bar of Law Society of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.

138. This assumption is based on the notion of national sovereignty. Admittedly, nation-states do submit to the authority of certain third parties such as the World Trade Organization and the United Nations. Nation-states voluntarily join these organizations, however, and choose to follow only certain guidelines of the organization. For example, my research uncovered nothing to contradict the proposition that there exists any nation-state that subjects its judiciary to the scrutiny or decision-making authority of any third party.

139. PROF'L LEGAL ETHICS, *supra* note 8, at 95.

Essentially, the Home State allows its lawyers to apply the other nation's ethical code to resolve most issues, but for certain issues, such as conflicts of interest, it requires compliance with its own code. A lawyer must take note of these exceptions before engaging in cross-border practice and conduct his activities accordingly.

Similar to previously discussed responses to double deontology problems, there are several glaring problems caused by this solution. First, two nation-states that disagree on fundamental aspects of the legal profession—what constitutes a conflict of interest, for example<sup>140</sup>—are unlikely to agree on exceptions. Indeed, if a Home State is so opposed to a Host State's treatment of an issue that it requests an exception, that issue will likely be central to a lawyer's ability to provide competent legal services. In such a situation, neither state would acquiesce.

Second, the Positive List approach also requires many standing agreements between nations<sup>141</sup> before exceptions are created. There is little incentive for every Member State to develop agreements with every other Member State because lawyers can already move freely between countries in order to provide services pursuant to the European Community's Mutual Recognition Directive<sup>142</sup> as well as its other applicable directives.<sup>143</sup> This solution therefore undermines, or at least calls into question, substantive law already in place. Further, such a solution implicates concerns about the political difficulty of trying to create a large number of comprehensive agreements between different nations.

#### *E. Harmonized Rules Approach*

Finally, there is the Harmonized Rules approach, under which the multiple ethical codes are combined into a solitary guideline with the force of law. Every lawyer engaging in cross-border practice would be required to follow this code, effectively eliminating double deontology problems.<sup>144</sup> This unified ethical code would outline specific applications as either a self-contained document containing the guidelines in its text, or by serving as a guidepost, instructing lawyers when to apply which state's rules.<sup>145</sup>

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140. See *supra* Part IV.D.

141. These would most likely be similar to the ABA-Brussels Bar Agreement. Hybrid Model, *supra* note 127, at 1483.

142. See generally Mutual Recognition Directive, *supra* note 64.

143. See generally Lawyer Services Directive, *supra* note 66; Establishment Directive, *supra* note 71.

144. PROF'L LEGAL ETHICS, *supra* note 8, at 95.

145. The CCBE Code is designed as both a guidepost and a self-contained document setting forth

This approach is probably the only response that can completely eliminate double deontology problems from transnational legal practice. For the aforementioned reasons (particularly the difficulty in reaching a consensus between so many nations), however, it would also be the most difficult, and therefore the most unlikely response to be adopted. Reconciling multiple ethical codes would be very difficult, as organizations and nations would have to surrender traditional manners of practice in order to conform to the new rules that do not currently have the force of law.<sup>146</sup> Further, such an attempt would face problems related to its lack of authority to bind member states, and consequently, enforcement issues.<sup>147</sup>

Implementing the Harmonized Rules approach is only feasible in the European Community and would require amending or repealing specific sections of the EC Treaty, the Establishment Directive, and the Lawyer Services Directive. Perhaps the easiest way to achieve this goal would be to structure the European Community's guidelines based on the United States' legal model, which has strict standards for lawyers who practice in multiple jurisdictions.<sup>148</sup> Moreover, it would require all states adopting this code to sign a treaty, thereby incorporating it into the laws of each nation. If a Member State refused to sign the unified code, their lawyers could not benefit from the freedoms granted in the EC Treaty and substantive European law affecting lawyers.

The CCBE Code is an attempt to implement this Harmonized Rules approach, but it faces major problems. The differences in legal traditions and ethical codes between nations are at the heart of the double deontology problems and will exist irrespective of any compromises that are made.<sup>149</sup>

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specific standards. This creates confusion of various ethical issues, such as conflicts of interest, advertising legal services, etcetera. *See supra* note 137.

146. PROF'L LEGAL ETHICS, *supra* note 8, at 95.

147. *See, e.g.*, ICC-ASP/4/32, available at [http://www.icc-cpi.int/library/defence/ICC-ASP\\_4-32.Eng.pdf](http://www.icc-cpi.int/library/defence/ICC-ASP_4-32.Eng.pdf) [hereinafter "IBA Code"]. Essentially, no state wants to sacrifice its sovereignty or subject its citizens to disciplinary action in another nation unless it is adequately compensated with some benefit or views the discipline as appropriate. The IBA Code, which is an example of such an attempt, is applied sporadically at best.

148. The standards in the United States require a lawyer wishing to engage in cross-border practice to first either gain admission to the Host State's bar association, effectively defeating the freedom of movement of people and services that is central to the EC Treaty, or gain American reciprocal admission, which requires lawyers to meet certain guidelines, such as attending continuing legal education programs on the law of the Host State and specifying exactly what ethical codes are applied in specific situations. Consistent with the central principles of the European Community, the most feasible structure would be to create stricter standards for reciprocal admission and require a certain amount of education/training under the Host State's legal system, similar to Continuation Legal Education in America.

149. A unified code may resolve this issue before it becomes a problem by instructing lawyers as to the circumstances in which they must apply the rules of either the Home or Host State. However,



Beginning with such varied perspectives, gathering professionals from different countries to write a comprehensive code is a daunting task, which is exacerbated by the necessity of convincing each nation to sign it.<sup>150</sup> In addition, as previously noted, the CCBE Code contains ambiguities and contradictions. One solution would be to allow the Code to serve only a guidepost function, as this would eliminate the need for nations to entirely sacrifice their unique legal traditions.<sup>151</sup>

Yet another major problem with the CCBE Code is that Member States have the ability to pick and choose which of the European community resolutions they adopt because legislation on the national level is necessary to adopt any CCBE directive.<sup>152</sup> Since the CCBE is a voluntary organization, some European nations may refuse to submit to the Code's jurisdiction, creating massive enforcement issues. Simply refusing to extend the benefits of the Code to lawyers from Member States that refuse to take the requisite steps for the Code to have the force of law does not guarantee that all Member States will take those steps.

In sum, problems related to implementing this solution suggest that, practically, it would likely operate against the principles outlined in the EC Treaty by restricting the freedom of movement and services, as no European nation could be forced to adopt or comply with the CCBE—each would be free to completely ignore both the organization and the CCBE Code.

#### CONCLUSION: SORTING OUT THE DOUBLE DEONTOLOGY DISORDER

Double deontology, while pertinent to only a small percentage of legal practice, is a very real and growing problem. As transnational practice grows to keep pace with the globalization of business, conflicting ethical codes will become a greater problem for lawyers, as they increasingly engage in cross-border activities.

By its very nature, double deontology is an international issue. At the most rudimentary level, there are two courses of action in response to the double deontology problem. On one hand, the international community—the European Community—can choose to do nothing, thereby adopting the *Ignore the Problem* approach and allowing each individual situation to

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developing these instructions remains a tremendous task.

150. The CCBE currently has only 28 members. Clearly, this does not represent the entire European Community, which faces double deontology problems. About the CCBE, *supra* note 27.

151. See *supra* note 136 and accompanying text.

152. CCBE History, *supra* note 28, § 2.2. Hellwig, *supra* note 32. CCBE Member States only adopt those resolutions with which they agree.

resolve itself or let every nation adopt its own policies.<sup>153</sup> Such a response would leave individual lawyers, firms, and countries to handle individual issues as they deem necessary. On the other hand, the international community can take an unprecedented step by adopting the *Harmonized Rules* approach<sup>154</sup> and integrating the ethical codes of each Member State to create a single, comprehensive guideline that has the force of law.

Ignoring the problems created by double deontology is the easy option and maintains the *status quo* at the expense of individual lawyers and structuring globalization under the rule of law. As a self-regulating profession,<sup>155</sup> lawyers guide each other in making ethical decisions. However, where a lawyer faces potential disciplinary action in several jurisdictions, a lawyer deserves some decision-making guidance. Toward this end, any embodiment of the Home State Assistance approach,<sup>156</sup> the Conflicts of Law approach,<sup>157</sup> or Positive List approach<sup>158</sup> would be helpful to shape a lawyer's decision and minimize double deontology problems. Admittedly, each of these techniques goes beyond simply ignoring the problem, but more importantly, each option faces its own unique set of problems while simultaneously failing to completely eliminate the problems created by double deontology. Anything short of creating a single, unified set of ethical rules will inherently lack the force of law and be fragmented and, therefore, difficult to apply.

By allowing the unrestricted freedom of movement and services, the European Community leaves a vacuum in the legal framework where the ethical codes of the Home and Host States conflict. This leaves lawyers without authoritative guidance in resolving double deontology problems arising from their transnational practice, while simultaneously leaving them open to disciplinary action by multiple jurisdictions. The CCBE Code is an excellent step towards resolving the double deontology problem. However, a new unified piece of guiding legislation, created at the European Community level and having the force of law, is the only way to completely banish the threats posed by double deontology. The European Parliament must take drastic steps to structure the broad freedoms for which the substantive European law provides, while keeping certain professions in mind. Otherwise, the legal profession will not be

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153. See *supra* Part IV.A.

154. See *supra* Part IV.E.

155. See German Lawyer Regulations, *supra* note 95. With a few notable exceptions, such as Germany where lawyers are statutorily regulated, lawyers are self-regulating in a majority of countries.

156. See *supra* Part IV.B.

157. See *supra* Part IV.C.

158. See *supra* Part IV.D.

able keep pace with the global expansion of business, and the world's access to the instrumentalities of justice may be unable to help.

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